REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT MISC. NO. 658 OF 2012

JIMMY WAFULA SIMIYU .....PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

Dismissal for want of prosecution

[1] The Defendant has applied through the Notice of Motion dated 10th March 2014 that this suit be dismissed for want of prosecution. The application is expressed to be made under Order 17 Rule 2 of the Civil Procedure Rules. It is based on the Supporting Affidavit of Stella Mbuli dated on 10th March 2014 and other grounds adduced by the Applicant.

Arguments by the Applicant

[2] According to the Applicant this is a case falling within the category described by *Lenaola J* in ***Dickson Miriti Kamonde v Kenya Commercial Bank Limited (2006)eKLR*** that:

> ***"No evidence that the court was unavailable has been given. The delay cannot be excused and an indolent party must reckon with the consequences of inaction. I am persuaded that I should look with favour towards the Respondent and I am satisfied that this is one case that must be dismissed for want of prosecution……"***

[3] The Applicant submitted that the Plaintiff has not made any application or taken any step for one year in this case. This suit came up before the Court was for a Ruling on the Plaintiff's Application dated 16th October 2012. But the ruling was only read on 8th March 2013 wherein an injunction Order was issued restraining the Defendant or its authorized agents from exercising its statutory rights, pending hearing and determination of the suit. The court granted the injunction on the basis that the Defendant's Statutory Notice had been returned to the sender, i.e. the Defendant's Advocates. The Defendant, having obtained the ruling in his favour, has preferred not to take action to set down the suit for hearing as he enjoys the equitable relief. That is unfair because; 1) for more than one year he has not taken measures as provided by the Civil Procedure Rules. He has defaulted on specific provision of the said Rules; 2) The Plaintiff has not been making any payments whatsoever to his Account. See Exhibit STM3 annexed in the Affidavit of

Stella Mbuli and interest continues to accrue. It is uncertain as to whether the Defendant shall recover from the Plaintiff the sums owing plus accruing interest; 3) the plaintiff has not shown any reason why he has not been making payments to this account and the continued default is definitely in reliance to the existing Orders; 4) continued pendency of this suit without being prosecuted is hurting the business of the Defendant as it is being deprived of money it advanced to the Plaintiff. In the circumstances, the only fair ways of ensuring justice is by dismissing the Plaintiff's suit and allow the Defendant to exercise its statutory rights by issuance of fresh notices unless the Plaintiff settles the sums owing.

[4] The Applicant termed the affidavit by the Plaintiff dated 15th May 2014 to be devoid of merit. Paragraphs 4 and 5 erroneously imply that the Honourable Court has not been hearing any cases for the last one year. The Plaintiff has not shown he had made any attempts to have the matter listed or produced evidence where the Court stated it was busy as alleged. Paragraphs 6-13, are superfluous as it is the Defendant's Advocates who called the plaintiff to list the suit for hearing. See exhibit SM1 of the Stela Mbuli Affidavit. Paragraphs 14-19 the plaintiff's allegation that his advocate was sick for the period from November, 2013 does not cover the period from March, 2013 when the matter was last before the Honour able Court. More so, it appears that the plaintiff is now taking advantage of his advocate's illness to cover up for his delays in prosecuting the case. The attempts made by the plaintiff to fix the case for hearing, and to have the matter settled by negotiations after the current application had been filed are pretentious and aimed at defeating justice. The delay is beyond the time limit set by the provisions of Order 17 Rule 2 and no credible explanation has been adduced by the plaintiff to excuse the delay. There is no doubt the suit property is charged to the defendant. See Exhibit JWS2. The temporary orders, in any event and by virtue of Order 40 Rule 6 Civil Procedure Rules, 2010 have lapsed, and should be treated as such.

