



**Kioni v Rafiki Microfinance Bank Limited (Civil Suit 163 of 2016)
[2025] KEHC 1140 (KLR) (Commercial and Tax) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 163 OF 2016
PM MULWA, J
FEBRUARY 27, 2025**

BETWEEN

PRISCILA MUTHONI KIONI PLAINTIFF

AND

RAFIKI MICROFINANCE BANK LIMITED DEFENDANT

RULING

1. The Defendant filed a Notice of Motion dated 30th January 2024 seeking orders that the suit be dismissed for want of prosecution in accordance with the provisions of Order 17 Rule 2(3) of the [Civil Procedure Rules](#). In the alternative, that the Plaintiff's/Respondent's suit be declared dismissed by operation of law according to the provisions of Order 17 Rule 2(5) of the [Civil Procedure Rules](#).
2. The application was supported by the grounds on the face of it and by the sworn Affidavit of John Cheruyoit Langat who stated that the Plaintiff filed the current suit seven (7) years ago against the Defendant/Applicant vide the plaint dated 29th March 2016 and filed in court on the 10th May 2016. Simultaneously, the Plaintiff filed the application dated 14th April 2016 seeking injunctive orders which was dismissed on the 4th November 2016 vide the ruling delivered by Lady Justice Olga Sewe.
3. The matter has been in court on other several occasions even surviving a notice to show cause issued by the court with the last date in court being the 29th November 2021 when parties were to appear and take directions on the hearing of the suit.
4. The Defendant averred that the Plaintiff has failed to take steps to prosecute this in over two (2) years as there has been no action on the matter by the Plaintiff. That there has been inordinate and inexcusable delay in having this matter prosecuted, and that is evidence the Plaintiff has lost interest to have this matter concluded.



5. In response to the application, the Plaintiff filed a replying affidavit dated 13th February 2024 stating that from the filing of this matter on 18th May 2016 till 10th September 2019, the court file went missing and despite repeated documented attempts by his advocates on record, the file could not be traced to list the matter for hearing.
6. Further, the Defendant has at all material times delayed the hearing of this matter by failing to file their Defence/Amended Defence in time. The Defendant only filed its Defence on 2nd October 2019, after the Plaintiff had made a Request for Judgement in Default of Appearance on 1st October 2019. Repeatedly, when the Defendant was granted fourteen (14) days to amend the Defence on 10th December 2019, they only filed/served it on the Plaintiff's Advocates on 4th October 2021.
7. The parties herein filed written submissions which the court has carefully considered alongside the application and the responses. Therefore, the court frames only one issue for determination, that is whether the Plaintiff's suit stands as dismissed by operation of law.
8. Order 17 Rule 2(1) of the [Civil Procedure Rules](#), which governs dismissal of suits for want of prosecution, 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.”
9. Further Order 17 Rule 2(3) of the [Civil Procedure Rules](#), states thus:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1.”
10. Clearly, the statutory threshold set out under Order 17 Rule 2 of the Civil Procedure Rules is that a suit qualifies to be dismissed for want of prosecution, if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit.
11. 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 as follows:

“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.”
12. It is common ground that that the matter was filed in 2016 and after delivery of the ruling in the Plaintiffs application the file disappeared and was only traced in 2019 when the matter came up for on 10th September, 2019 for hearing of the Notice to Show Cause issued by the court.
13. The matter then proceeded for case management conference. On 10th December 2019, Hon. Majanja J, granted the Plaintiff fourteen (14) days leave to amend the plaint and the Defendant was also granted an equal fourteen (14) days leave to amend its Defence. The amended Plaint was filed on 18th December 2019.
14. Further to the above, the matter came up severally from 6th February 2020 till 1st October 2021. The Defendant then proceeded to serve the Plaintiff with the Amended Defence on 4th October 2021.



15. The Defendant pointed out that the matter was last in court on the 29th November 2021 and after that no action was taken by the Plaintiff to move the matter. Further, no sufficient explanation has been given why for those two (2) years the matter was not listed for hearing. As per the provisions of Order 17 Rule 2(5) where no action has been undertaken in a suit for two years, such suit stands dismissed by operation of the law and the Court is not even obliged to issue any notice for such dismissal. The dismissal is automatic.
16. In contrast the Plaintiff explained that the Advocate handling the matter at the firm of M/S Kimani Kiarie Advocates, Ms. Esther N. Mungai left their employ to start her own firm on 30th July 2020. Following Ms. Mungai's departure from the firm of M/S Kimani Kiarie Advocates, the Plaintiff tried to follow up on the progress of the matter to no avail.
17. Consequently, the Plaintiff sought a new representation and the advocate promptly came on record and filed the notice of change of Advocates dated 4th December 2023 together with a letter to the Deputy Registrar seeking a mention date for the purpose of setting this matter down for hearing. The matter was then set for mention on 18th January 2024 for purposes of taking directions on the hearing of the suit.
18. It is notable that when the matter came up on 18th January 2024, the Defendant argued that this matter had been dismissed for want of prosecution after 29th November 2023.
19. It is the court's considered view that the Plaintiff has sufficiently explained the events that led to the delay of the prosecution of the suit. The Defendant equally acknowledged the fact that the file was missing at some point in time. In addition, the Defendant took a lot of time to file its Defence in this suit.
20. The above notwithstanding, the matter was then given a mention date of January 18, 2024 for purposes of taking directions on the hearing of the suit. Therefore, the court has considered the circumstances that led to the delay and the upshot of this Ruling is that the Defendant's application dated January 30, 2024 does not satisfy the mandatory one-year threshold stipulated under Order 17 Rule 2 of the Civil Procedure Rules and the same is hereby dismissed for lack of merit.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Mungai for Plaintiff/respondent

Ms. Yala for Defendant/applicant

Court Assistant: Carlos

