



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 663 (A) OF 2008

**PRUDENTIAL BUILDING SOCIETY (IN
LIQUIDATION).....PLAINTIFF**

-VERSUS-

**SIGAL INVESTMENTS
LIMITED.....1ST DEFENDANT**

**MISON
KIPKOTI.....2ND
DEFENDANT**

**JANE
KIPKOTI.....3RD
DEFENDANT**

**JAMES MUIRURI
KAHUMBURA.....4TH DEFENDANT**

**WILSON KIPKEMBOI
KIPKOTI.....5TH DEFENDANT**

**PAUL KIPSANG
KOSGEI.....6TH
DEFENDANT**

**SELINAH
KIBOGY.....7TH
DEFENDANT**

**PAUL
TARUS.....8TH
DEFENDANT**

**(Sued as Legal representatives of the estate of the late PHILIP KIMAIYO
KANDIE KIMUTAI)**

RULING

1. This suit was commenced by a plaint dated 22nd September 2008 and filed in court on 11th November 2008. Summons to enter appearance were issued by court on 2nd July, 2009. At some point, the plaintiff's

lawyers requested the court to amend the name of Mison Kipkoti, the 2nd defendant, on those summons. A set of summons was again issued dated 5th August 2009.

2. I now have before me a notice of motion by the 1st, 3rd and 5th defendants dated 18th May 2011 praying for dismissal of the suit for want of prosecution. The gist of it is that the plaintiff has not taken any steps to prosecute the matter. It is also averred in the annexed affidavit of Charles Njuguna of even date, that the plaintiff has never served summons to enter appearance in the suit. The applicants aver further that on 27th October 2009, they filed an application to strike out the suit. A ruling on that matter was delivered on 1st April 2010. The applicants contend that since that date, no further steps to prosecute the suit have been taken by the plaintiff.

3. The plaintiff contests the motion. There is a replying affidavit sworn on 21st October 2011 by Elijah Mwangi. At paragraphs 6 to 14 of that affidavit, it is deponed that this matter relates to a breach of trust and failure of a fiduciary duty by the defendants. The plaintiff avers that after the ruling of 1st April 2010, it discovered that the defendants had subdivided the suit land and sold some plots to third parties, despite a caveat emptor notice placed in the newspapers on 15th April 2011. The plaintiff also avers that the court file could not be traced and that there are competing claims over the suit property in High Court Miscellaneous Application number 392 of 2011 by one Timothy Nduvi claiming an interest in one of the subplots. The plaintiff states it has filed a notice of motion also dated 18th May 2011, which is pending, to join in other parties to the suit and praying for re-issue or extension of validity of summons to enter appearance. The plaintiff in sum states that it is keen on prosecuting the suit and that no prejudice will be suffered by the applicants if the present motion is disallowed.

4. I take the following view of the matter. The summons to enter appearance in this suit have never been served. They have in fact expired and have not been renewed since they were first issued on 2nd July 2009 and 5th August 2009 respectively. That fact is beyond contest and is admitted by the plaintiff by virtue of its application dated 18th May 2011 seeking for re-issue or extension of validity of summons.

5. The record of the court also speaks for itself. It is clear that the plaintiff has not fixed the suit for hearing since the ruling of court of 1st April 2010. At paragraph 16 of the replying affidavit of Elijah Mwangi is an express admission. He depones that he believes that “the plaintiff, though not making steps in the court record to prosecute the suit, took time to amass credible information to progress the suit with all necessary parties joined in the suit”.

6. Facts can be very stubborn. Since the summons to enter appearance have never been served, the plaintiff’s suit lies inert. The pleadings cannot close. There is hence no suit to set down for hearing. The plaintiff may have devoted a lot of time and resources in pursuing searches, caveats and notices to protect the suit land or to try and identify and bring new parties to the suit. But in all that, it has abandoned its key responsibility to prosecute the suit that dates back to the year 2008. That inaction unfortunately has held the defendants and the court at abeyance. The law on this aspect is well settled. Unfortunately, it does not favour the plaintiff.

