



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 11 OF 2016**

**AMBROSE RACHIER, OKOME ARWA**

**FRANCIS OLALO & STEPHEN LIGUNYA**

**t/a RACHIER & AMOLLO ADVOCATES.....PLAINTIFF/RESPONDENT**

**VERSUS**

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

**RULING**

1. This ruling relates to a notice of motion application dated 31<sup>st</sup> October, 2019, brought under the provisions of; section 3A of Civil Procedure Act and Order 17, Rule 2(3) of Civil Procedure Rules, 2010.

2. The Applicant is seeking for orders that; the suit be dismissed for want of prosecution, or in the alternative, the suit be struck out for failure to pay court fees on the filing of the suit. The application is based on the grounds thereto and an affidavit dated 30<sup>th</sup> October 2019, sworn by Doreen Kimori, the Manager with the Applicant, in charge of Legal Services.

3. She deposed that, the Respondent filed this suit sometime in January 2016, but did not take any step to prosecute it until March 2017, when amended plaint was filed. Further, the Respondent was required by the court on 19<sup>th</sup> August 2019 and later on 16<sup>th</sup> September 2019, to show evidence of, payment of court filing fees but did not bother to attend court. As such the Respondent lost interest in the prosecution of this suit and it is unfair to saddle the Applicant with the suit.

4. However, the application was opposed based on the grounds of opposition dated 13<sup>th</sup> December, 2019 wherein it is stated that: -

*a) The Application is premature and a non-starter based on clear misrepresentation of the law and or misrepresentation of facts.*

*b) That, only those suits dormant for one year or more can be dismissed suo moto or on application under Order 17 rule 2 aforesaid*

*c) The suit herein cannot be dismissal for want of prosecution under order 17, rule 2 of the Civil Procedure Rules, because the suit is active and was last in court in; November 2019, less than one calendar month when case management conference was fixed for the 22 January 2020.*

*d) The filing fees was repaid on 26 November 2019, on a without prejudice basis before the case management was scheduled.*

*e) The Plaintiff has never lost interest in prosecuting this suit and should be allowed to pursue it to its logical conclusion. Conversely, the Defendant has been absent on various mention dates which shows lack of commitment on their part to participate in the proceedings.*

*f) That, the interests of justice require that this suit be sustained now that case management is already scheduled. The Plaintiffs are entitled to have their suit heard on merit before the court in full exercise of their absolute constitutional right to fair hearing.*

*g) That, there is risk of injustice and irreparable loss if the case is dismissed. The Defendant bank will be unjustly enriched to the tune of USD62,000 (Six Two Thousand US Dollars) with interest thereon, since 2016, at the Plaintiff's expense; which sum was fraudulently and negligently paid out to strangers with the connivance and or participation of the Defendant.*

*h) The Defendant has not raised any credible ground for dismissal of this active suit, hence the application is frivolous and must be dismissed with costs to the Plaintiffs.*

5. The application was orally canvassed in court and I have considered the submissions herein and find that, the only way to determine is whether the Applicant has advanced sufficient grounds for the dismissal of the suit. It suffices to note from the outset that, the alternative prayer has been overtaken by events.

6. I have considered the court record and finds that; the Plaintiff filed the case on 20<sup>th</sup> January 2016; vide a plaint dated 11<sup>th</sup> January 2016. The summons to entre appearance were issued on 21<sup>st</sup> January 2016. The Defendant entered appearance on, 28<sup>th</sup> January 2016 and filed the statement of defence dated 11<sup>th</sup> February 2016, on the same date.

7. Apparently, the Defendant also filed a chamber summons application under Order 15(1) of the Civil Procedure Rules 2010, seeking for leave to issue a Third-Party notice. The application dated 10<sup>th</sup> February 2016, was served upon the plaintiff, on 22<sup>nd</sup> March 2016, On 13<sup>th</sup> June 2016 the notice dated 29<sup>th</sup> March 2016 was served upon the Third Party.

8. On 19<sup>th</sup> March 2017, the Plaintiff filed a notice of motion application dated 11<sup>th</sup> January 2017, seeking for leave to amend the plaint. The application was heard on 2<sup>nd</sup> February 2017, and the amended plaint dated 23<sup>rd</sup> February 2017, filed on 13<sup>th</sup> March 2017.

9. On 14<sup>th</sup> March 2017, the Plaintiff filed the witness statement by Stephen Ligunya, together with a list and bundle of documents and on 23<sup>rd</sup> July 2018, the Defendant filed an amended statement of defence.

