



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL SUIT NO. 98 OF 2010**

**SIMON KIHOSHIA NDIRITU & 100 OTHERS.....PLAINTIFF**

**=VERSUS=**

**ABDI SHEIKH AHMED.....1ST DEFENDANT/APPLICANT**

**AKIBA (DEVELOPMENT) LIMITED.....2ND DEFENDANT**

**TARAGURI LALITCHANDRA PANDIT.....3RD DEFENDANT**

**DHRUV LAITCHANDRA PANDIT.....4TH DEFENDANT**

**ABRAHAM MURIUKI MUNENE.....5TH DEFENDANT**

**R U L I N G**

**Introduction**

1. The Application for determination is a Notice of Motion dated 26th February 2014 brought by the 1st Defendant, seeking orders that this suit be dismissed for want of prosecution. The Application is premised on the ground that the Plaintiffs have refused/ neglected and/or otherwise failed to take any steps to prosecute the suit for a period of one year and two months since the last court attendance. The 1<sup>st</sup> Defendant has contended that he continues to suffer unnecessary anxiety due to the Plaintiffs' inaction.

**Grounds**

2. The Application is supported by the 1<sup>st</sup> Defendant's Affidavit sworn on 26th February 2014 in which he has contended that the suit herein was filed on 14th October 2010 together with a Chamber Summons Application which has not been heard owing to the Plaintiffs' refusal/neglect to prosecute the same. The 1st Defendant has further contended that they filed a replying affidavit and statement of defence and that the Plaintiffs filed a premature bill of costs and since the time a ruling on the same was delivered, the Plaintiffs have not bothered to set down the suit for hearing. The 1<sup>st</sup> Defendant contends that the suit is an abuse of the court process, and that it is in the interest of justice that the suit be dismissed for want of prosecution.

**Opposition**

3. The Application is opposed. Through a replying affidavit sworn on 7th April 2014, Martin Mutura, the

Vice Chairman of Akiba Belle Vue Estate, deponed that the Application before court was fatally defective and a non-starter, the same having been brought by “Abdi Sheikh Ahmed” who is not a party to the suit. He contended that the 2<sup>nd</sup> Defendant who had the 3<sup>rd</sup> and 5<sup>th</sup> Defendants as its directors was no longer in existence and that it was an abuse of the court process for counsel for the 1<sup>st</sup> Defendant to file documents claiming to act for a non-existent body. The Plaintiffs further contended that the application made reference to orders which had not been annexed and that it was not possible for the court to know the veracity of the allegations, thereby making the application fatally defective.

4. According to the Plaintiffs, the Application before court was brought in bad faith since the defendants had not responded to their list of issues served on 25th June 2013. The Plaintiffs contended that the Defendants having ignored their advocates’ efforts to narrow the issues for determination, they should not claim that the Plaintiffs have delayed the suit by not taking steps to prosecute it.

### **Submissions**

5. The Application was canvassed by way of Written Submissions. The 1<sup>st</sup> Defendant/Applicant in his Submissions dated 26th November 2016 stated that the guiding principles for dismissal of a suit for want of prosecution was spelt out in the case of **Cecilia Wanjiru Njoroge vs. National Environmental Management Authority ELC No. 529 of 2010**. Counsel for the 1<sup>st</sup> defendant submitted that the applicable law was Order 17 Rule (1) and (3) of the Civil Procedure Rules. Reference was also made to Order 12 Rule 1 and Order 17 Rule 3 of the Civil Procedure Rules. The 1<sup>st</sup> defendant submitted that there had been inordinate and inexcusable delay by the Plaintiffs and that the time stipulated under Order 17 rule 3 had lapsed. He stated that the Plaintiffs have lost interest in the suit and that the delay in prosecuting the suit has caused him anxiety.

6. The Plaintiffs/Respondents in their Submissions dated 10th February 2015 argued that only a court could initiate a dismissal under Order 17 Rule 2(1) of the Civil Procedure Rules and that by bringing the Application under the said rule, the 1st Defendant had usurped the role of the court. Counsel for the Plaintiffs contended that the 1st Defendant was misleading the court by claiming that they had not taken any step to prosecute the suit for over 1 year yet on 25th June 2013, the Plaintiffs’ Advocates forwarded a list of issues to the Defendants’ Advocates for their approval.

7. The Plaintiffs also submitted that the supporting affidavit is headed “Abdi Shekh Ahmed” was sworn by “Abdi Sheikh Ahmed”. Counsel argued that the Affidavit had 3 people and that there was no deed poll for change of name or affidavit to show that the three names belonged to one and the same person. The court was urged to find that “Abdi Sheihk Ahmed” and “Abdi Shekh Ahmed” are strangers to the suit.