The plaintiff offered resistance

[5] The plaintiff opposed the application dated 10th March, 2014. He filed a Replying Affidavit sworn on 15th March, 2014. He deposed that the delay if at all is not inordinate; it is four months less than that contemplated by Order 17 Rule 2 of the Civil Procedure Rules, 2010. The suit was last in court on 18th March, 2013 when the court granted a temporary injunction pending hearing and determination of the suit after arriving at a finding that the Defendants Statutory Power of Sale had not arisen. It is important to note that the court found the plaintiff's suit merited and not a frivolous one. Other that payer 1 which is an injunction, the rest are Declarations under the new Land Laws that came into effect in 2010 seeking to have the Charge herein re-opened and a final Redemption amount recalculated and determined. The court should take Judicial Notice of the depositions at **paragraphs 4, 5 and 13 of the Replying Affidavit**. Depositions at *paragraphs 6, 7, 8, 9, 10 and 11* all disclose steps taken by both the plaintiff and the defendant in preparing this suit for trial. When issues for determination by court had crystalized at 16th June, 2013, the defendant amended their defence to introduce a Counter Claim causing the plaintiff to amend his defence on 12th July, 2013 thus contributing to the delay to set the suit down for hearing. The defendant filed and served the Agreed Issues herein on 15th July, 2013. Parallel without prejudice negotiations have also been going on resting with the Defendant's Advocates letter dated 3rd April, 2014. *See page 40 of the Replying Affidavit Exhibit JWS3.* But in paragraph 13 of the replying Affidavit, it is averred that the Plaintiff's advocate Dishon Murungi Mwiti was taken ill and admitted in hospital from 12th November, 2013. The said advocate is yet to fully recover and he in and out of hospital barely a week apart. The plaintiff was forced to change advocates. *See paragraphs 14, 15, 16, 17, 18 and 19 of the Replying Affidavit and Exhibit JWS 2 appearing at page 17 of the Replying Affidavit bundle.* The new Advocate immediately took steps towards preparation of the suit for hearing by inviting the Defendants to fix a hearing date to the main suit on 11th March, 2014.

[6] According to the Plaintiff, the application before court is based on a misconception of the law as the Plaintiff has ably demonstrated steps taken in the last less than one year from the date

of filing the application for dismissal to prepare the suit for hearing. The defendant served the Agreed issues for determination on 15th July, 2013 and this application was filed in court on 10th March, 2014 a period of 8 months far less than 1 year. The application should, therefore, fail. In any event, the out of court negotiations, are also steps taken toward resolving this suit and the last such correspondence rests with a letter dated 3rd April, 2014. This suit is active and does not merit to be dismissed for want of prosecution. Any delay that can be demonstrated is not inordinate, has been contributed to by the defendants and the delay caused can be remedied by an order that a pre-trial mention date be given and a hearing date ordered to be fixed at the Registry on a priority basis. The Plaintiff cited **Lee Waigwa Waruingi v Housing Finance Corporation of Kenya Limited (2005) eKLR,** that application for dismissal for want of prosecution must show:-

i. *That there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line as a lesser period on the other. What is, or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.*
ii. *That his inordinate delay in inexcusable. As a rule until a credible excuse is made out, the natured inference is that it would be inexcusable.*
iii. *That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice of the trial of issues between themselves and the plaintiff, between themselves and third parties or between each other. In addition to any inference that may be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at trial.*

The plaintiff also relied on **Eastern Produce Kenya Limited Vs Rongai Workshop & Transporters Limited and Another (2014) eKLR** and in Justice Chesoni's holding in **Ivita v Kyumbu (1984) KLR 441** that:-

> *"The test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can still be done despite the delay. Thus, even the delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of the discretion of the court."*

Also **Nakuru Industries Limited Vs Solomon Wanjala Mabunga (2010) eKLR** where the court declined to dismiss the suit for want of prosecution as the delay was partly contributed by the Defendant.

