Omondi v Equity Bank Limited & 3 others (Civil Case 36 of 2018)
[2024] KEHC 14984 (KLR) (29 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14984 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 36 OF 2018

JRA WANANDA, J

NOVEMBER 29, 2024

BETWEEN

JOSEPHINE OCHIENG OMONDI ..... PLAINTIFF

AND

EQUITY BANK LIMITED ..... 1ST DEFENDANT

VINCENT OLOO ODUOR ..... 2ND DEFENDANT

KEYSIAN AUCTIONEERS ..... 3RD DEFENDANT

IGARE AUCTIONEERS ..... 4TH DEFENDANT

RULING

1. The Application before Court for determination is the 1st and 3rd Defendants' Notice of Motion dated 8/09/2023 filed through Messrs D.L. Were & Were Co. Advocates. The same seeks orders as follows:

    i. That this suit be dismissed for want of prosecution.

    ii. That costs of the suit be borne the Plaintiff.

2. The Application is premised on the grounds cited on the face thereof and is supported by the Supporting Affidavit sworn by Daniel Lawrence Were, the Counsel acting for the 1st and 3rd Defendants and practicing as Messrs Were & Were Co. Advocates.

3. In the Affidavit, Mr. Were deponed that the Plaintiff filed this suit on 18/9/2014 together with an Application seeking injunctive orders, that the Court allowed the Application on 1/04/2016 and thus granted the Plaintiff the injunctive orders pending the hearing and determination of the suit, that since that date of dismissal, the Plaintiff has failed to move the Court and cause the suit to heard and determined and that the same has been pending ever since without any attempt to prosecute it. He deponed further that the outstanding loan amount continues to accrue interest daily and may outstrip

the value of the suit property to the detriment of the 1st Defendant since the Plaintiff continues to enjoy interim orders at the peril of the 1st Defendant, that failure to prosecute thus suit expeditiously is the Plaintiff's tactic of delaying the same and frustrating the 1st Defendant's attempt to recover the outstanding loan from the Plaintiff and the 2nd Defendant.

4. According to Counsel, the Plaintiff and the 2nd Defendant are not acting in good faith and that are less interested in the expeditious disposal of this matter and that their actions are unfair as they expose the 1st Defendant to economic risk and losses in view of the accruing loan interest. He deponed further that the pendency of this suit is causing anxiety to the 1st Defendant and it would be just and fair that the same be dispensed of by way of dismissal because as it stands now, the 1st Defendant is greatly prejudiced yet there is no prejudice being suffered by the Plaintiff as he has already benefitted from the loan advanced to him by the 1st Defendant.

Plaintiff's Replying Affidavit

5. In opposing the Application, the Plaintiff's Counsel, Abigael Lusinde Khayo, through her law firm, Messrs Lusinde Khayo and Co. Advocates, swore the Replying Affidavit filed on 11/06/2024. It is unclear when or how the said law firm came on record considering that the Plaintiff's Advocates had hitherto, as aforesaid, been Messrs Chepseba Lagat & Co. Advocates and I have not come across any Notice of Change of Advocates. Be that as it may, I will not belabour this point since no objection has been raised to representation of the Plaintiff.

6. Counsel deponed that they followed up on setting down the suit for hearing when suddenly the file went missing and could not be traced, that in the year 2018 they learnt that the matter had been transferred to the High Court Commercial Registry, and that they kept on following up on tracing the file but were not successful. She deponed that the Plaintiff has been and is very desirous in prosecuting the matter, and that indeed the Plaintiff has shown great passion in following up at their office seeking to know the progress of the case. She added that the 1st Defendant messed the Plaintiff by extending an overdraft to the 2nd Defendant without the Plaintiff's knowledge and that this is a matter that is suitable for hearing on merit and that dismissing it will be giving the 1st Defendant leeway to sell the Plaintiff's land for the 1st Defendant's own mistake.

7. Counsel urged that it is against the rules of natural justice to condemn a party unheard and especially when it was not of his own making. According to Counsel, it is in the interest of justice and fairness that the Application for dismissal be disallowed, the Court to hear both parties and make a decision that addresses the real issues in controversy. She prayed that the Plaintiff be given a chance noting that parties had already filed their pre-trial documents and statements ready to prosecute the suit without any further delay.

Hearing of the Application

8. The Application was canvassed by way of brief oral submissions made by the Advocates in Court on 19/06/2024.

9. Mr. Were, Counsel for the 1st and 3rd Defendants' submitted that there is no good reason given for the delay, that the Plaintiff admits knowledge of the file having been transferred to this Court from the Environment & Land Court (ELC), that there is no evidence of any attempt to fix the matter for hearing, that the annexures exhibited by the Plaintiff were letters delivered at the ELC, not the High Court, that the letter dated 22/02/2019 confirms that since that date, there has been no attempt to fix a hearing date and that the third exhibit appears to have been written to defeat this Application as it is clearly backdated.

10. Ms. Khayo, Counsel for the Plaintiff, in her brief response, denied that the third exhibited letter was written subsequently or backdated.