### **Issue for Determination**

8. The issue for determination in the material Application is whether the suit herein is liable for dismissal for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules.

### **Legal Framework & Guiding Principles**

9. In exercising judicial authority, courts are generally guided by the broad principles set out under Article 159(2) of the Constitution. A court’s determination of any issue before it must resonate with the letter and broad spirit of the principles. Among these principles is the emphasis to administer justice promptly and without undue regard to procedural technicalities.

10. The statutory framework on dismissal of suits for want of prosecution is found in Order 17 Rule 2 which provides as follows:-

**“2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**

**(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**

**(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

**(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”**

11. Besides the statutory framework set out in Order 17 Rule 2, the guiding test to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities, among them, the case of **Ivita -vs- Kyumbu(1984) KLR 441** where it is summarized as follows:

**“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay.**

**12. In Mwangi S. Kimenyi -vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009, the Court restated the test as follows:-**

***1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the Plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.***

***2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”***

## **Determination**

13. From the plain wording of Order 17 Rule 2 it is clear that a party to a suit may move the court to dismiss a suit for want of prosecution. My understanding of the framework contained in Order 17 Rule 2 is that a court may *suo motto* dismiss a suit for want of prosecution. Within the same framework, the court may dismiss suit on the same ground on the application of either party.

14. Whether the exact rule is captured in the formal application or not is a matter of procedural technicality which should not obstruct the court in its duty to do substantive justice to the litigants.

15. From the record, the suit herein was last in court on 11th December 2012 when the Deputy Registrar delivered a Ruling upholding a Preliminary Objection by the Defendants. Subsequently, on 25th June 2013, the Plaintiffs, through a Letter dated 24th June 2013, forwarded a Draft Statement of Issues to the Defendants’ Advocates, for approval with or without amendments. This fact is not controverted. The forwarding of the Draft Statement of Issues, in my view, was the last step taken in this Matter prior to the filing of the present Application. The present Application was filed on 7th March 2014, period of seven months after that last step. It is therefore clear that by the time the Application seeking dismissal was filed on 7th March 2014, the threshold period of one year had not lapsed. The one year period lapsed on 25th June 2014. For this reason alone, the Application under determination does not satisfy the legal threshold of one year set out under Order 17 Rule 2. In my view, the drafting and service of the Draft Statement of Issues was a “step” contemplated by Order 17 Rule 2.

16. The 1st Defendant contended that there was inordinate and inexcusable delay and that the continued pendency of this suit was causing him anxiety. It is however not sufficient for a defendant to show that there was delay; he must satisfy the one year threshold and further satisfy the court that he will be prejudiced by the delay; and that owing to the delay, a fair trial cannot be conducted. Such prejudice was explained in the case of **Jimmy Wafula Simiyu vs. Fidelity Commercial Bank Limited (2014)** as follows:-

**“...And, for the Defendant...the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice and Articles 48, 50 and 159 of the Constitution are the relevant guide here. Ultimately, as Chesoni J (as he then was) stated in the case of Ivita vs Kyumbu, the Court should ask itself, whether, despite the delay, it is still possible to do justice for all the parties.”**

17. In **Ivita vs. Kyumbu**, the court echoed a similar view by stating

**“...(the defendant) must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.”**

18. In my view, the issue of mis-spelling of the 1st Defendant’s name is a typographical error which should not be used to obstruct the quest for substantive justice. Indeed, Article 159 of the Constitution of Kenya requires courts to ignore such minor issues and administer substantive justice.

19. For the above reasons, I hold that the statutory threshold set out under Order 17 Rule 2 specifying a timeframe of one year of inaction has not been satisfied. Similarly, the guiding judicial principles articulated in various decisions interpreting Order 17 Rule 2 have also not been satisfied. Consequently, I dismiss the 1st Defendant’s Application dated 26th February 2014 with costs to the Plaintiffs.

20. In the interest of expeditious disposal of this matter, I hereby give the following directions:-

**a. Parties shall file and serve bound and paginated bundles of pleadings, witness statements, evidential documents and statements of issues within the next 30 days. The Plaintiffs shall file their bundle within 15 days and the Defendants shall file their bundles within 15 days from the date of service.**

**b. The court shall give a hearing date at the time of reading this Ruling.**

**Dated, signed and delivered at Nairobi on 6<sup>th</sup> day of March 2017.**

.....

**B M EBOSO**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court clerk