



Mungai & 2 others (Suing in their Capacity as Elected Representatives of the Tenants of the Defendant Occupying the Defendant's Flats in Bombolulu Estate) v Registered Trustees of Teleposta Pension Scheme (Civil Suit 162 of 2012) [2024] KEHC 17258 (KLR) (27 February 2024) (Ruling)

Neutral citation: [2024] KEHC 17258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 162 OF 2012
F WANGARI, J
FEBRUARY 27, 2024**

BETWEEN

**DAVID MUNGAI 1ST PLAINTIFF
SAUMU REHANI 2ND PLAINTIFF
KENNEDY OUMA JALANG'O 3RD PLAINTIFF
SUING IN THEIR CAPACITY AS ELECTED REPRESENTATIVES OF THE
TENANTS OF THE DEFENDANT OCCUPYING THE DEFENDANT'S FLATS
IN BOMBOLULU ESTATE**

AND

REGISTERED TRUSTEES OF TELEPOSTA PENSION SCHEME .. DEFENDANT

RULING

1. The Defendant in this matter had filed a Notice of Motion dated 06/05/2022 seeking to have this suit dismissed for want of prosecution on grounds that the Plaintiffs had not taken any action for over 9 years and 7 months as at the time of filing the application. The application was opposed, and parties directed to file their respective submissions.
2. Upon considering the pleadings and the submissions by both parties, this court vide the Ruling dated 25/05/2023 dismissed the said application for lack of merit. However, it was ordered that the Plaintiff do set down the suit for hearing within the next 30 days, after date of ruling, in default, the suit to stand dismissed for want of prosecution.



3. The Plaintiffs had not set the suit down for hearing after the expiration of the 30 days' period. The Defendant filed a Notice of Motion dated 19/09/2023 seeking for costs of the suit as the suit stood dismissed for noncompliance of the orders dated 25/05/2023.
4. In response to the Application, the Plaintiffs in their Replying Affidavit dated 03/07/2024 stated that the suit was premature as the suit had not be heard and determined on merits. Further, failure to comply with the court's orders was due to the fact that the ruling date was not brought to the attention of the Plaintiffs, hence they should not suffer due to actions beyond their control
5. The Plaintiffs filed a Notice of Motion dated 16/10/2023 seeking an order for reinstatement of this suit which was dismissed by virtue of the ruling dated 25/05/2023. It was stated that when the ruling of the application stated in paragraph 1 above, came up on 05/04/2023, the court was not sitting and parties were directed that notice for fresh dates would be issued after 22/05/2023.
6. No notice was served upon them and they only came to learn that the ruling had been delivered after they were served with the application dated 19/09/2023. They further stated that on the day of the ruling, they and their advocates were not present as they were not aware of the ruling date. They deponed that they failed to fix the suit for hearing as they were not aware of the court's directions.
7. In response to the application, the Defendant filed a Replying Affidavit dated 19/10/2023. It was deponed that the application was an abuse of the court process as it was not demonstrated what steps the Plaintiffs took in following up the delivery of the ruling, and it was until when they were served with the Defendant's application that they woke up from their slumber.
8. Further, it was stated that the Plaintiffs were not ready for hearing as they were yet to comply by filing of witness statements, list and bundle of documents and statement of issues within time which has now lapsed. The Plaintiff had taken no steps in prosecuting the matter since filing the suit 11 years ago, despite being given a golden opportunity to do so.
9. The Plaintiffs were accused of using the suit as a basis for delay in payment for rent and bar the defendants from levying distress for rent. The Plaintiffs still owe the Defendants rent payments and they had huge rent arrears as per the Statement of Accounts, annexed as an exhibit.
10. When both applications came up for directions, it was directed that both applications be disposed of by way of written submissions. Both parties were directed to file consolidated submissions, and they both complied.

