



**Bankim v Diamond Trust Bank Kenya Limited (Commercial Case E014 of 2021)
[2025] KEHC 11727 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11727 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E014 OF 2021**

MN MWANGI, J

JULY 31, 2025

BETWEEN

PATEL KIRTI BANKIM PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 8th April 2024 filed by the defendant pursuant to the provisions of Order 17 Rule 2[3] & Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act* and all enabling provisions of the law. The defendant prays for an order that this suit be dismissed for want of prosecution.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Ms Jeniffer Thiga, the defendant's Company Legal Officer. Ms Thiga averred that the plaintiff last appeared in Court on 12th November 2021 when his application seeking for an order for a temporary injunction was dismissed. She stated that since then, over two years have passed without the plaintiff taking any steps to prosecute this suit, despite the Court setting several mention dates between June 2023 and March 2024, all of which the plaintiff or his representatives failed to attend.
3. She averred that the defendant bank believes that the plaintiff has lost interest in this matter. Additionally, that the prolonged delay in prosecuting this suit is prejudicial to the defendant's defence due to staff turnover and loss of contact with potential witnesses. Ms Thiga asserted that the defendant bank continues to incur legal expenses, leading to unnecessary anxiety. In light of the above, she averred that allowing the instant application would serve the interests of justice and bring the litigation to a necessary conclusion.



4. In opposition to the application, the plaintiff filed a replying affidavit sworn on 7th May 2024 by himself. He averred that since the delivery of the Ruling dated 12th November 2021, he has made genuine efforts to prosecute this case despite challenges beyond his control. He explained that his failure to attend Court was not intentional but due to logistical and administrative difficulties.
5. Mr. Bankim stated that both he and his Advocates on record have tried to secure hearing dates and follow up on this matter. He maintained that any delay in prosecuting this suit was not deliberate and stated that he remains fully committed to pursuing justice through the legal system. Mr. Bankim averred that the continued pendency of this suit is prejudicial to both parties to this suit. He urged this Court to consider his efforts and the circumstances outlined above, and allow this matter to proceed towards a just resolution.
6. The instant application was canvassed by way of written submissions. The defendant's submissions were filed by the law firm of Madhani Advocates LLP on 30th July 2024, whereas the plaintiff's submissions were filed on 25th July 2024 by the law firm of H. Kago & Company Advocates.
7. Mr. Kisinga, learned Counsel for the defendant cited the provisions of Order 17 Rule 2 of the [*Civil Procedure Rules*, 2010](#), and submitted that it is clear from the record that the plaintiff has not taken any steps to prosecute this suit for over two and a half years, since the dismissal of his application seeking orders for injunction on 12th November 2021. To buttress these submissions Counsel relied on the decision made in [*Rose Makokha Mteka v Oserian Development Co. Limited* \[2022\] eKLR](#) and [*Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another* \[2016\] eKLR](#). Mr. Kisinga submitted that the instant application has met the requirements of Order 17 Rule 2[5] of the [*Civil Procedure Rules*, 2010](#), thus warranting automatic dismissal.
8. Counsel argued that the record shows that after securing temporary injunctive orders stopping the defendant from exercising its statutory power of sale, the plaintiff neglected to prosecute this matter, thus abusing this Court's process for personal gain. He referred to the case of [*Mwangi S. Kimenji v Attorney General & Another* \[2014\] eKLR](#) and asserted that the plaintiff's conduct not only delays justice but also violates the overriding objective of the [*Civil Procedure Rules*](#), which requires parties to facilitate the Court in expeditious disposal of cases. Mr. Kisinga submitted that the plaintiff's claim of logistical challenges does not amount to a sufficient or justifiable reason for the inaction. He further submitted that the defendant's key witnesses are no longer available due to staff turnover, further compromising the defendant's defence.
9. Mr. Kago, learned Counsel for the plaintiff relied on the case of [*Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others* \[2021\] eKLR](#) and submitted that continuous efforts were made to attend Court and obtain mention dates, but these were hindered by administrative and logistical challenges such as the unavailability of the physical Court file, which was only recently traced. He stated that the said delay was confirmed by Hon. Noelle Kyanya on 18th July 2024 and it was also beyond the plaintiff's control. He submitted that the defendant has failed to demonstrate any real or irreparable prejudice that it will suffer in the event that the instant application is disallowed. He contended that the trial risks cited by the defendant do not meet the legal threshold for irreparable harm.
10. Mr. Kago relied on the cases of [*Ivita v Kyumbu* \[1975\] KEHC 4 \[KLR\]](#) and [*Joshua Chebetgo Kulei v Republic & 9 others* \[2014\] eKLR](#), and emphasized that prejudice must go beyond typical litigation challenges. Further, that blunders or delays should not bar a party from being heard on merits, unless there is fraud or an intention to overreach. He contended that the defendant is yet to file a defence or witness statements in this suit since 2021, hence in filing the instant application, the defendant is attempting to avoid liability rather than being genuinely prejudiced by the delay. Counsel urged



this Court not to dismiss this suit, asserting that any inconvenience to the defendant can be remedied through payment of costs.

