



REPUBLIC OF KENYA



**KENYA LAW**  
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**Equity Bank (K) Limited v Mwangi & another (Civil Case 44 of 2018)  
[2022] KEHC 13364 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13364 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE 44 OF 2018  
EKO OGOLA, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**EQUITY BANK (K) LIMITED ..... APPLICANT**

**AND**

**BEATRICE WATHANU MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**EAGLE EYE AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By way of notice of motion dated November 9, 2021, the applicant seeks the following orders;
  - 1) This suit be dismissed for want of prosecution.
  - 2) Costs.
2. The application is based on the grounds contained therein and the deponements in the supporting affidavit.
3. The facts leading up to the application are that the plaintiff instituted the suit by way of plaint dated September 20, 2018 and filed a notice of motion on the same date. The application sought a temporary injunction against the defendants to restrain them from any dealings concerning the land known as Nyandarua/Kiriita/Mairinya Block 2 (Ngaindeithia)/4230 pending the hearing of the main suit. The application was heard and the court dismissed it on May 7, 2019 with costs to the defendant. The applicant then filed the present application as the plaintiff failed to move the court to have the suit heard since the dismissal of the application.

**Applicant's Case**

4. The applicant's case is that since the dismissal of the application on May 7, 2019 the plaintiff has failed to move the court to have the matter heard for over a year. She has neglected servicing the loan and



persists in so doing. The loan amount continues to accrue interest which may outstrip the value of the suit land. The applicant prays that the application be allowed the 1<sup>st</sup> defendant is greatly prejudiced and it would be just and fair that the matter be determined by way of dismissal.

### Respondent's Case

5. The respondent opposed the application and submitted that the defendants are yet to defend the suit as required by order 7. She also cited covid 19 as a reason that she could not continue with the matter due to the closure of the civil registry. She stated that if the application was not granted it would violate her right to be heard under article 47 of the Constitution.
6. The respondent cited sections 1A, 1B of the Civil Procedure Act and order 11 of the Civil Procedure Rules and submitted that the application was premature as parties had not complied with order 11. She prayed that the court dismisses the application with costs.

Upon perusing the application, responses and submissions, the issue for determination is whether the suit should be dismissed for want of prosecution.

7. Order 17 rule 2 (3) of the Civil Procedure Rules provides: -
  - 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.
8. It is noteworthy that after the application for injunction was dismissed by the court on May 7, 2019 none of the parties have made any attempt to move the court.

9. Order 7 rule 1 of the Civil Procedure Rules provides;

Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.

10. The applicant herein has not complied with the Civil Procedure Rules as has not filed or served a defence on the plaintiff.
11. In the case of Ivita vs 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.



12. As envisaged under article 50 (1) of the Constitution of Kenya, 2010 every person has a right to have a fair trial. The said article 50 (1) of Constitution of Kenya provides as follows:  
  
Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
13. A person should not be barred from having his day in court. The right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction. It is evident that the plaintiff filed the suit and as a result of the covid 19 pandemic, proceeding with the matter was a challenge as the registry operations were disrupted.
14. With regard to the provisions of order 17 rule 2, I stand guided by the courts' decision in the case of Investment Limited vs G4S Security Services Limited (2015) eKLR where it held: -  
  
This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of article 159 of the Constitution of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial "Sword of the Damocles". But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under article 159 (2) of the Constitution of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the plaintiff.
15. Whereas the plaintiff failed to move the court within one year, the responsibility must also be borne by the applicant. The applicant is directed to file a defence within 14 days and the respondent is also to expedite the matter and set it down for hearing within 7 days of the defence being served. In the premises, I find that the application is not merited and I decline to strike out the suit.
16. The application is dismissed. Parties to bear own costs.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 28<sup>TH</sup> OF SEPTEMBER 2022.**

**E. K. OGOLA**

**JUDGE**

RULING 2

