



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. 220 of 2012**

**FRANCIS LASALO NGONGA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**BARCLAYS BANK OF KENYA.....DEFENDANT/APPLICANT**

**RULING**

1. The suit herein was filed in May 2012 by **Francis Lasalo Ngonga** (Plaintiff) against **Barclays Bank of Kenya** (Defendant) seeking damages for breach of contract. By the end of 2012, the pleadings had closed but in the absence of further steps by the Plaintiff, the Defendant filed a motion on 1<sup>st</sup> July 2015 seeking the dismissal of the suit for want of prosecution. The motion, adjourned 27.10.2015, was apparently overtaken by the Plaintiff's subsequent motion dated 17<sup>th</sup> March 2016 and filed on 18<sup>th</sup> May 2016 seeking leave to amend the plaint.

2. The said latter motion was granted *vide* the ruling delivered on 3<sup>rd</sup> May 2018 and an amended Plaint and amended Defence subsequently filed. Compliance with Order 11 of the Civil Procedure Rules however took a further year and on 6<sup>th</sup> June 2019 the Deputy Registrar directed that parties fix the matter for mention before a Judge to certify that the suit was ready for hearing. Another lull followed the Plaintiff's letter dated 13<sup>th</sup> June 2019 inviting the Defendant's advocate to attend the Civil Registry on 26<sup>th</sup> June 2019 to fix a hearing date. Although the original invitation letter is on the record, it seems that no date was taken, and the Defendants filed a second motion, dated 1st September 2020 seeking to have the suit dismissed for want of prosecution.

3. The motion is expressed to be brought *inter alia* under Order 17 Rule 2(3) of the Civil Procedure Rules and is supported by the affidavit of **Dennis Joseck Mare**, the Defendant's advocate. The affidavit contains a rendition of the history of the cause and further the deponent asserts that it has been more than one year since the Plaintiff took any action to prosecute the suit, the Plaintiff's counsel having on three occasions invited the Defendant's advocates to fix a date but failing to send a representative on two of those occasions. It is deposed that it is now 8 years since the cause was filed and that the conduct by the Plaintiff was clear indication of disinterest in the prosecution of his suit; and that the delay on the part of the Plaintiff inordinate and inexcusable and is prejudicial to the Defendant.

4. The Plaintiff opposed the motion through a replying affidavit sworn by his advocate, **Dianarose Wambui** dated 7<sup>th</sup> October 2020. To the effect that the notion that the Plaintiff was disinterested in prosecuting his suit was misguided and untrue; that counsel for the Plaintiff had on numerous occasions invited the Defendant to attend the High Court registry for purposes of fixing a mutually convenient date but was advised by her clerk on the two occasions that the court file was missing; that further attempts by counsel to fix the matter for hearing by writing emails to the court were to no avail; and that the application was misconceived, scandalous, frivolous and an abuse of the court process. That if the court were to allow the motion, it would occasion great prejudice to the Plaintiff.

5. When the matter came up for hearing on 25<sup>th</sup> January, 2021 the court directed that the motion be canvassed by way of written submissions. The Defendant's submissions reiterated the matters in the supporting affidavit and pointing out that the Plaintiffs' last step towards prosecuting the suit was on the 6<sup>th</sup> June, 2019 asserted that the suit filed 8 years ago was ripe for dismissal for want of prosecution. As to the principles governing an application for dismissal of suit for want of prosecution, the Defendant relied on the case of **Argan Wekesa Okumu v Dima College Limited & 2 Others [2015] eKLR**. Counsel submitted that dismissal of suits for want of prosecution is based on the requirement of expediency founded upon Article 159(2)(b) of the Constitution of Kenya, that justice shall not be delayed. Further, and that by dint of Order 17 Rule 2 of the Civil Procedure Rules, the court on its own motion can dismiss a suit if there is inaction by the plaintiff for more than one year. Counsel relied on several pronouncements of superior courts including **ET Monks & Company Ltd v Evans & 3 Others [1974] eKLR**, and **Eliud Munyua Mutungi V Francis Murerwa [2014] eKLR**.

6. It was further submitted that the failure by the Plaintiff's advocate to send a representative to attend date-fixing at the registry was a

deliberate action to further delay hearing of the suit and that the onus was on the Plaintiff to progress his suit by taking all necessary steps in that regard. Reliance was placed on the case of **Utalii Transport Company Limited & 3 Others V Nic Bank & Another [2014] eKLR**. On the question of prejudice, it was submitted that the more the suit is delayed the less the likelihood of a fair trial, to the prejudice of the Defendant as found in the case of **Abdul & Another V Home And Overseas Insurance Company Limited [1971] EA 564 (CAK)**. The Court was urged to allow the motion.

