



Heshimart Enterprises v Rafiki Microfinance Bank & another (Civil Case 59 of 2016) [2022] KEHC 14061 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 59 OF 2016
RN NYAKUNDI, J
OCTOBER 21, 2022**

BETWEEN

HESHIMART ENTERPRISES PLAINTIFF

AND

RAFIKI MICROFINANCE BANK 1ST DEFENDANT

IMMEDIATE AUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. Before is a notice of motion dated March 14, 2022 filed by the 1st defendant/applicant. The applicant seeks to dismiss this instant suit for want of prosecution.
2. The application is premised on the grounds thereof and is further supported by the affidavit sworn on March 14, 2022 by Jane Warau, the Head of Debt Recovery, Rafiki Microfinance Bank.

Defendant's/Applicant's Case

3. The applicant deposed that this suit was last in court on July 15, 2020 for mention but both parties were absent. The applicant contends that since the said date, the plaintiff herein has not taken any steps to prosecute this instant and has further not taken any steps toward settling the outstanding sum owed to it. The further contends that the delay on the part of the plaintiff to prosecute this suit for more than one year is inordinate, inexplicable, unreasonable and inexcusable, the applicant further maintains that the plaintiff has lost interest in pursuing this suit and there is no reason for it to continue pending in court.
4. The applicant deposed that the applicant is highly prejudiced by the suit so remaining in abeyance. The applicant further deposed that the continued pendency of this case is causing the applicant unwarranted expense, delay, anxiety and inconvenience. The applicant contends that the outstanding sums have been pending for a long period and the outstanding sums continue to accrue interest.



5. The applicant deposed that it is in the business of banking and the retention of its monies by the plaintiff will lead to losses.
6. The applicant maintains that it is only fair and in the interests of justice that the plaintiff's suit be dismissed with costs to the applicant.

Plaintiff's /Respondent's Case

7. The application was opposed by the plaintiff *vide* the replying affidavit sworn on May 13, 2022 by Samuel Mutahi Kamua, the director of the plaintiff.
8. The respondent deposed that the delay in prosecuting this matter is not intentional as the matter was last in court on the July 15, 2020 at the onset of the Covid-19 pandemic when courts were not proceeding with matters. The respondent contends that in the instant case the court had directed that it would give further directions on how the matter would proceed but the same has never been undertaken.
9. The respondent further contends that it has been negotiating with the 1st defendant in terms of restructuring the loan. The respondent maintains that the negotiations are still ongoing and hence the matter has not proceeded for hearing. The respondent further contends that parties are yet to comply with the provisions of order 11 of the *Civil Procedure Rules*.
10. The application was canvassed by way of written submissions. The applicant filed its written submissions on July 18, 2022, whereas the respondent filed its written submission on July 14, 2022. I have keenly read the submissions by the parties herein and I need not reproduce the same as I would take into consideration the arguments therein in my determination.

Determination

11. I have considered the application herein, the affidavits in support thereof and the submissions filed.
12. Order 17 rule 2 of the *Civil Procedure Rules*, provides:

“Notice to show cause why suit should not be dismissed;

- (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. The exercise of the power to dismiss a suit for want of prosecution under order 17 is a matter that is within the discretion of the court. In *Invesco Assurance Co Ltd vs Oyange Barrack* [2018] eKLR, regarding the exercise of discretion, the court stated:

“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.”

14. In *Argan Wekesa Okumu vs Dima College Limited & 2 others* [2015] eKLR, the court considered the principles for dismissal of a suit for want of prosecution, where it stated as follows: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay. As such the 3rd defendant in this case must meet the burden of proof in seeking the dismissal of the plaintiff’s case for want of prosecution see the case of *Ivita vs Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

15. In *Mwangi S Kimenyi vs Attorney General and another*, Civil Suit Misc No 720 of 2009, the court stated as follows: -

- “1. 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.
2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

16. From the above provisions it is clear that a defendant seeking dismissal of a suit on the ground of want of prosecution must satisfy the legal requirement of one-year threshold stipulated in order 17 rule 2 of the *Civil Procedure Rules*. After satisfying the one-year threshold, he must also show that there was inordinate and inexcusable delay in the circumstances of the case. Thirdly, he must satisfy the court that he will be prejudiced by the delay if the suit were to be allowed to proceed to trial. Lastly, he must satisfy the court that owing to the delay, a fair trial cannot be achieved.



17. Applying the principles emerging from the above cited cases to the present application, the only question that arises is whether the delay in prosecuting the instant suit is inordinate, unreasonable and likely to prejudice the 1st defendant.
18. A perusal of the court file reveals that the matter was last scheduled to be in court on July 15, 2020 for mention. It is without a doubt that it is now over two years since the matter was last heard in court. The plaintiff attributed the delay to the Covid-19 pandemic which stalled the hearing of the cases in 2020 and as a precautionary measure all courts were closed to curtail the spread of the virus.
19. In the circumstances of this case and in the interest of justice it is my finding that the delay is not inordinate or intentional. The 1st defendant has further not demonstrated that the delay prejudiced it or caused any injustice.
20. I will therefore decline the prayer to dismiss the suit for want of prosecution but on condition that the plaintiff fixes the suit for hearing with three months from the date of this ruling failure of which the suit will automatically stand dismissed for want of prosecution.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 21ST DAY OF OCTOBER, 2022.

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R. NYAKUNDI

JUDGE

