

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 338 OF 2013

ST. STEPHENS EDUCATION INSTITUTE LIMITED.....PLAINTIFF

VERSUS

NIC BANK LIMITED.....DEFENDANT

RULING

1. The Defendant has filed the motion dated 9th April, 2015 seeking the dismissal of this suit for want of prosecution. The application is premised on the grounds set out on the body of the application and the supporting affidavit of Irene Wanjiru Mburu who is the advocate having conduct of this matter on behalf of the Defendant. It was stated that this matter was last in court on 17th March, 2014, when Hon. Waweru J., delivered a ruling allowing the Plaintiff's application for injunction. That since then, no steps have been taken to fix this matter for hearing. The Defendant also lamented that the Plaintiff has not taken out summons to enter appearance or served the same on the Defendant since the filing of this suit. It was stated that the delay in prosecuting this matter is inordinate and prejudicial to the Defendant since the Plaintiff has defaulted in paying a loan facility granted to it by the Defendant yet by this court's ruling of 15th August, 2013, the Defendant was restrained from disposing of motor vehicle registration number KBK 684Q whose purchase the Defendant financed. It was further stated that the Plaintiff is now indebted to the Defendant to the tune of KShs. 1,675,853.65/=.
2. In response to the application, two replying affidavits were filed. Elly Ondiek in his replying affidavit sworn on 26th June, 2015 stated that the court in its ruling noted that the Plaintiff has paid a very substantial portion of the loan amounting to KShs. 3,144,410/= out of the sum of KShs. 2,208,000/=. That he has paid several visits to the Defendants office in Kisumu with a view of having this matter settled out of court but the said visits have not yielded any settlement. He contended that he would suffer substantial loss if this suit is dismissed for want of prosecution considering that he has paid the Defendant KShs. 3,144,410/= towards liquidating the loan advanced to him yet the Defendant illegally repossessed the motor vehicle. He argued that Article 50 and 159(1)(d) of the Constitution be invoked in granting him an opportunity to prosecute this matter.
3. While I note that a Plaintiff has a primary duty to take steps to progress its case, the law prohibits impulsive inclination and requires that before making such an order as the one sought herein i.e. dismissal of a suit, that the court must first satisfy itself that there was inordinate delay in prosecuting the matter, that the said delay was deliberate and inexcusable and is an abuse of the court process, that the said delay shall occasion prejudice to the other party.
4. It has not been contended that there has been a delay in prosecuting this suit. There has been a delay of close to one and half a year. It has however been held severally that the court's concern is not so much on the amount of delay but on whether even with such delay justice could still be done. The reason given for the delay however is that the Plaintiff has made several attempts to talk the Defendant into having the dispute of the loan settled out of court which fact was not rebutted by the Defendant. I am thereby satisfied that the delay was occasioned by the negotiation that was ongoing. Bearing in mind that alternative dispute resolution is encouraged by Article 159 2 (c) of the Constitution, I find that the delay was not inordinate or geared towards defeating justice. I further note that it is the Plaintiff's unrebutted facts that the loan has been furnished but that the Defendant continues to hold the motor vehicle and as such is exposed to substantial loss in the event this application is allowed. In the circumstances, I find no merit in the application and it is herein dismissed on the following terms:-

- a. The Plaintiff to set down this suit for hearing within the next sixty (60) days from this date.
- b. A date be taken at the registry on priority basis.
- c. Failure to comply with the aforesaid directions, the suit shall automatically stand dismissed.
- d. Costs shall be in the cause.

Dated, Signed and Delivered in open court this 31st day of August, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff.

.....for the Defendant.