[7] Based on the above factual analysis and judicial decisions, the plaintiff asked the court to dismiss the application and give pre-trial directions for a hearing date be taken on a priority basis. Another thing; the plaintiff says the suit property is now the Plaintiff's matrimonial home as from the end of March, 2013 which requires special protection of this court under the new Land Laws of 2010. Dismissal of the application dated 10th March, 2014 and confirmation of the subsistence of the Injunction Orders granted on 5th March, 2013 is the only way to protect the matrimonial home.

THE DETERMINATION

On matrimonial home

[8] It is quite arrogant for the Plaintiff to think that conversion of a charged property into a matrimonial home will provide some form of indomitable shield from realization of a security given in a charge under the law. The law on creating charge on and sale of matrimonial home only aims at ensuring the consent of the spouse or spouses is sought before such property is charged,

and relevant notices are served on the spouse who had given consent to the charge before the exercise of chargor's statutory power of sale. The protection of a matrimonial home within the set-up of the law on mortgages and the Land Act is not, therefore, to be used as the spear by a defaulter on or as absolution of contractual obligations under a charge. On this, see PART VII and specifically sections 79 and 96 of the Land Act. The argument by the Plaintiff that the suit property is a matrimonial home, has been used improperly and totally misplaced in this application and the less I say about it the better. I will now turn to the substantive arguments.

[9] Order 17 rule 2 of the Civil Procedure Rules, 2010. Provided that:

1. ***In any suit in which no application or step has been taken by either party for more than 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 of the court, it may dismiss the suit.***
2. ***If cause is shown to the satisfaction of the court, it may make such orders as it thinks first to obtain expeditious hearing of the suit.***
3. ***Any party to the suit may apply for its dismissal as per rule (1).***

[10] No doubt the court has discretion to excuse a delay as long as it has been explained to the satisfaction of the Court. The satisfaction will come from the explanation given and the fact that the delay causes no substantial prejudice to fair trial or one of the parties or other or both. Therefore, the fact of delay *per se* does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay 1) is inordinate and inexcusable; and 2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. The Court will be interested in the nature and importance of the case, the right of the Plaintiff to be heard and the fact that summary dismissal of a suit drives away the Plaintiff from the seat of judgment; an arbitrary and draconian act comparable only to the proverbial ''sword of the Damocles''. And, for the Defendant, in order to complete the balancing, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice and Articles 48, 50 and 159 of the Constitution are the relevant guide here. Ultimately, as Chesoni J (as he then was) stated in the case of **Ivita Vs Kyumbu,** the Court should ask itself, whether, despite the delay, it is still possible to do justice for all the parties.

[11] I will apply this test. There has been some delay herein and I wish to state from the outset that the court has never informed the Plaintiff and can never inform any litigant that it is too busy to hear a case because doing so will be a complete negation of its constitutional mandate. The plaintiff or any other party in similar situation of inaction should carry their cross and seek only the assistance of the law as appropriate rather than make such bizarre allegations. That notwithstanding, I note the Plaintiff was awakened by the Defendant when it filed this application. But, nonetheless, took some steps in the matter. The steps taken by the Plaintiff albeit after being prompted by the Defendant are in the right direction and in the absence of some additional prejudice to the Defendant and the administration of justice, I am persuaded to sustain the suit and spare it the proverbial ''sword of the Damocles''. I direct the Plaintiff to set down the suit for hearing in the next 30 days which failing the suit will stand dismissed. There will be no need for a formal application once the default has occurred. The reason why I have made this order is because the Plaintiff is not a vigilant suitor and he has not been paying the borrowed sum perhaps despite the injunction-facts which completely removes the virtue of *bona fide* litigant from him. In the circumstances, it is only fair that he is required to move his suit forward within specified timelines to avoid prejudice to the Defendant. I am also aware of the *in duplum* rule in the Banking Act which limits the sum payable in a debt owed to the bank in case of default, and the operation of the rule becomes a real hazard on a bank if its money remains unpaid for a long time.

Dated, signed and delivered in court at Nairobi this 29th day of October, 2014

F. GIKONYO

JUDGE