



**Blue Horizon Properties Ltd v Attorney General & another (Civil Case 26 of 2010) [2023] KEHC 2452 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2452 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 26 OF 2010  
DKN MAGARE, J  
MARCH 22, 2023**

**BETWEEN**

**BLUE HORIZON PROPERTIES LTD ..... PLAINTIFF**

**AND**

**HON. ATTORNEY GENERAL ..... DEFENDANT**

**AND**

**DAMA TSUTSU MUSELEO (SUED AS ADMINISTRATOR OF THE ESTATE OF KALAMA KATANA) ..... RESPONDENT**

**RULING**

1. There are lies, damn lies and statistics. This file stands like a sore thumb as to what could be wrong with our litigation. On November 11, 2010 interlocutory Judgment was entered against the 2<sup>nd</sup> Defendant for failure to file Defence. Nothing was done in the file till the Court issued a notice under Order 17 Rule 2 of the *Civil Procedure Rules*.
2. On February 22, 2017, this suit was dismissed for want of prosecution as no cause was shown to the satisfaction of the Court. Nothing again was done till July 3, 2019, two years and 5 months later, when an application dated July 1, 2019 was filed and fixed for hearing on September 26, 2019. The Advocates for the Respondent sought time to respond. However, instead of complying, the advocates for the 2<sup>nd</sup> Defendant applied to cease acting as he could not trace the 2<sup>ND</sup> Defendant. On December 16, 2019, the 2<sup>nd</sup> Defendant was allowed to cease acting.
3. On February 27, 2020, the matter was stood over to April 28, 2020, for the defendant's reply. After a series of adjournments, the Application became ready for disposal and was placed before me.



## **Applicant's Submissions**

4. The applicant stated that judgment was entered against the Defendants and as such only execution remained. They stated that the plaintiff was not aware of dismissal.
5. The Applicant/Plaintiff filed Submissions filed on May 5, 2022 stating that Judgment was entered on October 11, 2010. Accordingly, is this what is remaining is only execution. The 1<sup>st</sup> Defendant opposes the application stating that the Applicant is guilty of laches.
6. If that is true, then the Decree on November 11, 2010 became time barred on November 10, 2022, 12 years after the entry of judgment in terms of Section 4 (4) of the Limitation of Actions Act Cap 22, which states as doth: -
  - (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

## **The 1st Respondents Submissions**

7. The 1<sup>st</sup> Respondent submitted that nothing stopped the plaintiff from fixing the matter for formal proof. Further that there were more than one prayers that require a hearing. Further there is no evidence if an error apparent in the face of the record. The plaintiff relies on the decision of Jim Rodgers Gitonga Njeru Versus Al Husnain Motors and 2 Others (2018) eKLR
8. On the issue of service of the notice of dismissal, then rely on the decision of Kesten Company -vs- Ndata Sleep & 2 Others (2018) eKLR. In this case, the Court was satisfied with service through the official website of the judiciary.

## **Analysis**

9. I therefore ask myself one question. If the plaintiff was not notified, could they have been in any case been ready. The Applicant did not do anything serious till July 1, 2019. Meaning for 2½ years from February 22, 2017 to July 1, 2019, he did not do anything to set aside the order. The order has been in situ undisturbed. The delay between February 22, 2017 and July 1, 2019 is inordinate. A party keen on their case will have seen the dismissal sooner than later.
10. In any case, a plaintiff who waits for 7 years without fixing a matter for hearing, is an indolent one. He against did nothing cumulatively for a period of 9 years from filing from the time they filed this application. Even if the suit was not dismissed on that day it could still be dismissed. I am not satisfied that the plaintiff has laid basis for exercising discretion in his favour. Let sleeping dogs lie

## **Formal Proof**

11. The case against the 1<sup>st</sup> Respondent is unique. Under order 1 Rule 20, there can be no interlocutory judgment against the government. The Rule protects any request for judgment against the 1<sup>st</sup> defendant without leave of the court. It provides: -

No judgment against Government without leave of the Court [Order 1, rule 20.]



- (1) A defendant shall not in any event be entitled to enter judgment against the Government under r. 19 without the leave of the court.
  - (2) Any application for leave to enter judgment against the Government under this rule shall be made by chamber summons served not less than seven days before the return day.
12. Judgment against the 1<sup>st</sup> Defendant was never entered. It means for more than 13 years, the Applicant sat on laurels waiting for manna to drop from heavens. No one other than the plaintiff can prosecute their case.

