



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 1336 OF 2001**

**ROSELINE MARY KAHUMBU.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD..... DEFENDANT**

**RULING**

This Ruling is delivered in the Defendant/Applicant Notice of Motion dated 10<sup>th</sup> June 2010, brought under **Orders XV1 Rule 5** and **L Rule 1** of the **Civil Procedure Rules (2009 Revised Edition)**, praying that the Plaintiff's suit herein be dismissed for want of prosecution, with costs being awarded to the Defendant/Applicant. The drafting of the Ruling stopped in its tracks when in the course of doing so I realized the Plaintiff was not in the file. A copy was placed on the file while I was away in July and the file was not brought up in good time for a Ruling notice to issue. The delay is regretted. The application is premised on 5 grounds set out in the Notice of Motion as follows:-

- (a) There is inexcusable and inordinate delay in the prosecution of this suit:**
- (b) There were (consent) orders entered by the parties to conserve the suit property in return for speedy hearing of the suit;**
- (c) The Plaintiff is in comfortable occupation of the suit property which is a security for a loan now exceeding KShs. 182 million and the Defendant is gravely prejudiced by the non- prosecution of the suit;**
- (d) The Plaintiff has abdicated her responsibility to prosecute her case; and**
- (e) It is unfair and unjust to burden the Defendant with a suit, which the Plaintiff is not prosecuting as diligently as the law requires.**

The application is supported by an affidavit sworn by the Defendant's Manager, Legal Services, Damaris Gitonga, in which she depones to several facts to demonstrate the Plaintiff/Respondent's apparent deliberate effort to delay the determination of the suit since filing the same on or about 31<sup>st</sup> August 2001, and the recording of a consent order to maintain the status quo on 15<sup>th</sup> April 2002, by virtue of which the Plaintiff/Respondent continues in possession of the suit properties, namely, **L.R. No.**

**7583/41 and L.R. No. 7581/19 Mwititu Estate**, which, her late husband, John Francis Kahumbu had charged to the Defendant/Applicant to secure borrowings from the Applicant. At the time of filing the application, the borrowings are said to have stood at KShs. 182 million.

It is deponed that, before filing these proceedings, the Respondent had filed three similar suits in an attempt to stop the realization of the Applicant's security by auctioning the suit property. The Respondent has also filed multiple applications over and above the injunction application filed alongside the Plaintiff. Specifically the Respondent filed a total of five applications the last one being an application dated 10<sup>th</sup> March 2008, for the entry of judgment against the Applicant. Instead of taking a date for the said application the Respondent's advocates are said to have invited counsel for the Applicant to fix the main suit for hearing, knowing fully well that the suit cannot be heard whilst the application remains pending. The Applicant believes that the Respondent is using the court process and the status quo order to delay justice. It is not disputed that the parties have unsuccessfully attempted amicable settlement thereby contributing to the delay in prosecuting the suit.

The application is opposed on the strength of the Plaintiff/Respondent's Replying Affidavit of 1<sup>st</sup> July 2010, as well as her Supplementary Affidavit (titled Further Replying Affidavit), sworn and filed on 27<sup>th</sup> October 2010. In the Supporting Affidavit of 1<sup>st</sup> July 2010, the Respondent depones that the delay herein is attributable to the futile negotiations for amicable settlement, which she says were instigated by the Applicant and that several offers and counter offers were exchanged since 5<sup>th</sup> June 2008, upto the time the negotiations eventually collapsed in March 2010. The Respondent depones further that after the collapse of the negotiations, her advocates attempted to secure a hearing date but were unable to do so as the court's diary for the year 2010, had already closed.

In the "*Further Replying Affidavit*" filed on 27<sup>th</sup> November 2010, the Respondent alludes to the fact that the delay in prosecuting her suit was largely due to the fact that she had to move the court to strike out a suit, **No. HCCC 510 of 2006**, filed against her by the Defendant to recover her late husband's debt. The suit was dismissed on 16<sup>th</sup> November 2007 on the grounds that it was an abuse of the process of court. The existence of the said suit, during the pendency of the current suit is not in dispute and I would be inclined to accept that to be a factor affecting the progress of this suit and as providing a valid explanation for the difficulty in prosecuting the present suit while at the same time defending that other suit.

The first question presenting itself before this court is whether the application has merits under the requirements of **Order XV1 Rule 5** of the **Civil Procedure Rules (2009 Revised Edition)** now replaced by **Order 17 (2)**. The second is question whether the Plaintiff has shown good cause why the suit should not be dismissed. **Order XV1 Rule 5** of the old Rules provided that:-

**"if after three months after:-**

- (a) The close of pleadings, or**
- (b) (deleted )**
- (c) the removal of the suit from the hearing list; or**
- (d) the adjournment of the suit generally, the Plaintiff does not set down the suit for hearing, the Defendant may either set the suit down for hearing or apply for its dismissal."**

