



**Quality Bitumen Products Limited v Equity Bank Kenya Limited (Civil Case 141 of 2019) [2022] KEHC 10788 (KLR) (Commercial and Tax) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10788 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 141 OF 2019  
WA OKWANY, J  
JUNE 23, 2022**

**BETWEEN**

**QUALITY BITUMEN PRODUCTS LIMITED ..... PLAINTIFF**

**AND**

**EQUITY BANK KENYA LIMITED ..... DEFENDANT**

**RULING**

1. The plaintiff instituted this suit against the defendant through plaint dated June 24, 2019 seeking judgment as follows: -
  - a. An order of permanent injunction restraining the defendant whether by itself, agents or servants from doing any of the following acts, that is to say, commencing realization of security, exercising power of sale, further advertising, selling, disposing alienating, transferring and/or in any other manner interfering with the plaintiffs quiet possession, occupation and enjoyment of all that piece of land known as Land Reference Number 336/203 (Original Number 336/188/1)
  - b. A declaration that the defendant has willfully and recklessly mismanaged and mishandled the plaintiffs account and is liable to pay damages.
  - c. An order that the defendant bank do account to the plaintiff in respect of the any such borrowing showing accurately the principle amount of the loan/borrowing advanced (if any) the rates of interest charged from time to time and the penalties and other charges levied on the plaintiff's account over the period.



- d. A declaration that the defendant does not possess any statutory power of sale over the suit property known as Land Reference Number 336/203 (Original Number 336/188/1) as the facility granted was long cleared
  - e. Costs of this suit together with interest thereon
  - f. Such other or further order as this honourable court may deem fit to grant.
2. Before the suit could be set down for hearing, the defendant filed the application dated June 21, 2021 seeking the dismissal of the suit for want of prosecution.
  3. The application is supported by an affidavit of the defendant's advocate Mr Anthony Mbaji and is based on the following grounds:-
    1. That the last time this matter was in court was on the March 3, 2020 when it came up for mention before the Deputy Registrar.
    2. That the plaintiff/respondent has not taken any active steps to fix this matter for either mention or hearing since the time the matter was last in court as aforesaid.
    3. That the continuing inaction and undue delay on the part of the plaintiff is prejudicial to the defendant.
    4. That it will be in the interests of justice and principles of equity to have this suit against the defendant/applicant dismissed by this honorable court.
  4. The plaintiff opposed the application through the replying affidavit of its Managing Director Mr Peter Mugambi who states that the application is frivolous, misconceived and premised on false information. He urges the court to take cognizance of the fact that Covid 19 pandemic led to the closure of the courts for the better part of 2020 and that following the re-opening of the courts, the plaintiff filed a request for judgment as, at the time, the defendant had not entered appearance or filed a defence. He further averred that the plaintiff was later informed about a statement of defence filed by the defendant and adds that this demonstrates that the suit had been active.
  5. The application was canvassed by way of written submissions, which I have considered. The main issue for determination is whether the application meets the threshold set for the dismissal of a suit for want of prosecution.
  6. Dismissal of suits for want of prosecution is governed by order 17 rule 2(1) of the [Civil Procedure Rules](#) which provides as follows: -
 

“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.”
  7. Further order 17 rule 2(3) of the [Civil Procedure Rules](#), states thus:-
 

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”
  8. The defendant/applicant's case is that the matter was last in court on March 3, 2020 when it was mentioned before the Deputy Registrar and that the plaintiff had since then, not taken any further steps to prosecute it.



9. The plaintiff, on the other hand, attributed the delay in prosecuting the case to Covid 19 pandemic that necessitated closure of the courts for some time.

10. In the case of *Ivita v Kyumba* [1984]KLR 441, it was held:-

“The test applied by the courts in the 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 the 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 of and in the discretion of the court.”

11. In *Invesco Assurance Co Ltd v Oyange Barrack* [2018] eKLR, the court held as follows on the exercise of discretion: -

“11. 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.”

12. Dismissal of suits for want of prosecution under order 17 is a matter that falls within the ambit of the court’s discretion. The court record shows that the matter was last before the Deputy Registrar on March 3, 2020. I also note that the plaintiff requested for default judgement on December 1, 2020 and the application for dismissal made on June 21, 2021.

13. From the above overview of the pleadings or actions taken by the parties herein, it is clear that one year had not lapsed from the last action taken by the plaintiff when it filed the request for judgment to the time the instant application was filed as envisaged under order 17 rule 2 of the CPR.

14. In the premises, I find that the present application is premature and devoid of merit. I therefore dismiss the application with orders that costs shall abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF JUNE 2022.**

**W. A. OKWANY**

**JUDGE**

In the presence of: -

Mr. Omondi for Gachie for Plaintiff/Respondent.

Mr. Mafumbo for Mbaji for Defendant.

Court Assistant- Sylvia

