



Kenya Railways Corporation v Leonid Limited & 2 others (Environment & Land Case 199 of 2008) [2023] KEELC 264 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEELC 264 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 199 OF 2008
NA MATHEKA, J
JANUARY 25, 2023**

BETWEEN

KENYA RAILWAYS CORPORATION PLAINTIFF

AND

LEONID LIMITED 1ST DEFENDANT

CORRUGATED SHEETS LIMITED 2ND DEFENDANT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
DEFENDANT**

RULING

1. The application is dated April 12, 2021 and is brought under Order 17 Rule 2(3), Order 51 of the [Civil Procedure Rules](#) seeking the following orders;
 1. That the suit against the 1st defendant be dismissed with costs for want of prosecution;
 2. That the costs of this application be awarded to the defendant.
2. It is based on the grounds that this suit was filed on August 7, 2008 and the plaintiff's chamber summons Application for Injunctive Orders was dismissed on March 13, 2009 when the matter was last in court. That since the delivery of the Ruling in respect of the plaintiff's application, the plaintiff has not taken any further steps to have the suit heard save for taking out a Notice of Appeal. That 2nd defendant did file on March 4, 2016 an Application to dismiss this suit for want of prosecution which Application was allowed by this honourable court on November 1, 2016. That it is only fair and just that the suit against the 1st defendant herein be dismissed with costs as no steps have been taken herein by the plaintiff since March 13, 2009.
3. The plaintiff submitted that the power to dismiss is discretionary and is governed by order 17 Rule 2(1) and (3) of the [Civil Procedure Rules](#) 2010. That the one year threshold prescribed therein has not yet



lapsed when this application for dismissal was filed. The last step in this matter was taken on September 3, 2021 and this application was filed on the September 22, 2021.

4. This court has considered the application and the submissions therein. Order 17 Rule 2(1), which governs dismissal of suits for want of prosecution, provides as follows:
5. 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.”
6. Further Order 17 Rule 2(3) states thus:
Any party to the suit may apply for its dismissal as provided in sub-rule 1”
7. The power of dismissal for want of prosecution under Order 17 is a matter that is within the discretion of the court. In the case of *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D. Popat and others & another* [2016] eKLR, the court held that;

“Nonetheless, article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita v Kyumba* [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

8. In *Argan Wekesa Okumu v Dima College Limited & 2 others* [2015] eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated as follows;

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay. As such the 3rd defendant in this case must meet the burden of proof in seeking the dismissal of the plaintiff’s case for want of prosecution see the case of *Ivita v Kyumbu* [1984] KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”



9. In *Naftali Opondo Onyango v National Bank of Kenya Ltd* [2005] eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated that;

“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the plaintiff.”

... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate.”

10. In the present case, that court has perused the court record and find that the matter was last in court on the September 3, 2021 a period of about six months had elapsed between the then and the filing of the present application on the September 22, 2021. Order 17 Rule 2 provides that a matter should have been pending for 12 months before the court, either on its own motion or on the application of a party, makes an order for its dismissal for want of prosecution. The plaintiff/respondent relied on this provision in the rules to submit, correctly, that the period has not expired. It is evident that it has no explanation for not taking steps to prosecute its claim. Having, however, noted that the delay has not been inordinate and that it falls below the time period provided in law, I find that the interests of justice lie in allowing the Plaintiff to prosecute its claim. I find that this application for dismissal of the suit is not merited and I dismiss the application dated April 12, 2021 with no order as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY 2023.

N.A. MATHEKA

JUDGE

