



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**ELC CASE NO. 1141 OF 2007**

**CHUMA FABRICATORS LIMITED.....PLAINTIFF**

**VERSUS**

**ALCON HOLDINGS LIMITED.....DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 17<sup>th</sup> September 2014 in which the Defendant/Applicant seeks for this suit to be dismissed for want of prosecution and that the costs of this suit be awarded to it.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Philip Nyachoti, sworn on 17<sup>th</sup> September 2014 in which he averred that he is an Advocate of the High Court of Kenya with the conduct of this matter on behalf of the Defendant/Applicant. He further averred that the Plaintiff/Respondent filed this suit by way of Originating Summons dated 30<sup>th</sup> September 2004 filed in court on 8<sup>th</sup> October 2004. He averred further that the Defendant through its advocates then on record entered appearance and filed a Replying Affidavit on 15<sup>th</sup> March 2005. He further averred that the last time the Plaintiff fixed the matter for hearing was on 5<sup>th</sup> and 6<sup>th</sup> June 2007 on which dates the matter did not proceed to hearing. He averred further that the Defendant filed an application dated 14<sup>th</sup> October 2008 seeking orders of court to dismiss this suit for want of prosecution but that the court in its ruling of 28<sup>th</sup> June 2013 in respect of that application ordered that the suit be set down for hearing at the earliest possible date. He further averred that since then, the Plaintiff has without any justifiable reason failed, neglected and or otherwise refused to set this suit down for hearing and failed to take steps to prosecute the same for a period of over one year. He added that the Defendant/Applicant continues to suffer unnecessary anxiety and uncertainty due to the delay in prosecution of this suit. He added that he believes that the Plaintiff has completely lost any interest in prosecuting this suit and it is only just, fair and expedient that this suit be dismissed for want of prosecution with costs to the Defendant.

The Application is contested. The Plaintiff's Advocate on record, Meshack Odero, filed his Replying Affidavit sworn on 30<sup>th</sup> January 2015 in which he averred that he personally visited the registry from July 2013 trying to fix a hearing date but was told that the file was missing and could not be traced. He further averred that he personally attended the registry to enquire about the whereabouts of the court file every fortnight until the year 2013 ended. He further averred that he asked whether he could apply to reconstruct the file but was encouraged to be patient as it was believed that the file could be found any

time. He further added that the court file was traced in May 2014 but he could not fix a hearing date that year because the court diary was full. He added that the suit involves industrial land in Nairobi which the Plaintiff had bought from the Defendant and fully paid for and therefore there is no way it would lose interest in pursuing and prosecuting this suit. He added that the Plaintiff/Respondent is prepared to have the suit heard on a priority basis.

Both parties filed their written submissions. This court has carefully considered the Application, the affidavits together with the submissions made by the Plaintiff and the Defendant and the issue for this court's consideration is whether or not to dismiss this suit for want of prosecution.

The applicable law is Order 17 Rule 2(1) which provides as follows:

***“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.”***

Order 17 Rule 2(3) provides as follows:

***“Any party to the suit may apply for its dismissal as provided in sub-rule 1”***

The dismissal of a suit for want of prosecution is meant to prevent an abuse of the court process. The test in an application for dismissal of suit for want of prosecution was laid out in the case of **Ivita vs. Kyumbu [1984] KLR 441**, where Chesoni, J. (as he then was) held that,

*“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He 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. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”*

Further in **E. T. Monks and Co Ltd v Evans (1985) KL R 584** the court stated as follows,

*“The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable. Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances..... If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself..... It is the duty of the plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position.”*

Whether or not this Application should be allowed is a matter for the discretion of the judge who will be guided by the reasons advanced by the Plaintiff as to why they did not set the suit down for hearing. It is noteworthy that this is the second time this court is faced with the Defendant's application to have this suit dismissed for want of prosecution. In the first instance, this court found that while the Plaintiff was to blame for not setting the suit down for hearing for a period of 1½ years, the Defendant was itself guilty of delaying the prosecution of their application for dismissal for a period in excess of 3 years. On that ground, I rejected the Defendant's application to dismiss the suit and directed that the Plaintiff do set down this suit for hearing at the earliest possible date. That was on 28<sup>th</sup> June 2013. Since then to the date this Application was filed on 17<sup>th</sup> September 2014, a period of about 2 years, the Plaintiff took no step to fix this suit for hearing. Their excuse is that the court file was missing and only resurfaced in May 2014.

The Plaintiff's contention that this file was missing during that period and they visited the registry fortnightly in their search for the court file are mere statements which are unsupported by any evidence. Further, during this period of time, the Plaintiff has not shown that they were in constant communication with the Defendant informing it of the efforts to fix this suit down for hearing and enumerating the challenges they were facing in the process. That being the case, my finding is that after I delivered the ruling on 28<sup>th</sup> June 2013, the Plaintiff did not comply with my directions that they fix the suit for hearing at the earliest possible time but instead went to sleep. It is unfair to hold the Defendant/Applicant in limbo awaiting the Plaintiff to fix this suit down for hearing. The Plaintiff's excuse is inadequate and I find that they have lost interest in prosecuting this suit.

In light of the foregoing, this Application is allowed with costs to the Defendant.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 29<sup>TH</sup> DAY OF JULY 2016.**

**MARY M. GITUMBI**

**JUDGE**