



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL SUIT NO. 2 OF 2021

ZEKI WANJALA T/A

ZEKI MOTOR AGENCIES PLAINTIFF/RESPONDENT

VERSUS

NCBA BANK KENYA PLC.....1ST DEFENDANT/APPLICANT

GARAM INVESTMENTS

AUCTIONEERS.....2ND DEFENDANT/APPLICANT

RULING

The defendants/applicants filed an application dated 4th November, 2020 seeking a dismissal of the suit herein on the grounds that the plaintiff has not taken steps to prosecute the matter since 30/10/2018 and a period of 2 years 11 months has lapsed since then. That the continued pendency of the suit is prejudicial to the defendants and is a waste of judicial time. That it is in the interest of justice to that the application is allowed.

They also filed a further affidavit deponing that the plaintiff filed an application in this matter seeking injunctive order which application was dismissed. He then filed Civil Suit 128 of 2020 which was again dismissed on 20/11/2020 for being sub judice. Upon dismissal, he preferred Civil Suit E013 of 2021 which once again dismissed on 29/3/2021.

That the plaintiff is intent on frustrating the defendants from pursuing its loan advanced to the plaintiff by preferring a multiplicity of suits while lying in this suit that he had been taken ill.

The plaintiff filed his replying affidavit stating that the 1st defendant is a stranger having not been substituted. That he disagreed with his advocate whom he had instructed to prefer an appeal against a ruling on stay application. That the delay to prosecute this suit was partially caused by the advocate's inability to secure the documents for appeal purposes and has now abandoned the appeal for the main suit. That he was taken ill in the year 2020 and part of 2021 due to Covid-19 related complications.

He depones that allowing the application will deny him an opportunity to be heard since the suit property is his only source of livelihood.

The application was disposed of by way of written submissions. Both parties complied. The submissions are on record.

The legal provisions for dismissal of suits for want of prosecution is grounded in Order 17 Rule 2 of the Civil Procedure Rules which provides;

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 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.

The court is aware that a dismissal of party's suit is rather draconian and tends to drive away the litigant from the seat of justice. The constitution under Article 159 mandates the court to administer substantive justice without undue regard to procedural technicalities.

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 and stated:-

“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.”

In the present case, the suit property subject of the facility is E. Bukus/S. Kanduyi/2028. The plaintiff depones that it is his only source of livelihood. Nevertheless, the plaintiff is obligated to settle the facility advanced. He is contractually bound to do so. As such the court is to balance the rights of either party to this suit.

It is not lost to the court that the plaintiff has filed a number of suits after his application in this suit was dismissed seeking to safeguard his interests in the suit property. The applications were equally dismissed.

The respondent in explaining the delay in prosecuting the suit stated that he disagreed with his advocate and was later taken ill. This however is not an excuse for not prosecuting his suit within the stipulated time. Neither does it give him a leeway to prefer a multitude of suits instead of prosecuting the main suit.

The overriding objectives under the Civil Procedure Act empowers the court speedily determine matters. This emanates from Article 159(2) (b) of the Constitution which provides that justice shall not be delayed.

After considering the application and the submissions, I hereby direct that the plaintiff/respondent do prosecute the suit to be heard and finalized within **Three (3) months**; that is, by 28/1/2022. If the same is not heard and finalized by that date, this suit will stand dismissed.

DATED AT BUNGOMA THIS 26TH DAY OF OCTOBER, 2021

S. N. RIECHI

JUDGE