



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL SUIT NO.1 OF 2000

**HANNINGTON MUKHUNGO.....RESPONDENT/
PLAINTIFF**

=VERSUS=

**KENYA COMMERCIAL BANK LTD.....APPLICANT/
DEFENDANT**

R U L I N G

The Application before the court is the Chamber Summons dated 8.9.2009 and filed by the Defendant/Applicant. It seeks the dismissal of the suit for want of prosecution. The applicant's grounds for seeking dismissal shown on the face of the application, among others, are that the plaintiff has since the close of the pleadings failed to move the court for the finalization of the suit and that it is in the interest of justice that this litigation should come to an end.

The record shows that the final step for pleadings was the discovery by listing of documents of the plaintiff in January 2009. However this court allowed the parties to file fresh affidavits to bring to the record the recent position of the suit since it was filed in the year 2000.

In the recent affidavits the plaintiff/Respondent averred that the last time he visited his advocates was January 2009 when his advocate told him that he was preparing the case for a hearing and that he would communicate with him in due course. That by March, 2010, the advocate had not communicated. That he used to live and trade at Nambale when he filed the case but had since moved to Funyula. That apparently two letters from his advocate since he moved did not reach him and may have been lost. That he is still interested in the case.

On the other hand the applicant/defendant deponed that the suit was filed on 6.1.2000. That although the suit was fixed for a hearing on 18.5.2000, the hearing failed because defence counsel was ailing. That hearings were again adjourned on 4.12.2001 and 4.10.2004, the last one by consent. The counsel for the defendant admitted that they on their part, did not attend to fix the suit for a hearing when they realized that the plaintiff had failed to do so for one reason or another. But they insisted that since the last adjournment, the plaintiff hath no excuse for not taking a fresh hearing date and clearly has lost interest.

I have carefully perused the record and considered the arguments from both sides. Before examining the actual issue of whether or not to dismiss the suit for want of prosecution, it is important to highlight other facts on the record which might influence the court's mind one way or the other.

The suit apparently arose out of a mortgager–mortgagee relationship. The plaintiff/applicant appears to have borrowed a sum of kshs500,000/= over a mortgage contract of February, 1998. By early 2000 the plaintiff appears to have defaulted in servicing the mortgage and the lender – the defendant – threatened realization of its security which apparently was the plaintiff's parcel of land known as L.R. No. Bukhayo/Kisoko/3958. It is not clear what the default amount was then. The result was that the plaintiff filed this suit on 6.1.2000. However, he had by 14.3.2000 obtained from court ex parte, a temporary injunction restraining the defendant/respondent from selling the mortgage property to realize its security. The hearing of the application inter partes was then fixed on 3.4.2000. A search of the record does not show that the injunction application was ever heard inter partes to date. The record also reveals that thereafter the parties began to talk of the hearing date of the main suit without caring to refer to the ex parte injunction on the record, which exparte injunction appears to subsist on the record, notwithstanding its legal status under Order 39 of the Civil Procedure Rules under which it was obtained.

Turning now to the application before me, the question is whether the main suit should be dismissed or not. In making a decision to dismiss or not, the court should be guided by what would serve best, the interest of justice. Under former Order 26 rule 6 of the relevant rules under which this application was brought it is the normal policy of this court to be slow to order dismissal of a suit for want of prosecution where the suit can proceed to a hearing without delay and where it is clear from facts and circumstances arising from the record that the defendant has not lost interest and that the appellant has always shown intention to take the suit to finalization.

If on the other hand there is evidence that the defendant has no genuine interest to bring the suit to finalization or that the plaintiff is using court process to obstruct finalization, then clearly, the court might be persuaded that he deserves no further favourable discretion as such conduct deserves none.

As stated in Ivita vs. Kumbu [1984] KLR 441, one of the main tests in this kind of cases is whether the conduct of the defendant has caused unnecessarily prolonged or inordinate or inexcusable delay in having the case heard and determined. In such a case nevertheless, the court must be satisfied that the plaintiff's excuse for delay may be preferred for the ends of justice or whether the ends of justice will be served by dismissal.

In practice also, the suit will not be dismissed if it is shown that the defendant waived his rights to the delay or acquiesced to it. Mere inaction, for example, by failure of the defendant to fix a hearing himself, cannot alone amount to such waiver or acquiescence. There must be some positive action on the part of the defendant which intimates that he agrees that the case should not proceed, thus inducing the plaintiff to do further work or incur further expense in detraction to the prosecution of the case. At the end of the day however, it will be the facts and the circumstances of the case before the presiding court that will

determine whether a suit is for dismissal or not. There are no hard and fast rules as to what amounts to inexcusable or inordinate delay as stated also in Allen vs. Sir Alfred McAlphine & Son [1968] 1 ALL ER, 543.