Determination

11. The issue for determination herein is evidently, "whether this suit should be dismissed for want of prosecution."

12. In respect to dismissal for want of prosecution, Order 17 Rule 2 of the Civil Procedure Rules provides as follows:

> "(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".

13. It is clear from the foregoing that the Respondent has approached the Court under the provisions of sub-Rule (3) and above (underlined).

14. The principles to be applied in determining whether to dismiss an action for want of prosecution were well set out in the case of Allen Vs Sir Alfred Mc Alphine & Sons Limited (1968) where Salmon L. J guided as follows:

> "A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the superior court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice

can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial."

15. Echoing the above, R.Z. Chesoni (as he then was), in the case of Ivita vs. Kyumba (1984) K.L.R 441, stated that:

> " 3. The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."

16. The above principles were restated by the Court of Appeal in the case of Salkas Contractors Ltd v Kenya Petroleum Refineries Ltd (2004) e KLR, where it stated as follows:

> " ..... The principle that pervades these decisions is that the court has to be satisfied that the ordinate delay is excusable and if so satisfied, then the court has to consider whether justice can be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done then it will be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution."

17. Borrowing from some of the above authorities, Gikonyo J, in the case of Jimmy Wafula Simiyu v Fidelity Commercial Bank Limited [2014] eKLR broke down the above principles and extrapolated the same in an even more elaborate manner as follows:

> " [10] No doubt the court has discretion to excuse a delay as long as it has been explained to the satisfaction of the Court. The satisfaction will come from the explanation given and the fact that the delay causes no substantial prejudice to fair trial or one of the parties or other or both. Therefore, the fact of delay per se does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay 1) is inordinate and inexcusable; and 2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. The Court will be interested in the nature and importance of the case, the right of the Plaintiff to be heard and the fact that summary dismissal of a suit drives away the Plaintiff from the seat of judgment; an arbitrary and draconian act comparable only to the proverbial ''sword of the Damocles''. And, for the Defendant, in order to complete the balancing, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice and Articles 48, 50 and 159 of *the Constitution* are the relevant guide here. Ultimately, as Chesoni J (as he then was) stated in the case of Ivita Vs Kyumbu, the Court should ask itself, whether, despite the delay, it is still possible to do justice for all the parties."

18. Applying the above principles to the facts of this case, I note that this suit was filed by the Plaintiff on 18/09/2014 through Messrs Chepseba Lagat & Co. Advocates. The suit was filed at the Environment and Land Court at Eldoret and assigned the number, Eldoret ELC Case No. 290 of 2014. The genesis of the suit was a Guarantee given by the Plaintiff for a loan advanced to the 2nd Defendant by the 1st Defendant. As such Guarantor, the Plaintiff gave out his property known as Eldoret Municipality/ Block 20 (Kapyemit) 648 (suit property). It appears that along the way, the 2nd Defendant defaulted in repayment of the loan and as a result, the 1st Defendant moved to recover or realize its outlay by selling the suit property. This then is what triggered the filing of this suit by the Plaintiff. The prayers sought in the Plaint were as follows:

    a. An order of injunction restraining the 1st, 3rd and 4th Defendants, their agents, servants and/ or any other person claiming or acting on behalf of the 1st, 3rd and 4th Defendants' instructions from selling, auctioning, disposing of or in any other manner interfering with the Plaintiff's property land parcel number Eldoret Municipality/Block 20 (Kapyemit) 648.

    b. A declaration that the Plaintiff is not entitled to pay any overdraft whatsoever granted by the 1st Defendant to the 2nd Defendant.

    c. An order that the 1st Defendant do render the Plaintiff with proper statements of the loan account.

    d. Costs of the suit together with interest thereon.

    e. Any other relief that this Honourable Court may deem fit to grant.

19. Together with the Plaint and the other usual pleadings, the Plaintiff also filed an Application seeking interlocutory orders of injunction to stop the public auction sale of the suit property pending hearing and determination of the suit.

20. The 2nd Defendant filed his Statement of Defence on 2/10/2014 in person. He admitted the default, attributing the same to loss of his business, and pleaded that he was "willing and ready to discuss with the 1st Defendant on the way forward in clearing the balance". On its part, the 1st Defendant filed its Statement of Defence on 13/10/2014 through Messrs D.L. Were & Were strenuously challenging the suit.

21. The interlocutory Application was subsequently canvassed and determined vide the Ruling delivered on 1/04/2016 by Hon. Justice A. Ombwayo. By that Ruling, the Application was allowed and the Plaintiff granted interlocutory injunction barring the public auction sale pending hearing and determination of the suit.

22. Subsequently, owing to developments that had, in the meantime, arisen in law in respect to the jurisdiction of the ELC, this matter, being one relating to exercise of a lender's statutory power of sale as a charge, was, by the orders made on 17/05/2018 by Hon. Justice A. Ombwayo, transferred to this Court. Upon receipt in this Court, the suit was assigned the current case number.