Analysis and determination

11. I have considered the Appellant's application, and filed submissions together with the authorities relied upon by the parties, as well as the law and in my respectful view, there is only one issue for determination, that is whether the respective Applicants have made out a case for grant of orders it seeks. Corollary to this finding is the issue of costs.
12. I will first deal with the application by the Plaintiffs dated 16/10/2023, seeking to reinstate the suit after its dismissal for want of prosecution, as this would affect the outcome of the application by the Defendant.



13. Order 17 Rule 2 (3) of the Civil Procedure Rules provides, inter alia: -

“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.

14. The essence of dismissal of suits for want of prosecution is the need for expeditious dispensation of suits. In *Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another* [2004] eKLR, it was held as follows;

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”

15. This court has a duty to determine the application on merits. In *Mwangi S. Kimenyi -vs- Attorney General and Another*, Civil Suit Misc. No. 720 of 2009, the court on considering whether or not the suit should be dismissed for want of prosecution stated as follows: -

When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

- 1) whether the delay has been intentional and contumelious;
- 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court;
- 3) whether the delay is inordinate and inexcusable;
- 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and
- 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

16. It is not in dispute that the Defendant had previously filed the application dated 06/05/2022, seeking to have the suit dismissed for want of prosecution. The application was dismissed vide the ruling dated 25/05/2023 and the Plaintiffs given a lifeline to set the suit down for hearing within 30 days after the date of ruling.

17. The Plaintiffs deponed that the ruling date notice was not issued upon them and the ruling was delivered in their absence, hence the failure to comply with the court’s directions.



18. It is a fact that the ruling was not delivered on 25/04/2025 when it was initially set to be delivered. It is however the practice of the court that notices are issued through the registry. Upon going through the e-filing system, it is indicated that the ruling date was given for 25/05/2025. It is a fact that the parties have access to the Case Tracking System. Nevertheless, it is also the duty of the parties herein to follow up on their matters. The Defendant who was also not present at the time of the delivery of the ruling must have followed up on the matter hence having the knowledge of the contents of the ruling subsequently leading to the filing of their application dated 19/09/2023.
19. I have perused through both the court file and the e-filing platform and I find no correspondence filed by the Plaintiffs, to show that before the application for costs of the suit was filed, efforts had been made to make a follow-up on the status of the ruling.
20. I do agree with the Defendant and find that there was laxity on the part of the Plaintiffs in following up on the matter, and only took action after the Defendant filed the application for costs of suit, after the suit was dismissed for want of prosecution.
21. It cannot be overlooked that this matter was filed in year 2012. By the time the Defendant was filing the application for dismissal for want of prosecution, the Plaintiff had not taken any action for over 5 years. The Plaintiffs only take action whenever compelled by circumstances, and in this case, the actions of the Defendant. Every suit must come to an end. I find that the application seeking to reinstate the appeal has got no merits and is hereby dismissed.
22. Having found the Plaintiffs application is without merits, I now turn to the Defendant's application dated 19/09/2023. Section 27 of the Civil Procedure Act decrees that the costs follows the event. However, the court retains its discretion to either award or not to award costs.
23. The Plaintiffs have been indolent in prosecuting their suit despite having been given an opportunity to do so. The fact that they were not aware of the directions of the court 5 months after the ruling was delivered, is an indicator that the Plaintiffs had no interest in following up their matter. The suit having been dismissed and failed to meet the threshold for reinstatement, there is nothing barring this court from granting the Defendant the orders as sought. The application dated 19/09/2023 seeking for costs of the suit is allowed.
24. Following the foregone discourse, the upshot is that the following orders do hereby issue;
 - a. The Plaintiffs Notice of Motion dated 16/10/2023 lacks merits and is hereby dismissed.
 - b. The Defendant's Notice of Motion dated 19/09/2023 has merits and is allowed as prayed.
 - c. Costs of the applications subject to this ruling awarded to the Defendant.
 - d. File is closed.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 27TH DAY OF FEBRUARY, 2024.

.....
F. WANGARI

JUDGE

In the presence of;

Mrs Ndugire Advocate h/b for Amadi Advocate for the Plaintiffs

Ms Kimorna Advocate h/b for Bundotich Advocate for the Defendant



Mr, Brian, Court Assistant

