



REPUBLIC OF KENYA



KENYA LAW
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**Amayi & another v Co-operative Bank of Kenya & another (Civil Suit 453 of 2017)
[2025] KEHC 12412 (KLR) (Commercial and Tax) (4 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 453 OF 2017
PM MULWA, J
SEPTEMBER 4, 2025**

BETWEEN

**GEOFFREY ATALIZA AMAYI 1ST PLAINTIFF
REHEBEAM AGENCIES LIMITED 2ND PLAINTIFF**

AND

**CO-OPERATIVE BANK OF KENYA 1ST DEFENDANT
GARAM INVESTMENTS AUCTIONEERS 2ND DEFENDANT**

RULING

1. This ruling concerns the Notice of Motion dated 13th October 2023 in which the Defendants/Applicants seek orders that the suit be dismissed for want of prosecution and that costs be borne by the Plaintiffs/Respondents.
2. The application is opposed. The Plaintiffs/Respondents rely on the Replying Affidavit of Geoffrey Atalliza Amayi sworn on 13th March 2024. He depones that the application is misconceived, premature and does not meet the legal threshold for dismissal. It is his case that the matter was last in court on 27th November 2023 for mention, hence there has been no inordinate delay. Further, the parties have been attempting to negotiate an amicable settlement pursuant to the orders issued on 22nd July 2022 directing reconciliation of accounts relating to facilities issued to the Plaintiffs in 2009. The Plaintiffs contend that they have been following up with the 1st Defendant on reconciliation and issuance of statements of account, which keep changing due to repayments and accrual of interest. They maintain that they are keen to prosecute the matter.



3. Pursuant to directions, parties filed written submissions. The Defendants/Applicants filed submissions dated 12th June 2024 while the Plaintiffs/Respondents filed submissions dated 15th July 2024.

Analysis and determination

4. The sole issue for determination is whether the suit should be dismissed for want of prosecution.
5. The power to dismiss a suit for want of prosecution is a discretionary one. In *Invesco Assurance Co. Ltd v Oyange Barrack* [2018] 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.”

6. Order 17 Rule 2 of the Civil Procedure Rules, provides:
 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.
7. The test for dismissal of a suit for want of prosecution is stated in the case of *Ivita v Kyumbu* (1984) KLR 441). The test was expressed as follows:

“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 the 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 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.”

8. In the present case, the record shows that the matter was last in court on 27th November 2023 for a mention. The application herein was filed on 13th October 2023, less than a year after the last step was taken in the matter. Clearly, the period contemplated under Order 17 Rule 2 had not lapsed..
9. The Plaintiffs have also explained that the parties have been engaged in reconciliation of accounts as directed by the court on 22nd July 2022. This explanation is not disputed by the Applicants. Such



reconciliation efforts, involving changing loan statements and repayments, are demonstrative of an intention to prosecute the matter rather than abandonment.

10. In *Ecobank Ghana Limited v Triton Petroleum Co. Ltd & 5 Others* [2018] KECA 346 (KLR), the court emphasized that:

“...it is well settled that in considering whether to dismiss a suit for want of prosecution the courts will consider the following guiding principles; whether the delay is inordinate, and if it is, whether the delay can be excused and lastly, whether either party is likely to be prejudiced as a result of the delay or that a fair trial is not possible as a result of the delay.”

11. It is trite law that dismissal of a suit for want of prosecution is a draconian remedy to be sparingly exercised and only where it is clear that the plaintiff has lost interest in the matter. From the record before me, the Plaintiffs have demonstrated continued pursuit of reconciliation of accounts and readiness to prosecute their claim.
12. I therefore find that the Applicants have not satisfied the threshold for dismissal of this suit. Justice will be better served by allowing the matter to proceed to hearing on its merits.
13. For the foregoing reasons, I find no merit in the Notice of Motion dated 13th October 2023. The same is hereby dismissed with costs to the Plaintiffs/Respondents.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF SEPTEMBER 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Orende for Plaintiff

Ms. Ontita for Defendants/Applicants

Court Assistant: Carlos

