



REPUBLIC OF KENYA



Kimani (Suing through Joseph Obudho Oware) v Housing Finance Corporation Limited & another (Civil Case 49 of 2019) [2023] KEHC 26998 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26998 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 49 OF 2019
RN NYAKUNDI, J
DECEMBER 20, 2023**

BETWEEN

**RITA WANJA KIMANI (SUING THROUGH JOSEPH OBUDHO
OWARE) PLAINTIFF**

AND

**HOUSING FINANCE CORPORATION LIMITED 1ST DEFENDANT
HEGEANS AUCTIONEERS 2ND DEFENDANT**

RULING

Coram: Before Justice R. Nyakundi

M/s. Kayla & Co. Advocates

1. The applicant approached this court vide a Notice of motion dated 10th July 2023 seeking the following orders;
 1. That the plaintiff's suit be dismissed for want of prosecution.
 2. That costs of the application and the suit be borne by the Plaintiff.
2. The application is premised on the grounds set out therein and the averments in the affidavit in support of the same sworn by Beatrice Kipkesei.
3. The applicant contends that the plaintiff instituted the suit in 2019 and the matter was last in court on 18th May 2022. Since the last time it was in court, the plaintiff has never taken any steps to prosecute the suit or set down the matter for hearing. It is clear that the plaintiff is not keen on prosecuting the suit and further, the delay to prosecute the suit is inordinate and inexcusable.
4. The affidavit on record was sworn by Beatrice Kipkesei who is on record as the advocate for the 1st defendant. She averred that the matter was last in court on 18th May 2022 when the court made a ruling



on the applicant's injunction application dated 18th December 2019 which was dismissed with costs. She averred that the pendency of the suit is causing the defendant anxiety and the delay is inordinate and inexcusable. Urging that litigation has to come to an end, she prayed the court allow the application as prayed.

5. There is no response to the application by the respondent on record despite evidence that the respondent was served with the application.

Analysis & Determination

6. Upon considering the pleadings, the following issue arises for determination;

1. Whether the suit should be dismissed for want of prosecution

Whether the suit should be dismissed for want of prosecution

7. On an application to dismiss a proceeding for want of prosecution fixed formulae cannot be prescribed to limit the judicial discretion to do that which is justice between the parties. A problem arises when different judges or magistrates differently constituted within a particular jurisdiction lean towards one or other position as exemplified by the invocation of Art. 159 (2) (d) of the *constitution* which states: Justice shall be administered without undue regard to procedural technicalities. A court's leaning may well be towards the significance of Art. 159 to strengthen or weaken the value of the principles in guiding the prospective exercise of discretion in reference to an application to dismiss the suit for want of prosecution. It is trite that it is proper for the court to proceed to dismiss an inactive case docket for want of prosecution where the facts *prima facie* satisfies the following criteria.

- a. That the default of the plaintiff has been intentional, negligent, contumelious
- b. That there has been inordinate and in excusable delay on the part of the plaintiff or his or her counsel and that such delay will give rise to a substantial risk that is not possible to have a fair trial of the questions in the proceeding, or he is such as likely to cause or to have caused, serious prejudice to the defendant as between himself and the plaintiff or as between himself and another party or witnesses. These principles guide the discretion and they are tailored with one another in specific circumstances. The material facts giving raise to the application are all discernible from the record and even the interlocutory application filed was dismissed on 18.5.2022. After that ruling there has been a lapse of approximately more than one and half years which time there are no further steps or proceedings taken by the plaintiffs in the remainder of the remedies in the suit. I turn first to the provisions of the law which so far are relevant to the outcome of this matter.

8. Dismissal of suit for want of prosecution is governed by order 17 rule 2 which provides as follows:-

" 2.

- (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 (4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

9. This is not a mere matter of procedure or technicality; it is deemed to impact on the substantive rights of the parties in so far as the cause of action is concerned. It should be borne in mind that the purpose of the rule is to ensure tht a party to an action is not got off-guard by any step or proceedings taken by the other party after a long lapse of more than a year. There has been no compliance by the plaintiff in taking positive steps to prosecute the claim against the respondent. The respondent took out the application to dismiss the suit for want of prosecution and the power should be exercised to dismiss it for reasons of in ordinate and in excusable delay on part of the plaintiff. Though the suit was filed way back in 2019 the crucial question is that lying idle in the registries it runs a substantial risk of the expiry of the limitation period though the plaintiff may argue that the suit was filed within the statutory period. For my part it must be a matter of great weight that when suits are filed in terms of Art.50 (2) (e) of the constitution a party as an obligation to prosecute and have it concluded within a reasonable time. This default has been intentional and literally no evidence that the plaintiff is actively pursuing this litigation. The prevention of abuse of process is by itself a ground for the courts to strike out any cause of action by virtue of its in inherent jurisdiction in respect of the question of delay.
10. The criteria applicable in considering whether or not a suit should be dismissed for want of prosecution has been discussed 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.”
11. The plaintiff filed an application dated 18th December 2019 which was dismissed by the court vide a ruling delivered on 18th May 2022. Since then, it is clear from the record of the court that the matter has never proceeded any further. It appears the intention was to obtain injunction orders and when that failed, the plaintiff abandoned the suit.
12. Whereas courts are reluctant to strike out suits, it is equally encouraged that litigation must come to an end. The plaintiff dragged the defendants to court but has exhibited a reluctance to prosecute the matter. The plaintiff was served with this application and has elected not to respond. I am in total agreement with the initiative taken by the applicant/defendant and I fully endorse the principles on an application to dismiss a suit for want of prosecution. Given that it is over a year and a half since the matter was last in court, and no effort has been made to move the court for a hearing date, I find that it is ripe for dismissal for want of prosecution.
13. In the premises, the application succeeds in its entirety and the suit is dismissed for want of prosecution. As it is trite law that costs follow the event, I award costs of the suit and the application to the applicant.
14. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF DECEMBER 2023

In the presence of Manjala for the Defendant

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R. NYAKUNDI

JUDGE

