



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 56 OF 2017

MIDDLE EAST BANK KENYA LIMITED.....PLAINTIFF

VERSUS

WIDAD HUSSEIN BADRU.....1ST DEFENDANT

HASSAN SALEH MANSWAB.....2ND DEFENDANT

RULING

[1] Before the Court for determination is the Notice of Motion dated **24 September 2021**. It was filed herein on **27 September 2021** pursuant to **Article 159** of the **Constitution**, **Section 1A, 1B, 3A** of the **Civil Procedure Act**, **Chapter 21 of the Laws of Kenya** and **Order 17 Rule 3** of the **Civil Procedure Rules, 2010** by **M/s John Bwire & Associates**, the advocates for the 2nd defendant, for the dismissal of this suit for want of prosecution on the grounds that the plaintiff has not taken any action towards prosecuting it since **14 May 2020** when the Court made orders that the suit be set down for hearing within 60 days.

[2] The application was supported by the affidavit annexed thereto, sworn by the 2nd defendant on **24 September 2021**, in which he deponed that this action was instituted by the plaintiff by way of the Plaint dated **22 May 2017**; and that whereas he promptly entered appearance on **30 May 2017**, the plaintiff has not taken any action towards the prosecution of this suit; and more so in the light of the directions issued by the Court on **14 May 2020**. Thus, it was the contention of the 2nd defendant that it has been over one year since the plaintiff took any step to prosecute this suit. The 2nd defendant further averred that since the suit has been pending before the Court for close to 5 years, there is a substantial risk to fair trial; granted that some of the defence witnesses have expressed fatigue, anxiety and unwillingness to continue participating in these proceedings. It was therefore the averment of the 2nd defendant that it is only fair that the suit be dismissed with costs to him for want of prosecution.

[3] The application is, thus far, unopposed. The Affidavit of Service sworn by **Daniel Mitsanze Thoya** on **15 October 2021**, is to the effect that the said application was duly served along with a Hearing Notice for **18 October 2021**. Thus, the said application proceeded *ex parte* on **18 October 2021** after the plaintiff and its counsel failed to attend court.

[4] I have given due consideration to the written submissions filed herein as well as the averments in the Supporting and Replying Affidavits sworn and filed herein in respect of the application. **Order 17 Rule 2** of the **Civil Procedure Rules**, pursuant to which the application has been brought, provides 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) The court may dismiss the suit for non-compliance with any direction given under this Order.

[5] Accordingly, the issues falling for consideration in this application are:

[a] Whether there has been inordinate delay herein in the prosecution of the suit;

[b] Whether the delay is excusable; and,

[c] Whether the Applicant has been prejudiced by the delay.

[6] And as was well elucidated by **Lord Denning MR** in the case of **Allen vs. Sir Alfred McAlpine** [1968] All E.R. 543 at 546, any delay in the administration of justice is to be deprecated. He stated thus:

"The delay of justice is a denial of justice...all through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear...To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it."

[7] Thus, in **Ivita vs Kyumbu** [1975] eKLR it was held that:

"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 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 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."

[8] There is no dispute that the last action herein, for purposes of **Order 17 Rule 2** of the **Civil Procedure Rules**, is the Ruling dated **14 May 2020**. One of the orders made by the Court in that Ruling was that the parties were to prepare and set down the suit for hearing within 60 days from the date of the Ruling. A perusal of the court record confirms the assertion by the 2nd defendant that the plaintiff has neither complied with the court order nor taken any step whatsoever in the matter since **14 May 2020** with a view of prosecuting this suit. Thus, for purposes of **Order 17 Rule 2(1)** of the **Civil Procedure Rules**, I am satisfied that a delay of 1 year and 5 months in the prosecution of the case has been clearly demonstrated.

[9] As the application is unopposed, there is no justification at all for the delay. As was aptly pointed out by **Lord Denning** in **Fitzpatrick vs. Batger & Co. Ltd** [1967] 2 All ER 657:

"...it is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition...The delay [of two years] is far beyond anything we can excuse...It is impossible to have a fair trial after so long a time..."

[10] In the premises, the delay herein is not only unexplained but also unwarranted, viewed from the backdrop of the specific order of the Court that the suit be fixed for hearing within 60 days from **14 May 2020**. Moreover, in the absence of any justification for the delay by the plaintiff I find valid the 2nd defendant's apprehension that he stands to suffer great prejudice by the delay. Thus, I find merit in the application dated **24 September 2021**. The same is hereby allowed and orders granted as hereunder:

[a] That this suit be and is hereby dismissed with costs for want of prosecution.

[b] That the costs of the application be borne by the plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21TH DAY OF OCTOBER 2021

OLGA SEWE

JUDGE