



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO.1191 OF 2005**

**GERSHON ANGADO DULO.....1<sup>ST</sup> PLAINTIFF**

**MURPHY MARKETING SERVICES LTD.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD..... 1<sup>ST</sup> DEFENDANT**

**ROBI MASON LIMITED .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Motion on Notice dated 30/9/2014, the Defendants applied to dismiss the suit for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules. The application is supported by the Affidavit of Edwin Odundo sworn 30/9/2014 wherein he contended that pleadings in this suit closed sometimes in February, 2006. That the suit was first fixed for hearing on 16<sup>th</sup> and 17<sup>th</sup> June, 2008 but was removed from the cause list by the consent of the parties. That since 11/11/2009 when the Plaintiff invited the Defendant to attend the registry to fix the matter for hearing, no further step has been taken in this suit.

2. At the hearing, Mr. Odundo, Learned Counsel for the Defendants submitted that there had been a lapse of five (5) years which was a delay that was inordinate and inexcusable. Counsel urged that the application be allowed.

3. The application was opposed vide a Replying Affidavit of the Plaintiff himself sworn on 17/2/15. He deponed that the suit was filed by his previous Advocates C.D Nyamweya & Company. That shortly after 2008, Charles Duke Nyamweya closed his firm abruptly without notice to him and disappeared. That it was an arduous task trying to locate the said Advocate and retrieve the documents relating to this suit. That it is only in November, 2014 that he managed to trace a former clerk of the said Advocates who was able to retrieve the file for him. That it is only then that he was able to instruct his current Advocates who can now be able to list the suit for prosecution. He pleaded that he could hitherto not be able to prosecute the suit for the said reasons and pleaded that he be granted the last opportunity to prosecute the suit on merit.

4. Mr. Mungu, Learned Counsel for the Plaintiff submitted that; the Plaintiff had been candid and truthful in his showing cause why the suit should not be dismissed for want of prosecution. That his firm upon being instructed was unable to take a date for lack of documents; that now with the documents the Plaintiff is ready to take all such steps as shall be necessary to prosecute the suit. That no prejudice had

been shown that would be suffered by the Defendants if the suit proceeded for trial on merit. That justice will be served by excusing the Plaintiff.

5. I have carefully considered the Affidavits on record and the rival submissions of Learned Counsel. In applications such as the present one the applicable principles to be considered are, the length of the delay. If inordinate, whether the delay has been explained. Finally, the prejudice to be suffered, whichever way the court decides the matter.

6. On the first principle, the last time there was an attempt to prosecute the suit was in 2009. That is a delay of about five (5) years. Obviously the delay has been inordinate. Has there been an explanation for the delay? The Plaintiff's position is that his former advocate one C.D Nyamweya abruptly closed his firm and disappeared in 2009; that the Plaintiff attempted to trace the said Advocate to retrieve his documents for the suit to no avail; that it's not until November, 2014 that a former clerk in the said firm was able to retrieve the file for the Plaintiff.

7. The aforesaid explanation was made on oath. The same was not denied. It was also not suggested that the explanation is improbable. To my mind, I believe that it would have been impossible for the new Advocates to proceed and prosecute the suit in the absence of the documents which were being held by the former Advocates. On my part, I am satisfied that the delay has been explained.

8. On prejudice, the defendant did not allude to any prejudice they have suffered as a result of the delay or any prejudice to be suffered if the suit is tried on merit. The court cannot presume such prejudice as that is a question of fact. On the other hand, if the suit is dismissed, the Plaintiff would have been unseated from the seat of justice for ever for no fault of his own. In my view, the justice of the case tilts in favour of sustaining the suit for it to be tried on merit.

9. Accordingly, the motion dated 30/9/14 is without merit and is dismissed with no order as to costs. The Plaintiff is to take steps to commence and undertake pre-trials within 90 days of delivery of this ruling.

DATED and DELIVERED at Nairobi this 12<sup>th</sup> day of June, 2015.

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**A. MABEYA**

**JUDGE**