### **Judgment Against the 2<sup>nd</sup> Defendant.**

13. It is true that judgment in default of defence was entered against the 2<sup>nd</sup> defendant on November 11, 2010. No amount is indicated. However, there is no judgment against the 2<sup>nd</sup> Defendant. Summons to enter appearance were issued against the Hon. Attorney General and Anthony Mrima on February 2, 2010.
14. The suit had been filed on January 29, 2010. The Ag. Senior Principal Litigation Counsel, Mwangi Njoroge entered appearance for the 1<sup>st</sup> Defendant. There was an amendment on April 4, 2020. No fresh summons were issued. No wonder the 2<sup>nd</sup> defendant appeared under protest.
15. The case in the plaint are:-
- a. Ksh. 12,000,000/= , being: - The Dispute
    - a. Deposit paid to the deceased Ksh 7,500, 000/=
    - b. Stamp duty paid Ksh 3,000,000/=
    - c. Legal fees incurred Ksh. 1, 500,000/=
  - b. A declaration that the cancellation o transfer in favour of the Plaintiff is null and void (sic).
  - c. An injunction to restrain the 2<sup>nd</sup> Defendant from winding up and distribution of the estate pending hearing and determination of the suit.
16. The claim is not in a nature of a debt but a contract for sale of land that allegedly aborted. The 2<sup>nd</sup> Defendant is not the person who received the money. There therefore mean that these has to be a way of proving that:-
- a. The money is owed.
  - b. The 2<sup>nd</sup> Defendant is on administrator
  - c. How much is due and by whom.
17. This therefore following this had the suit not lapsed for lack of summons it was still to be dealt with through formal proof. The burden in formal proof still remained before the suit was dismissed.
18. It is surprising that the Applicant did not find it necessary to proceed for formal proof since 2010. The nature of the claim required proof of liability and further, proof of the amount due. It was not a liquidated claim but for pecuniary damages and other prayers.



19. Even in the request for judgment filed, there was no prayer for entry of judgment for a liquidated claim. This issue had been dealt with by Justice Edward M. Muriithi, in [\*Josphat Muthuri Kinyua & 5 others v Fabiano Kamanga M'etirikia\*](#) [2021] eKLR, where he had this to say: -

“This Court finds that the failure by the Respondent to file a defence did not amount to an admission of the negligence claim in the Plaint. It only meant that the matter could proceed to formal proof as undefended cause. This Court further finds that the provision of assessment of damages pursuant to entry of interlocutory judgment with respect to a claim for pecuniary damages under Order 10 Rule 6 of the [\*Civil Procedure Rules\*](#) did not absolve the Appellants from their duty to prove liability. A reading of Order 10 Rule 9 reveals that a Plaintiff is required to set down his matter for hearing with respect to all other claims even when the Defendant has failed to file a defence or to enter appearance. The claim by the Appellants was twofold. The first part was on liability for negligence and the second part was on quantum of damages. The claim on liability qualifies in the category of ‘all other claims’ required to have been set down for hearing as per Order 10 Rule 9 of the [\*Civil Procedure Rule\*](#).”

20. Justice A. Mabeya, FCI Arb, in [\*Peri Formwork Scaffolding v White Lotus Projects Limited\*](#) [2021] eKLR, stated as follows: -

In [\*Samson S. Maitai & Another v African Safari Club Ltd & Another\*](#) [2010] eKLR, Emukule J observed: -

“..... I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to [\*Halsbury's Laws of England\*](#), vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced.”

21. There is thus need to adduce evidence to prove breach of contract and the other prayers as sought in the plaint. This is contrasted to a claim for money had and received. A claim for refund of stamp duty is not a claim for money had and received Stamp duty is tax paid to the government for a transaction. This is not a pecuniary claim.

22. There needs to be tendered evidence that it ought not to be paid or otherwise. Without formal proof, such claims fall. In [\*Peri Formwork Scaffolding v White Lotus Projects Limited\*](#) [2021] (*supra*), court held as doth: -

“In [\*Rosaline Mary Kabumbu v National Bank of Kenya Ltd\*](#) [2014] eKLR, the Court held: -

“In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits. 8. In this regard, in a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the court as to its truth.”



23. The plaintiffs did not fix the matter for hearing after requesting for Judgment. The burden of proof in formal proof is still the same as a defended suit.
24. There was therefore inordinate delay between November 11, 2010 and February 2, 2017 when the suit was rightly dismissed. The Applicant notes that they were to fix the matter in 2019 for formal proof, and found the suit dismissed for want of prosecution. That is what we call true indolence is Litigation must come to an end for parties to be able to deal with other issues.
25. In *Rose Makokha Mteka v Oserian Development Co. Limited* [2022] eKLR, the court addressed the same issue as follows: -

“Ultimately, taking the law and the facts into account, it is clear to me that this matter which commenced in 2011, has taken a long journey the in-expedition of which must be laid straight on the plaintiff’s laps; it emanates from the indolence of the plaintiff. This indolence, disclosed in the analysis of the record of proceedings, shows a casual, disinterested and laid back approach of the appellant/plaintiff.”

26. The court in the above matter was relying on the decision *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR where Justice Francis Gikonyo had this to say: -

“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.

“...There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word “inordinate” in its dictionary meaning, but to apply it in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.”