The position taken by the courts in applications of this nature is that the court will be hesitant to dismiss the suit if a reasonable explanation as to the delay is given to the satisfaction of the court and that the justice of the case calls for the suit to be sustained. The Plaintiff opposes the application on the basis that:-

- (i) She has always been willing to proceed diligently with the matter**
- (ii) She is not guilty of inexcusable or inordinate delay**
- (iii) The application is brought in bad faith**
- (iv) The Applicant is guilty of material non disclosure**

**(v) The Applicant has not come to court with clean hands**

**(vi) The delay in prosecuting the suit has been caused by the Applicant filing applications and a new suit, which the court has held are a       fragrant abuses of the court process.**

The application itself is unclear as to the length of delay in prosecuting the suit although the reference to the existence interlocutory orders enjoyed by the Respondent in 2 grounds cited tends to support the Applicant's submission that its complaint is as regards a delay of 9 years, since the adjournment of the suit generally, on some date in 2001. Considering the record, however, and having found that the filing of **HCCC No. 510 of 2006** was material, I would take the date of the dismissal of that suit as the effective date for the purposes of the application before me.

The record shows that after the parallel suit was dismissed on 16<sup>th</sup> November 2007, the Plaintiff/Respondent filed an application for judgment on admission dated 10<sup>th</sup> March 2008. The same was adjourned at the request of counsel for the Defendant/Applicants on 29<sup>th</sup> April 2008, and again on 5<sup>th</sup> June 2008. On 8<sup>th</sup> October 2009, the said application was again adjourned, this time *"at the request of both counsel for the Plaintiff and Defendant"* and marked stood over generally. The Respondent has deponed in her affidavits that the parties went into negotiations with the Defendant itself making offers to settle the matter out of court, which negotiations collapsed in March 2010. The court's record of 8<sup>th</sup> October 2009, shows counsel for the Defendant, Mr. Ojiambo to have stated the following before Hon. Lady Justice Koome.

**"The Notice of Motion dated 10<sup>th</sup> March 2008 was coming up for hearing. My client wishes to finalize all the disputes so my client gave an offer to settle. We request the matter be stood over generally to enable parties settle the matter out of court."**

To this, counsel holding brief for Mr. Olunya for the Plaintiff replied;

**"That is the position."**

Correspondence exhibited by the Plaintiff, which the Defendant/Applicant does not deny confirms that the negotiations broke down in March 2010, after which the Plaintiff invited the Defendants to fix the application dated 10<sup>th</sup> March 2010, for hearing. The invitation is dated 15<sup>th</sup> March 2010. The Applicant's contention that she was unable to take a hearing date, owing to the closure of the 2010 diary, is confirmed by the depositions in paragraph 18 of the Plaintiff's Supporting Affidavit sworn by Damaris Gitonga.

In regard to the taking of the hearing dates, the deponent states the following paragraphs 18, 19 and 20 of the Supporting Affidavit;-

**"18. That our Advocate informs me that when the diary for 2010 opened last year the Plaintiff did not take a hearing date for either her application dated 10<sup>th</sup> March 2008 or for formal proof of her case -----**

**19. That long after the court diary had closed the Plaintiff's advocate purported to invite our advocates for the taking of a hearing date for the main suit instead of taking dates for the pending application -----**

**20. That Mr. Ojiambo informs me, which I verily believe to be true, that the court diary is still open for the taking of dates for applications yet       the Plaintiff has made no effort to list her application for hearing."**

It is quite clear, as supported by both the record and the depositions made in the Supporting Affidavit, that the negotiations out of court were mutual. These substantially contributed to the delay in setting down the suit for hearing. The Plaintiff's application for judgment on admission having been adjourned at the behest of the Defendant on 8<sup>th</sup> October 2009, to give room to negotiations, I am of the

view that the filing of the present application by the Defendant instead of taking a date for the hearing was not well calculated and cannot be said to be in the interests of justice. If anything, it has caused further delay in having the matter concluded. The facts of the case, as demonstrated by the weighty issues raised in the pleadings go against its succeeding. This long protracted dispute can only be conclusively and effectively determined through a formal hearing on merits.

In the premises, the Defendant 's Notice of Motion dated 10<sup>th</sup> July 2010 is disallowed. However, in the interests of justice I direct that the matter be fixed for a full hearing within 30 days. The Plaintiff's application, which seeks for a judgment, albeit on admission will not serve a better purpose than if evidence was taken for the court to decide the matter with finality. In exercise of my inherent power and jurisdiction, I order that the Plaintiff's application dated 8<sup>th</sup> March 2008, be marked as withdrawn to give room to the full hearing on merits. The Plaintiff must fix the suit for hearing within the next 30 days, in default of which, the same shall stand dismissed.

Parties will bear their own costs in both applications.

Orders accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 11<sup>TH</sup> day of NOVEMBER, 2011**

**M. G. MUGO**

**JUDGE**

In the presence of:

Ms. Kamau holding brief for Mr. Ojiambo For the Applicant

Mr. Oluga holding brief for

Mr. Oluoch-Olunya For the Respondent