10. On 8<sup>th</sup> March 2019, the Deputy Registrar; Commercial and Tax Division, of the High Court, send the Plaintiff a notice, to the effect that, the Receipt serial number 6570212, dated 20<sup>th</sup> January 2016 used to pay filing fees of Kshs. 70,390, was found to be fake as that money was not reflected in the Judiciary account. The matter was stood over to 9<sup>th</sup> May 2019 for further orders.

11. The Plaintiff responded vide a letter dated 3<sup>rd</sup> April 2019 disputing the demand for fresh payment, as the fees was only assessed and a Judiciary receipt issued. On 23<sup>rd</sup> April 2019, the Honourable Deputy Registrar, requested for the initial receipt issued to the Plaintiff to enable the court regularize the payment and avoid the pleadings being deemed improper due to non-payment of filing fees.

12. On 14<sup>th</sup> May 2019, the Plaintiff appeared before, the Honourable Deputy Registrar to seek for time to make the payment. The matter was stood over to 17<sup>th</sup> June 2019. On that date, the matter was stood over to on 18<sup>th</sup> July 2019, and referred to Honourable Lady Justice Kasango; the Presiding Judge of the division.

13. The Presiding Judge upon considering the matter, stayed further proceedings therein, as the fees had not been paid. She referred the matter back to the Honourable Deputy Registrar, for mention on 19<sup>th</sup> August 2019. The Honourable Deputy Registrar mentioned the matter but there were no parties. The same was stood over to 16<sup>th</sup> September 2019.

14. On 16<sup>th</sup> September 2019, the Plaintiff was absent. The Honourable Deputy Registrar then referred the matter back to the Judge. On 17<sup>th</sup> October 2019, the Plaintiff informed the Judge that, they were willing to pay the court filing fees once assessed. The matter was once again referred to, the Honourable Deputy Registrar and set for mention on 21<sup>st</sup> November 2019.

15. However, on 8<sup>th</sup> November 2019, the Defendant filed this subject application. On 28<sup>th</sup> November 2019, the Plaintiff informed the court that, the fees had been paid on a “without prejudice basis”. The pleadings were marked as properly filed and/or on record. On 19<sup>th</sup> December 2019, the court ordered that, since the Plaintiff had rectified the initial receipt by making alternative payment, the matter should proceed on. On 22<sup>nd</sup> January 2020, the parties canvassed the subject application orally.

16. In a nutshell the Applicant avers that, there has been an inordinate and unexplained delay, of over three (3) years from the date of filing the suit. That order 17, Rule 2 of the Civil Procedure Rules provides that, a suit that has been dormant for one (1) year should be dismissed for want of prosecution. Therefore, the Plaintiff must explain the delay. The Applicant relied on the case of; *Ivata vs Kyumbu (1984) KLR 441*, to argue that if the delay is not explained as herein, the suit should be dismissed.

17. However, the Respondent submitted that, the Applicant has not shown the prejudice it will suffer if the suit is not dismissed. That order 17 Rule 2 of the Civil Procedure Rules 2010, states that, if no “step” is taken, thus as long as the file is active, steps are taken. The Respondent relied on the list of authorities filed on 16<sup>th</sup> December 2019, to argue that, the suit has been active and was last in court in November 2019.

18. I have considered the application in the light of, the chronology of events as outlined herein and the arguments and/or submissions by the parties. I find that the suit was active from the date of filing to 23<sup>rd</sup> July 2018, when the amended defence was filed. Therefore, if there was any lapse then it was after the 23<sup>rd</sup> July 2018.

19. The one-year period would then run from; 23<sup>rd</sup> July 2018 to 23<sup>rd</sup> July 2019. The court record shows that, during that intervening period, the matter was active but on the administrative issues, being the authentication of the receipt purportedly issued upon the payment of the filing fees and/or whether Plaintiff’s pleadings were properly on record.

20. It is also noteworthy that, on 18<sup>th</sup> July 2019, just before one-year period expired, the court stayed the proceedings. The stay order was

lifted on 17<sup>th</sup> October 2019, therefore, the one-year period started running afresh after the order staying proceeding was lifted. In the meantime, the application herein was filed.

21. In my considered opinion, in the given circumstances, there is no delay. The delay arising out of non-payment of filing fees cannot be visited upon the Plaintiff, as it is public knowledge that, there were mass frauds, involving fake receipts in relation to the payment of filing fees. Although the Plaintiff was initially slow in making alternative payment, it has now been done, and the case should now proceed to a full hearing.

22. I therefore disallow the application and order that each party to meet its own costs.

23. It is so ordered.

**Dated, delivered and signed on this 29<sup>th</sup> day of April 2020.**

**G.L. NZIOKA**

**JUDGE**

**In the presence of:**

Mr. Ochieng for the Plaintiff/Respondent

No appearance for the Defendant/Applicant

Aswani/DR.....Court Assistant