7. The Plaintiff also relied on the principles in the **Argan Wekesa Okumu** case. His counsel submitted that the court's power under the provisions of Order 17 Rule 2 of the Civil Procedure Rules is discretionary and ought to be exercised judiciously. The Plaintiff cited the case of **Nilesh Premchand Milji Shah & Another T/A Ketan Emporium V M.D. Popat And Others [2016] eKLR** in support of this submission. The Plaintiff contended that a clear explanation had been given concerning the obstacles faced by the Plaintiff in attempts to set down the suit for hearing; that these were not of the Plaintiff's making and the application by the Defendant was premature and did not satisfy the conditions warranting dismissal for want of prosecution. Citing the cases of **Naftali Opondo Onyango v National Bank of Kenya Ltd [2005] eKLR**, and **Agip (Kenya) Limited v Highlands Tyres Limited [2001] KLR 630** the Plaintiff's counsel submitted that the Plaintiff has advanced a sufficient and reasonable explanation for the delay herein and is the party more likely to be prejudiced by the dismissal of the suit in the circumstances of this case.

8. The Court has considered the material canvassed in respect of the Defendant's motion. Order 17 Rule 2 of the Civil Procedure Rules echoes the constitutional injunction in Article 159(2) (b) of the Constitution and the overriding objective in Section 1 A and 1B of the Civil Procedure Act for the expeditious dispensation of justice. The former Rule provides provides *inter alia* that:

**“(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)..... “**

9. The *locus classicus* on the above Rule is the case of **Ivita v Kyumbu (1984) KLR 441** which has been followed in a long line of authorities, including those cited by the parties herein. The Court of Appeal restated the principles enunciated therein in the case of **Rajesh Rughani v Fifty Investments Limited & Another (2016) eKLR** by stating that:

**“The test for dismissal of a suit for want of prosecution is stated in the case of Ivita -v- Kyumbu (1984) KLR 441). The test was expressed as follows:**

**“The test is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite such delay. Justice is justice to both the plaintiff and the 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 satisfy the court that he 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.”**

See also **Argan Wekesa Okumu v Dima College & 2Others (2015) eKLR**.

10. The cumulative delay in this case is over 8 years as the suit was filed in May 2012 and as earlier shown, it took another 4 years before the Plaintiff applied to amend the plaint after the Defendant filed the first dismissal motion. The parties were directed on 6.06.2019 to set down the matter for mention before the Judge, but until September 2020, the direction had not been complied with. There is on record one original letter dated 19.06.2019 by the Plaintiff's counsel inviting the Defendant's advocate to a date-fixing in the registry. The Defendant's copy of the said letter (annexure **DMJ1** to supporting affidavit) bears an endorsement that the Court diary was closed). The Plaintiff has exhibited two further similar letters dated 15<sup>th</sup> and 24<sup>th</sup> January 2020 (see annexure **DWR1** to replying affidavit) which were admittedly served upon the advocates of the Defendant.

11. However, the said advocates assert in their affidavit in support of the motion that the Plaintiff failed to send a representative to the date-fixing on both occasions. This assertion is not expressly controverted in the replying affidavit, the Plaintiff's position being that the Court clerk of the Plaintiff's advocate had advised that the court file was missing. The said clerk has not sworn an affidavit in this regard and the Plaintiff's advocate's emails in August and September 2020 (annexure **DWR2**) make no reference to the court file being missing.

12. The delay of over one year in the circumstances of this case is rather prolonged even if not inordinate. Moreover, even discounting the cumulative delay in the suit, the court is not wholly satisfied with the Plaintiff's explanation for the delay in setting down the matter for pretrial since June 2019. It is not enough for a plaintiff to keep on taking occasional random and ineffective actions such as writing letters to the registry or sending invitations to the adverse party, while not following up, and which actions therefore do not effectively progress his matter. This appears to be the case here. The Plaintiff cannot therefore be heard to plead that the cause of the delay were factors outside his control.

13. Delay in litigation whether deliberate or inadvertent is always prejudicial to the party who has been dragged to court. As observed in **Ivita's** case, delay may affect the likelihood of a fair trial being held as documents and witnesses may become unavailable, while memories

of such witnesses may fade over time. However, in that case the Court also added the rider that:

**“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 available time. It is a matter in the discretion of the court.”**

14. In this case, despite the Plaintiff’s wanting explanation, it has not been demonstrated that due to the delay, justice cannot be done between the parties. In view of the foregoing, and in the interest of doing justice on both sides, the Court most reluctantly declines to dismiss the suit but directs the Plaintiff to **prosecute the case to conclusion within eight (8) months of today’s date, failing which it will automatically stand dismissed for want of prosecution.** Having also considered the pleadings herein, the Court notes that the lower court has the requisite jurisdiction to entertain the Plaintiff’s claim. The Court therefore orders that the instant suit be immediately transferred to the **CM’s Milimani Commercial Court** , Nairobi for hearing and disposal in the period stipulated. For this purpose, the matter is to be listed before the Chief Magistrate for her directions on 15.06.2021. The Plaintiff will bear all the costs occasioned by the Defendant’s application.

**Delivered and signed electronically on this 20<sup>th</sup> Day of May 2021**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Plaintiff/Respondent: N/A**

**For the Defendant/Applicant: Mr. Mare.**

**C/A: Carol**