Analysis and Determination.

11. I have considered the instant application, the grounds on the face and of it the affidavit filed in support thereof, the replying affidavit by the plaintiff and the written submissions by Counsel for the parties, the issue that arises for determination is whether this suit should be dismissed for want of prosecution.
12. The defendant contends that this matter was last in Court on 12th November 2021 when a Ruling was delivered dismissing the plaintiff's application for injunction. A review of the Court record reveals that after delivery of the aforesaid Ruling, this matter was in Court on 4th December 2023 for mention to confirm the typing of proceedings. Additionally, an examination of the Case Tracking System [CTS] shows that this matter came up before Hon. Osoro on 5th June 2023 when a mention date was set for 7th August 2023 when directions were given and it was later mentioned before Hon. Noelle Kyanya on 4th December 2023 to confirm the typing of proceedings. The case was next mentioned on 18th December 2023, but the Court file was not availed thus it was rescheduled to 9th February 2024.
13. On 9th February 2024 & 21st February 2024, this matter was mentioned to confirm the status of the typed proceedings, but on both dates, the Court file was not availed. From the Court record, it is clear that the defendant's Counsel suggested that the plaintiff had abandoned the suit. The Court directed that a formal application be filed and the matter was scheduled for mention on 18th March 2024. On that date, the Court file was again unavailable, prompting a rescheduling to 9th April 2024 for confirmation of file availability. According to the CTS and Court record, Hon. Kyanya was away on training on 9th April 2024, thus this matter was listed for mention on 18th April 2024 & 30th April 2024, but on both occasions, the physical file was not availed.
14. Dismissal of suits for want of prosecution is provided for in Order 17 Rule 2 of the [Civil Procedure Rules](#), 2010, which provides as hereunder -
 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.
 5. A suit stands dismissed after two years where no step has been undertaken.
 6. A party may apply to Court after dismissal of a suit under this Order.
15. It is evident from the above provisions that there are two instances when a suit can be dismissed for want of prosecution. The first instance is contemplated under Order 17 Rule 2 sub-rules 1-4, where in a suit no application has been made or step taken by either party for one year, the Court shall issue a Notice to Show cause to the plaintiff to show cause why the suit should not be dismissed and/or any party to the suit may apply for the dismissal of the suit for want of prosecution. The operative words under Order 17 Rule 2 [1] is, "step taken by either party". This means that the plaintiff is not the only party required to take the necessary steps to move the Court and/or set down the suit for mention/hearing



within that period of one year. Sub-rule 5 on the other hand provides that a suit stands dismissed by operation of the law where a period of two years or more has lapsed and no step has been undertaken.

16. From the summation I have made at paragraphs 12 & 13 here before, that following the delivery of the Ruling dated 12th November 2021, this matter was next mentioned before Hon. Osoro on 5th June 2023. Thereafter, this matter was consistently listed for mention on several occasions, although in most instances the physical Court file was not availed. Notably, while more than a year had elapsed before the matter came up again on 5th June 2023, neither party moved the Court to seek dismissal of the suit for want of prosecution. Furthermore, this Court did not issue a Notice to Show Cause to the plaintiff to demonstrate why this suit should not be dismissed for want of prosecution.
17. In the case of *George Gatere Kibata v George Kuria Mwaura & another* [2017] eKLR, the Court considered the principles for dismissal of a suit for want of prosecution, and stated as follows -

“My understanding of the framework contained in Order 17 Rule 2 is that a Court may suo moto dismiss a suit for want of prosecution. Within the same framework, the Court may dismiss a suit on the same ground on the application of either party to the suit.

Besides the legal framework set out in Order 17 Rule 2, the guiding criteria 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 v 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.” [Emphasis added].

18. In this case, it is evident that in as much as there has been delay in prosecuting this suit, the same was not occasioned by the plaintiff and/or the defendant but was caused by the Court file that had gone missing.
19. Given the said circumstances, the instant application cannot be entertained at this time. This is especially so, since it was filed on 8th April 2024, despite the fact that this matter had been consistently before Court since 5th June 2023 but could not proceed due to the unavailability of the physical Court file.
20. The upshot is that the application dated 8th April 2024 is not merited. It is hereby dismissed with costs to the plaintiff.
20. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JULY 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kisinga for the defendant/applicant

Mr. Kimutai holding brief for Mr. Kago for the plaintiff/respondent

Ms B. Wokabi - Court Assistant.

