



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 88 OF 2012**

**WILSON KIARIE NJOROGE.....PLAINTIFF**

**VERSUS**

**FAMILY BANK LIMITED.....1ST DEFENDANT**

**CREDIT REFERENCE BUREAU AFRICA LTD.....2ND DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> Defendant filed a notice of motion dated 16<sup>th</sup> April, 2015 under Order 17 rule 2(3), Order 51 rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeking the dismissal of this suit for want of prosecution.
2. The application is based on the grounds set out on the body of the application and the supporting affidavit and a further affidavit of **Olive Muasya**. The reasons advanced for this application are that this matter was last in court on 15<sup>th</sup> February, 2013 and since then; the Plaintiff has taken no steps to prosecute it. It was stated that the delay of about 26 months now in prosecuting this matter is prejudicial to the 2<sup>nd</sup> Defendant and that it is apparent that the Plaintiff has lost interest in his case.
3. The Plaintiff filed a replying affidavit on 16<sup>th</sup> June, 2015 and contended that Olive Muasya's affidavit is invalid for having deposed to matters pertaining to setting down suits for hearing which matters are not within her knowledge. It was contended that the delay in setting down the suit for hearing was occasioned by the court's congested diary and by misfiling of the court file. It was further asserted that the clerks to the party's law firms visited the registry to take a hearing date on 11<sup>th</sup> April, 2013, but were informed by a court clerk one Nixon Muhatia that there were no dates available until later in the year 2014 and they had to wait for that year's diary to be opened. That again on 30<sup>th</sup> October, 2013 and 7<sup>th</sup> November, 2013, his advocates invited the Defendants advocates for fixing of a hearing date and when the clerks visited the registry on 6<sup>th</sup> and 15<sup>th</sup> November, 2013, they were informed that the court file was missing. He further stated that he instructed his current advocates but there was a delay in obtaining his file from the former advocates.
4. In the further affidavit filed on behalf of the 2<sup>nd</sup> Defendant, it was contended that there was no evidence that the court file was missing and or that the Plaintiff appointed Messrs Mwangi Mwaura & Partners as they have never filed a notice of change of advocates.
5. On whether the delay was inordinate, reliance was placed in **Mwangi S. Kimenyi v. Attorney General & Another (2014) eKLR** where it was held that there is no precise measure of what amounts to inordinate delay as it depends on the circumstances of each case and it was argued that the delay in the case at hand cannot be said to be inordinate considering the explanation that has

- been given for the delay. It was argued that since the Plaintiff took steps to try fixing dates for hearing, the delay here is excusable. To support the submission on excusability, reliance was placed in **Alnoor Al Mustaqeen v. Officer Commanding Station Garbatulla & 2 Others (2014) eKLR** and **Commercial Bank of Africa Limited v. Martin Fares Miyesa (2004) eKLR**. In both cases, the court held the position that a litigant ought not be punished for the errors of his advocates. It was further submitted that the 2<sup>nd</sup> Defendant did not establish how he stands to suffer prejudice while on the other hand the Plaintiff's repute would be at risk if the suit is dismissed considering that the Defendants had published defamatory words against him.
6. On the other hand, the 2<sup>nd</sup> Defendant contended that it was the duty of the Plaintiff to advance their case in an expeditious manner. To define the meaning of 'step', the 2<sup>nd</sup> Defendant cited the holding in **Victory Construction Company v. A.N. Duggal (1962) E.A. 697** where it was held that only a step on the record such as an interlocutory application could amount to such a step as envisaged by Order XVI rule 6 (now order 17 rule 2(3)). It was argued that in light of the age of this case, the suit ought to be dismissed. The 2<sup>nd</sup> Defendant took issue with the Plaintiff's reason that the court file was missing and argued that if it were so, then there should have been evidence to that effect and expressed that it is a wonder how it managed to file this application if truly the court file was missing. It was submitted that the 2<sup>nd</sup> Defendant has been subjected to escalating legal costs over the years.
  7. The court in **Alice Mumbi Ng'ang'a v. Damson Chege Ng'ang'a & another [2006] eKLR** discussed the applicable test in an application for dismissal for suit for want of prosecution. I observed as follows:-

*'This court has ruled in several cases that a civil case once filed is owned by a litigant and not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client, then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not per se make this court to exercise its discretion in favour of an aggrieved litigant. This court will exercise its discretion in favour of such a litigant after taking into consideration all the factors that are applicable in the case.'*

8. It follows therefore that a Plaintiff's primary responsibility is ensuring that a suit is set down for hearing without undue delay. I am further in agreement with the proposition in **Victory Construction Company** (supra) that only a step on the record such as an interlocutory application could amount to such a step as envisaged by Order 17 rule 2(3).
9. However, 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.
10. An application to dismiss suit for want of prosecution is reminiscent of a hunter being the hunted for inactivity. The power to dismiss suit for want of prosecution is nonetheless a discretionary power which should be exercised judiciously. See **Moses Muriira Maingi & 2 Others v Maingi Kamuru & Another Nyeri CA 151 of 2010**, citing with approval Chesoni J (as he then was) in **Ivita vs Kyumbu (1984) KLR 44** that :-

*"The test is whether the delay is prolonged and inexcusable, and if it is can justice be done despite such delay. Justice is justice to both the plaintiff and defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time.*

*The defendant must however satisfy the court that he will be prejudiced by the delay or that the*

*plaintiff 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 execute its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's explanation or excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."*

11. The above test can be summarized as under in **Halsbury's Laws of England VOL. 37 paragraph 448:**

*"The power to dismiss an action for want of prosecution, without giving the plaintiff the opportunity to remedy his default, will not be exercised unless the court is satisfied-*

1. *That the default has been intentional and contumelious; or*
2. *That there has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have cause serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."*

12. It is not denied herein that there has been a delay of about twenty six (26) months. 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. While the reason for delay given by the Plaintiff is that the court diary was full and that the court file went missing, he made no attempt to tender evidence in that respect for example by annexing the affidavits of the clerks who visited the court registry to take hearing dates. Further, no evidence was tendered to establish that the court file was missing for example a letter to the deputy registrar inquiring about the file.

13. I would therefore find that the explanation for the delay is not sufficient. Nonetheless, there is evidence that the plaintiff was awoken by the application to dismiss suit herein and has shown willingness to prosecute the suit with alacrity. That being the case, I would not oust him from the judgment seat.

14. Even if there has been delay, what does the interest of justice dictate? In this case, the interest of justice dictates that I should exercise my discretion leniently and allow the plaintiff to prosecute his case on merit.

15. The defendants can be adequately compensated by an award of costs since they have not shown what prejudice they shall suffer if the suit herein is sustained.

16. Before I conclude, I must mention that there were issues raised concerning defects in affidavit of Olive Muasya's and the issue of legal representation of advocates for the plaintiff but in my view, those are non issues as they are mere technicalities not fatal and do not override the substantive issues raised herein and parties can rectify the issue of legal representation before the suit is heard.

17. Accordingly, I decline to dismiss this suit for want of prosecution. I however direct that the plaintiff complies with all the pre-trial requirements within 45 days from to date.

The plaintiff shall also pay thrown away costs of kshs. 20,000 to the defendant's counsel within 21 days from to date and in default the defendant to execute for recovery.

Mention on **15<sup>th</sup> December 2015** to confirm compliance with all pre-trial requirements for purposes of pre-trial directions.

**Dated, signed and delivered in open court at NAIROBI this 28<sup>th</sup> day of October, 2015.**

**R.E.ABURILI**

**JUDGE**