I have carefully considered the above principles in relation to this case. The case is an old one having been filed in the year 2000. During the ex parte prosecution of the injunction proceedings on 14.3.200, the plaintiff appears to have said that the charge in relation of which the dispute as to repayment arose was valid but that if the mortgage property then valued over Kshs9 million was sold in auction, the defendant stood to lose heavily as the outstanding repayments then stood at barely over Kshs310,000/=.

There is evidence on the record also that although the court issued an interim injunction and the defendant from time to time fixed the suit for hearing, little has been done on the plaintiff's part to prosecute the suit until 30.3.2010 when the parties by consent, decided to fix this application for dismissal, for hearing. The court also notes that the plaintiff went to the court registry to take and took several hearing dates, he nevertheless from time to time failed to take out hearing summons or when he did so, he served them under protest because such service was done too late for the defendant to prepare for a hearing.

The main reason advanced by the plaintiff for not proceeding for hearing since 2006 is because he lost contact with his advocates. There is also evidence on the record that his first advocate died. However, there was no explanation why the plaintiff would lose contact with his advocates merely because he changed his place of abode. He always knew where his advocate's Chambers were situated. If he was interested in the completion of the case, nothing prevented him from going to his advocate's office and moving him to fix the suit for a hearing. The only reason which comes out of the record which might have consoled him and made him feel secure was the fact that there was an injunction in his favour on record restraining the Defendant from selling the mortgage property.

Furthermore and sadly, the plaintiff was given opportunity before the hearing of this application to explain his delay. The opportunity was to allow him give indication that he has indeed, made attempts since the injunction was issued to service his loan and that what remains of it if at all, is little. The plaintiff had indicated at the beginning that he had constructed a petrol station on the mortgaged land worth over kshs9 million which he would have lost if the defendant were to auction the property. This clearly had persuaded the court to grant an interim injunction perhaps to enable the plaintiff to clear the mortgage. However, clearly, the plaintiff took the favourable court's discretion for granted. He went to sleep on it. It is not difficult therefore to understand his inordinate delay in not fixing the suit for a hearing, at least since 2006.

In the circumstances what this court sees is a plaintiff who admits borrowing kshs500,000/= from the defendant in 1998. He failed paying it or part of it. When the defendant sought to recover the lent money, the plaintiff moved to court and in an ex parte application obtained an interim injunction. He failed to confirm the injunction in an inter partes hearing but used the interim ex parte injunction to protect himself to date. It is sad that the defendant also slept on its rights by failing to discharge the interim injunction which under former Order 39, became stale after 14 days of its making. It was indolence on the part of the defendant that the said interim injunction, is still on record when it should have been discharged by a proper action on his part. In this court's view, it is this indolence on the part of the defendant's counsel that encouraged the plaintiff to fail to prosecute the case because the plaintiff thought he was safe from losing the mortgage property in an auction sale.

I am satisfied that although the plaintiff may not easily have lost interest in the case whose final settlement is clearly of great interest to him, he has clearly shown little interest in prosecuting the case. The reason for such conduct is not hard to get. It is that completion of the suit soon may not be in plaintiff

interest because it may lead to the loss of his valuable property if he loses the case. The delay in completing the case is therefore squarely fixed in the threshold of the defendant's inaction, all along.

The interest of justice, in the courts view, lies in the giving to the plaintiff a little more and last chance to prosecute the suit. To encourage the plaintiff to move forward faster, the court hereby declares the interim injunction granted to it by court on 14.3.2000, immediately discharged for becoming void after 14 days of it being granted. That is because the injunction was neither extended nor confirmed by the court. This would set the defendant at liberty to realize its security unless there is another court order granted to bar such realization. There is no doubt however, that any court granting such an order will take into account the conduct of the plaintiff in relation to the earlier favourable discretion of the court and whether the plaintiff treated the court with the respect it deserved.

The result then is that this application to dismiss the suit for want of prosecution is hereby dismissed with costs to the defendant/applicant at an enhanced scale of 50% over and above the provided remuneration scale. Orders accordingly.

Dated and delivered at Busia on 12 day of May 2011.

D.A. ONYANCHA

JUDGE.