



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 184 OF 2018**

**GERAL MUHEMBERI KAVINGUHA.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**FAMILY BANK OF KENYA LIMITED.....DEFENDANT/APPLICANT**

**RULING**

This ruling is on the Notice of Motion dated 8/2/2021.

The said application which is under **Order 17 Rule 2(3)** and **Order 51** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act** and all other enabling provisions of the law seeks three orders against the Plaintiff;

- (a) Striking out the Plaintiff's suit for want of prosecution
- (b) Costs of the suit
- (c) Costs of the application

The grounds for seeking the above orders are that the Plaintiff has inordinately delayed the prosecution of the suit, that it has been over a year since he took any action in the matter, that the delay is unmerited and prejudicial to the Defendant, that the onus is on the Plaintiff to prosecute his case expeditiously, that the Plaintiff has lost interest in the suit, that this Court should dismiss the suit and it is in the interest of justice that the above orders be granted.

The application is supported by an affidavit sworn by Thomas Kairu Ng'ang'a an advocate in the firm of the Defendant's Counsel. In the affidavit, he deposes how the Plaintiff instituted the suit, obtained interlocutory orders failed to service the loan with the Defendant and also failed to prosecute the case.

The application is opposed by the Respondent Gerald Muhemberi Kavinguha who has sworn two affidavits dated 21<sup>st</sup> September, 2021 and 26<sup>th</sup> November, 2021. The gist of the two affidavits is that the Defendant filed an application dated 7/11/2016 and the same has not been prosecuted to date.

Secondly, the Plaintiff says that he has been servicing the loan by paying a monthly instalment of Kshs. 9, 850/- as agreed between the parties. Annexed to the affidavit dated 26/11/2021 is a copy of loan statement issued by the Defendant showing that the Plaintiff has been repaying the loan since 7/7/2020 to November, 2021.

For the first six months, the repayment rate was Kshs. 19, 880/= per month but from January 2021, it dropped to Kshs. 9, 880/= per month.

I have carefully considered the application in its entirety including the affidavits, the grounds and the annexures.

I find that there is only one issue to be decided namely, should the suit be dismissed for want of prosecution?

I find that the suit be not dismissed. Instead it should be heard on merit. Striking out pleadings is a draconian move which would result in derogation of the right to a fair hearing enshrined in **Article 50(1)** of the **Constitution**.

The suit, it seems to me, raises triable issues such as, did the parties re-negotiate the loan repayment? Why is the Defendant accepting payment from the Plaintiff if there is no consent?

I find that it is not necessary to hear the application to set aside the order of 14<sup>th</sup> October, 2016. Instead, I direct that the main suit be set down for hearing.

In the meantime, the parties to fully disclose and comply with *order 11 Civil Procedure Rules*.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 31<sup>ST</sup> DAY OF JANUARY, 2022.**

**M.N. GICHERU**

**JUDGE**