23. However, a perusal of the Court file reveals that since the file was received in this Court on 14/08/2018, no action whatsoever has been taken to progress the case in any manner. It is therefore under this background that on 8/09/2023, the 1st Defendant moved and filed the instant Application seeking dismissal of the suit for want of prosecution.

24. In opposing the Application for dismissal, the Plaintiff's Advocate has alleged that the reason why they have not prosecuted the suit is because, according to her, the Court file has been "missing". She has then exhibited copies of 3 letters which she alleges to have written to the Court inquiring about

the whereabouts of the Court file. The letters are dated 21/10/2018, 22/02/2019 and 23/03/2020, respectively. A look at the letters indicates that, although two of them are addressed to the High Court Registry, they all bear only the "Received" stamp of the ELC. The last letter, the one dated 23/03/2020, also bears the "Received" stamp of the 1st Defendant's Advocates on record, D.L. Were & Were Co. Advocates, thus indicating that a copy thereof was served upon them. None of the letters therefore bears the stamp of the High Court. This therefore means that the Plaintiff, since this matter was transferred to this Court in August 2018, 6 years ago, had allegedly never known the High Court case number assigned to the suit and by extension, confirms that he or his Advocates have never made any step to prosecute it.

25. I find it unconvincing, and in fact, a sign of shocking lethargy by the Plaintiff and his Advocates that for 6 years they have never known the status of their case. Even assuming that the Plaintiff's Advocates did deliver the said letters to the ELC making the alleged inquiries, there is no evidence that they did anything more as would be expected of a diligent litigant. The question is; by what miracle then did the 1st Defendant learn of the High Court case number assigned to the suit upon transfer thereof? Sending 3 letters in a span of 6 years without evidence of any taking further step is nothing but a joke and a mockery of this Court's intelligence. It is evident that the Plaintiff and his Advocates handled the matter, if at all, in a most lazy and lackadaisical manner. Would the Plaintiff have acted with such indifference had there been no interlocutory orders in his favour? If indeed the Court file was "missing", why did the Plaintiff not apply for reconstruction thereof after all these years? My strong suspicion is that the Plaintiff and his Advocates were fully aware of all relevant material particulars of the case including the case number but simply feigned ignorance and "manufactured" the excuse of the file being "missing" with the intention of delaying the hearing of the suit and thus continue to indefinitely enjoy the interlocutory injunction orders. The suit having been filed in September 2014, it is now more than 10 years since it was filed. The 1st Defendant has no doubt been seriously prejudiced by the delay to prosecute the suit in light of the existence of the orders of injunction.

26. It must be noted that, while the Plaintiff is entitled to be heard on the merits of his case, this right cannot be used to curtail the rights of the Defendants that he has brought to Court. It is the duty of the Court to ensure justice between the parties. Section 1B of the *Civil Procedure Act* requires that there should be "just determination, effective and timely disposal of proceedings and effective use of judicial time and resources". The Court should not therefore permit cases to be filed, and once the Plaintiff has obtained interim orders, deliberately avoids prosecuting the case. That is pure abuse of the Court process. In this case, it is clear that the delay is inordinate. It is also curious that the Plaintiff has himself not sworn any Affidavit of his own to explain the delay or convince the Court that indeed, he is still interested in prosecuting the suit, instead, leaving his Advocate to swear the Affidavit. Certainly, the Plaintiff would have no justification to complain were this Court to take the step of dismissing the suit after such inordinate delay and inactivity.

27. Be that as it may, in the circumstances of this case, I will not dismiss the suit for now, and will instead, give the Plaintiff a chance, solely in the interest of justice and equity, to prosecute the suit but upon the conditions that I shall prosecute hereinbelow. I have reached this decision upon considering that locking out a party from the seat of justice before hearing him on the substantive merits of his case may amount to a draconian action. I have also considered the contents of the Ruling of Ombwayo J whereof he issued the orders of injunction orders and which Ruling I find to have identified weighty issues that merit being determined after a full trial. I have also considered the pleadings filed by the Plaintiff when he filed this suit and in which he stated that the suit property is his only source of livelihood and matrimonial home and that public auction sale thereof will cause him serious adverse consequences. I have also considered that although a case belongs to a litigant and it is him, not his Advocates, who

bears the primary obligation to ensure its progress, where circumstances justify it, a litigant should not necessarily be punished for the mistakes of or inaction by his Advocate.

Final Orders:

28. In the premises, I order as follows:

    i. The 1st Defendant's Notice of Motion dated 8/09/2023 is disallowed but the Court shall now proceed to fix an early hearing date for full trial of this suit.

    ii. As costs for this Application and penalty for causing the 1st Defendant undue inconvenience by delaying to prosecute the suit, the Plaintiff shall, within a period of 60 days from the date hereof, pay to the 1st Defendant the sum of Kshs 40,000/-. In default, this suit shall stand automatically dismissed for want of prosecution, without any further reference to the Court.

    iii. Subject to compliance with order (ii) above by the Plaintiff, the suit is now fixed for hearing on the 11th day of February 2025.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 29TH DAY OF NOVEMBER 2024

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

N/A for Plaintiff

N/A for Defendants

Court Assistant: Brian Kimathi