7. Order 17 rule 2(1) and (3) provides as follows;

“2. (1) in any suit in which no application has been made or step taken by either party for 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, may dismiss the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1”

The delay in prosecuting this suit or serving the summons to enter appearance is too lengthy, inordinate and inexcusable. The present lawyers for the plaintiff took over the conduct of the suit and came on record on 12th August 2009, over two years ago. The suit itself was filed on 22nd September 2008, over three years ago. Part of the claims in the plaint relate to monies lent in the years 1995 to 1997. The plaintiff has thus slept over the matter and on its rights.

8. I have already set out order 17 rule 2 (1) and (3) which ground properly the notice to dismiss. In the decision in *Fitz Patrick Vs. Batger & Co Ltd* [1967] 2 ALL ER 657 Lord Dennig delivered himself thus;

“It is the duty of the plaintiff’s advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. Just consider the times here. The accident was on 13th December 1961. If we allowed this case to be set down now, it would not come up for trial until the end of the year. That would be six years after the accident. It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution”.

9. Again, with the coming into force of section 1A and 1B of the Civil Procedure Rules as read together with articles 50 and 159 of the constitution, it is incumbent on the court to do substantial justice to the parties. The overriding objective therein enjoins this court to expedite its business and to utilize judicial resources in an efficient manner.

10. When there is such a lengthy and inordinate delay or lethargy to prosecute the suit, it prejudices the defendants from a fair trial by the inert grip or hold of the plaintiff. The court had rather strong language but which is apt in the circumstances in *Mugo Njogu Vs Mary Githinji* [2010] e KLR where it stated;

“With the overriding objective in place, it is no longer acceptable in my view for the court to automatically excuse the mistakes and lapses of counsel. Counsel have a role and duty to assist the court in realizing the overriding objective and incompetency or lapses of counsel derogate from the objective”.

The court has inherent power in those circumstances to dismiss the suit in the interests of justice. See *Mukisa Biscuit Manufacturing Company Vs West End Distributors* [1969] E.A. 696.

11. I agree with the holding by Azangala J in *Trust Bank Limited Vs Aces High Limited and 2 others* Nairobi, HCCC No 2060 of 2000 (unreported) to the extent that the court must decide in each case whether in all the circumstances, it would be fair and just to dismiss the suit. The fact that this suit relates to land and that the plaintiff is under liquidation are relevant and pertinent. But those facts on their own cannot excuse the serious delays in serving summons (which have already expired) or prosecuting the suit (which cannot be done because the pleadings have not then closed for over three years). The claim in the suit at paragraph 14 of the plaint is for monies lent in 1995 to 1997. That is a long time ago.

12. The decision in *Ivita Vs Kyumbu* [1984] KLR 441 is a good guide here. The real test is whether the delay is prolonged or inexcusable. If in the affirmative as in the present case, the court will remove the offending party from the seat of justice and dismiss the suit. Again the words of Salmon L J in *Allen Vs MC Alpine & Sons* [1968] ALL E.R 543 at 561 set out how to determine whether a delay that is inordinate is inexcusable;

“as a rule, when inordinate delay is established, until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying which will never wear out however often said that, justice delayed is justice denied”.

13. In the totality of all the circumstances in this case, I find that there has been inordinate delay in taking out summonses to enter appearance and in taking any concrete step to prosecute the suit. I have also found paucity of credible evidence to explain it. The delay is thus inexcusable. For all of those reasons, I shall allow the notice of motion by the 1st, 3rd and 5th defendants. I order that the plaintiff's suit against the 1st, 3rd and 5th defendants be and is hereby dismissed.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 20th day of January 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Mwangi for the Plaintiff.

Mr. Ngige for Njuguna for the 1st, 3rd and 5th Defendants.