27. I find the Respondent has not explained the delay. What is the explanation given for the delay in prosecuting the matter? None. They say that only execution is pending. Is this real true? If I reinstate the suit, can the Plaintiff execute. He cannot. This means the application for setting aside is brought based on untruths and hyperbole. Over a decade of inaction is inexcusable. Let loss lie where it has fallen.
28. In contrast, the Court is reminded of the decision *Key Freight Kenya Limited v Mohammed Abdi* [2022] eKLR, where the Court noted the discretion of the court especially regarding the length of delays doth: -

“7. This application is governed by the provisions of Order 12 Rule 7 of the *Civil Procedure Rules* which states as follows –



Where under this order judgment has been entered or the suit has been dismissed the court, an application, may set aside the judgment or order upon such terms as may be just

8. Indeed, both the dismissal of this appeal for want of prosecution and its reinstatement is an act of the exercise of this court's discretionary power. Thus the principles in the case of *Mbogo & Anor -vs- Shab* (1968) EA 93 apply.
  9. I note that the dismissal of the appeal herein was on 8<sup>th</sup> July 2021 and this application was filed on 16/7/2021, just 8 days later. Thus it cannot be said there was inordinate delay in bringing the application.”
29. The length of delay before the dismissal and after the dismissal is inordinate. There is no plausible reason for the matter remaining in court.
30. If the delay is long and inexcusable, the dismissal is necessary and the court should not exercise discretion in favour of the Applicant. In *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR, the court Hon. Justice L. L. Naikuni, expressed himself S doth: -
- “In the case of “*Ivita – versus - Kyumbu* [1984] KLR 441 the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated:-
- “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 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 however satisfy the court that it 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time....”
31. In addressing the issue of prejudice, and balancing of rights, justice W Musyoka had occasion to deal with a two year delay. This is in contrast with a decade old delay. He state,
- “ 17. the instant suit, it should be noted that there is no statement of defence filed in the matter. The defendant has also not filed any list of witnesses or witness statements. it is clear, therefore, that the defendant has failed to prove prejudice on its part.
  18. Balancing the positions of the two parties, I take the view that delay of two years in prosecuting a matter is inordinate and unreasonable. The plaintiff has not explained it. The mere fact that the defendant has not demonstrated prejudice is not sufficient to sustain a suit that the plaintiff has shown no interest in prosecuting for the two years before the application for dismissal was made. It would appear that the suit was filed for the sole purpose of obtaining injunctive orders, and once the same were denied the plaintiff lost interest in the matter.



19. Parties should file suits in court with a view to prosecute them. It should never be the case that suits are filed for the sake of it. They should not remain parked in the court's registry, filling space and creating a false sense of backlog of cases. A suit should be prosecuted, failing which it should meet the fate of dismissal for want of prosecution."
32. The essence of dismissal for want of prosecution and the *Limitation Of Actions Act* is basically to unsaddle the defendants from stale claims. One acts before filing while another after filing. Parties file cases with gusto but are reluctant to proceed. They then hide behind Article 159 of the *Constitution*. I wish to remind parties that the same Article of the *Constitution* that ordains that we decide cases without undue regard to technicalities is the same one that deals with expeditious disposal of cases. Both are constitutional imperatives and as such both must be read holistically.
33. While a party should not be driven from the seat of justice, he should not saddle Defendants with claims they have no interests in prosecuting for years. This is so in these cases where the defendant is not a true defendant but an administrator, of an estate and may never know what the real dispute was.
34. In practice parties file these cases and at the same time pursue objections in the probate cases and after losing in succession they fall back to this case. I will tell them, no today, not this court, some other day.

### **Prejudice**

35. The parties are claiming prejudice. If the application is allowed, it means the state was to look for documents which were used in 2009; a period of 14 years ago.
36. Further, although the 2<sup>nd</sup> Respondent has not filed a Response she is sued in representative capacity. She must have distributed the estate and as such being called to defend this matter a decade later is not just. Litigation ought to come to an end. In this journey the Applicant have reached a dead end. That is where they must stay.
37. The state is now called to look into issues that took place may years ago. It is not clear whether there was service on the state and no steps were taken for a period of 10 years about the case. The applicant did not attempt to explain any delay. He blames the court for dismissing his case. If he has keen, he could have seen the dismissal immediately.
38. It is till two and half years later that he wakes up that the suit, that was lying in court for over 7 years was dismissed. Those are laches. I note that in exercise of discretion, I am entitled to balance between the two competing interests. The plaintiff has not laid basis for exercise of discretion in its favour. Being an equitable remedy, I do not agree that the plaintiff has met the criteria for grant of orders sought. I therefore decline the application.
39. The upshot of this is that this application dated July 1, 2019 is bereft of merit and is accordingly dismissed with costs of 20,000/= to the 1<sup>st</sup> Respondent payable in 30 days, default execution to issue.

### **Determination**

40. I make the following orders: -
- a. The Application to reinstate this suit, dated July 1, 2019 is bereft of merit and is accordingly dismissed with cost of 20,000/= to the 1<sup>st</sup> Respondent payable within 30 days, in default execution to issue.
41. The file is hereby closed.



DATED, ISSUED AND DELIVERED AT MOMBASA, VIRTUALLY 22<sup>ND</sup> DAY OF MARCH, THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.

.....

**HON. MR. JUSTICE DENNIS KIZITO MAGARE**

**JUDGE OF THE HIGH COURT, MOMBASA**

In the presence of:

Mohamud for the Plaintiff

No appearance for the 2<sup>nd</sup> Defendant

Mr. Waga for the 1<sup>st</sup> Defendant.

Court Assistant – Oliver Musundi.

