



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL CASE NO. 324 OF 2012**

**BUSURU RICHARD MARK T/A BUSURU**

**R.M. PARTNERS ARCHITECTS .....PLAINTIFF/RESPONDENT**

**VERSUS**

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

**RULING**

1. The defendant/applicant has filed an application dated 19<sup>th</sup> August, 2019 seeking for orders that the suit herein be dismissed for want of prosecution. The application is premised on grounds on the face of the application and supported by the affidavit of the applicant, Mr. Anthony Mbaji. The grounds in support of the application are that the last time that the matter was in court was on 1<sup>st</sup> December, 2016 when it came up for hearing of the main suit. That it could not proceed on that day as both parties were absent. That the respondent has since then failed to fix the matter for hearing. That the delay is inordinate and inexcusable. That it is only fair and just that the suit be dismissed.
2. The application was opposed by the respondent vide his replying affidavit sworn on 8<sup>th</sup> November, 2019. The respondent depones that he was initially represented by Mr. C. O. Samba advocate who in the year 2016 was seriously ill. That the matter could not proceed in that year because counsel was seeking medication in India. That he passed on in 2017. That on the 4<sup>th</sup> September, 2017 he appointed the firm of J. B. Otsiula & Associates, Advocates to act for him in the matter. That counsel sought to have the matter listed for hearing but the court file could not be traced at the registry. That counsel wrote to the Deputy Registrar over the issue vide a letter dated 30/10/2018, annexure marked "RMB 2". That the file was not found. That on 16/7/2019 he, the respondent, wrote to the Deputy Registrar vide a letter dated 17/7/2019 asking for Deputy Registrar's intervention over the matter – letter marked "RMB 3". That when the file was eventually traced, he was not informed of the matter.
3. The respondent contends that the delay in listing the matter for hearing was beyond his control. That the subject matter involves land where his ancestral and matrimonial home is situate. That he will suffer prejudice if the application is allowed.
4. The advocates for the applicant submitted that there was a delay of 2 years and 10 months since when the matter was last in court. That the delay was inordinate. They relied on the case of **Chairman, Kenya National Union of Teachers & Another –Vs- Henry Inyangala & 2 Others (2018) eKLR** where the Supreme Court held that a delay of one year and 3 months was inordinate and the applicants were guilty of laches. The advocates also cited the case of **Eliud Munyua Mutungi –Vs- Francis Murerwa (2014) eKLR** where it was found that delay of 3 years in setting the matter down for hearing was inordinate.
5. Counsel submitted that the delay was intentional as the respondent could have applied to have the court file reconstructed.
6. It was submitted that the hearing of the suit will not be possible without causing the respondent injustice or extreme difficulties in the trial for reason that the subject matter of the suit occurred in 2014 which is 5 years down the line.
7. The application is made under Order 17 Rule 2 (3) of the Civil Procedure Rules. Rule 17 (2) (1) of the same provides that:-  
  
***“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.”***
8. The issue herein is whether the respondent's suit should be dismissed for want of prosecution. The principles which the court has to consider for dismissal of a suit for want of prosecution were stated in the case of **Argan Wekesa Okumu –V- Dima College Limited & 2 Others (2015) eKLR** where it was held that:-

***“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 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.”***

9. The issue was also dealt with by the court in the case of **Mwangi S. Kimenyi –Vs. Attorney General & Another, Civil Suit Misc. No. 720 of 2009** where it was held:-

***“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 act 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. 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 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.”***

10. The question is whether the delay in this case was inordinate and excusable and whether any of the parties will suffer prejudice. The respondent has explained the delay of two years in that his advocate was sick at the time he could have fixed the case for hearing and that thereafter when he engaged another counsel to take over the matter, the court file was unavailable. These matters were not controverted. The court takes judicial notice that the late C. O. Samba was sick before he died. It is clear that the respondent made efforts to have the court file traced. The delay was therefore beyond his control and was excusable.

11. The respondent submitted that the delay has prejudiced a fair trial. The respondent on the other hand submits that the matter involves matrimonial home. That it is in the interest of justice that the matter be heard.

12. It is the duty of the applicant to demonstrate prejudice on his part. In **Pkiech Chesimaya –Vs- Limakorwai Achipa (2020) eKLR** the Court of Appeal held that:-

***”On the question of whether either party is likely to be prejudiced as a result of the delay, it is upon the party making the application to show the court the prejudice it would suffer as a result of the delay. In this respect, the court in the Ivita case (supra), found that:-***

***“The defendant must however satisfy the court that he 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.”***

13. The court is required to weigh the interests of both parties and determine the issue of prejudice in light of the facts of the case. In the instant suit, the issue revolves around a parcel of land that is likely to be sold off by the respondent should the suit not be determined. The applicant herein is a financial institution whose business entirely depends on record keeping and thus can defend the case. They have not shown by affidavit evidence how they have been prejudiced by the delay. On the other hand the respondent is likely to lose land should the application herein be granted and his fate shall be determined unheard.

14. The upshot is that the respondent has provided sufficient reason for the delay in prosecuting the suit. The application lacks merit and is dismissed with costs.

**Delivered, dated and signed at Kakamega this 29<sup>th</sup> day of May, 2020.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

No appearance for the Plaintiff/Respondent

No appearance for the Defendant/Applicant

Court Assistant - Polycap

30 days right of appeal.