



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 102 of 2005

FIDELIS MUSIKO OKONGA:::PLAINTIFF

VERSUS

RONALS INYANGALA:::1ST DEFENDANT

BETTY MUGANDA:::2ND DEFENDANT

EVERLYNE INYANGALA:::3RD DEFENDANT

BARCLAYS BANK OF KENYA LIMITED:::4TH DEFENDANT

RULING

The 4th defendant, **Barclays Bank of Kenya**, by its application dated 21st October, 2010, seeks an order that the plaintiff's suit be dismissed for want of prosecution. The application is expressed to be brought under the provisions of Order XVI Rule 5 (d) of the Civil Procedure Rules, Order L Rule 1, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. In my view, Section 3A of the Civil Procedure Act is improperly invoked as there is an express provision of the Civil Procedure Rules under which the relief sought by the applicant can be made.

Under Order XVI Rule 5(d), if within three months after the adjournment of the suit generally, the plaintiff or the court of its motion on notice to the parties does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for dismissal. The 4th defendant by this application has chosen the latter option. There are three main grounds for the application on the face of the application namely that the plaintiff is not interested in the suit anymore; that he has not taken any steps to have the matter dealt with and that it is neither fair nor in the interest of justice for the applicant to be kept in darkness due to laxity of the plaintiff. The application is supported by an affidavit sworn by **Job Mwangi Thiga** the applicant's advocate. It is deponed in the said affidavit, *inter alia*, that since 19th April, 2008, the a plaintiff has taken no step to fix the case for hearing; that it is clear therefore that the plaintiff is not keen to have this matter determined; that the plaintiff is guilty of laches which event causes the applicant undue hardship and it is only fair and just that the suit be dismissed.

The application is opposed on the basis of a replying affidavit sworn by **Joyce Chumba** the plaintiff's advocate. In the affidavit, counsel for the plaintiff denies that the suit came up for hearing on 19th April, 2008; he further contends that on 16th April, 2009 the case could not be heard because the relevant court file was misplaced; that there was then a lawyers boycott of the High Court and that the matter was under discussion between the plaintiff and the 1st defendant.

When the application came up before me for hearing on 11th July, 2012 counsel agreed to file written submissions which they duly filed by 10th October, 2012.

I have considered the application, the affidavits filed and the submissions of counsel. I have further given due consideration to the authorities cited. Having done so, I take the following view of the matter. This suit was filed on 27th October, 2005. The applicant entered appearance and delivered its defence on 16th May, 2006. The record shows that on 14th November, 2007 the plaintiff sought leave to enjoin the 5th and 6th defendants which application is still pending determination. The record however, shows that there have been some attempts to have the application fixed for hearing without success and on 10th January, 2012, counsel for the plaintiff appeared to abandon the application because on that date she fixed the main suit for hearing on 18th April, 2012. Come that date, counsel for the plaintiff sought and was granted leave to serve the 1st, 2nd and 3rd defendants personally. The case was then fixed for mention on 16th May, 2012. On that date **Mr. Barasa**, who was briefed by counsel for the plaintiff, informed the court that **Mr. Kitiwa** had been instructed to come on record for the 1st, 2nd and 3rd defendants.

Given the above background, I am unable to conclude that the plaintiff is not interested in this case. Besides, counsel for the plaintiff had deponed that at some point the court file was misplaced and at another time there was a boycott of the High Court by lawyers. She also averred that the matter was being discussed with the 1st defendant. Those averments have not been rebutted and, if true, could have contributed to the delay in the disposal of this suit.

Mere delay is however, not the only consideration in determining such an application. Other considerations include whether the delay is prolonged and inexcusable and even if it is, whether justice can still be done to the parties despite the delay (**See Ivitra -Vs- Kyumbu (1984) (KLR 441)**).

In the circumstances of this case, I am not persuaded that the delay involved in this case is inordinate or prolonged. The applicant has also not demonstrated, to the satisfaction of the court, the prejudice it stands to suffer unless this suit is dismissed, which prejudice, cannot be compensated by an award of costs. In my view, the court should always endeavour to determine issues between parties upon a proper hearing of the dispute and each application of this nature should be determined on its own peculiar facts. I am not therefore surprised that my learned brothers, **L Kimaru J. (in Danson Chege Nganga - Vs- Naivasha Municipal Council – (2006) eKLR)**, **J.B. Ojwang J. (as he then was) (Hotwase Hotels Limited -Vs- Nairobi CC (HCC No. 1180 of 200) (UR)**, **O.K. Mutungi J (retired) (Antony Munene - V- British American Tobacco (k) Limited (2005) eKLR)**, **JLA Osiemo J (retired) (Ramadhan Kinyudi -Vs- CFC Bank Limited (HCCC No. 1823 of 1997) (UR)** and **Ochieng J. (Marie Wamboi Thande - Vs- Barclays Bank of Kenya Limited HCCC NO. 675 of 2003 (UR)** reached different conclusions on the basis of material they were furnished with.

In the matter at hand, I am inclined to give the plaintiff a chance to prosecute her suit. The 4th defendant's application is therefore declined. The plaintiff should immediately complete pre-trial proceedings and on conclusion thereof, a hearing date be given a priority basis.

Costs in the cause.

It is so ordered.

**DATED AND DELIVERED AT ELDORET
THIS 7TH DAY OF NOVEMBER, 2012.
F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Omboto H/B for Mr. Wambua for the Plaintiff.

**F. AZANGALALA
JUDGE**

7TH NOVEMBER, 2012