



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CIVIL CASE NO. 121'A' OF 2007**

**DAVID L. BUNDOTICH.....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE (K) LTD.....DEFENDANT**

**RULING**

For consideration now is this Notice of Motion brought under the provisions of sections 3 & 3A of the Civil Procedure Act and Orders XVII Rule 5(a) and L rule 1 of the Civil Procedure Rules. The defendant applies praying that the plaintiff's suit be dismissed for want of prosecution. The application is based on the grounds that the case was last in court over a year prior to the filing of the application and the plaintiff has lost all enthusiasm and resolve to prosecute the case and such delay has highly prejudiced the defendant. DELMAS MWINAMO swore the affidavit in support of the application and he deponed that this case was last in court on 11/12/2007 when the same was taken out of the day's cause list and stood over generally as the plaintiff had not paid court fees and since then the plaintiff has not set it down for hearing. He added that it is impossible to have a fair trial after such undue delay and the suit should be dismissed.

In the Replying Affidavit sworn by TITUS BITTOK learned counsel for the plaintiff he states that the delay has been caused by his firm trying to establish the court's requirement of Kshs.70,000/- as further court fees as communicated to his firm by the letter dated 31/07/2007 from the Deputy Registrar of the court and that in that letter it had been communicated to the Defendant's advocates that no further action would be taken on the file until the further court fees were paid.

At the hearing both counsel made their submissions in support of their rival positions.

I have perused the entire file and have considered the application and submissions by both counsel. The guiding principle in determining applications such as the present one is whether the delay complained of is prolonged inordinate or inexcusable, is that delay so great as to amount to a denial of Justice and will the defendant suffer prejudice due to the delay; has the delay compromised a fair and just trial of the case and has the delay been explained sufficiently to earn the court's exercise of judicial discretion in favour of the applicant. If the delay is due to an inadvertence, excusable mistake or error or accident and it has not been occasioned so as to obstruct the cause of justice, then the court's unfettered discretion **SHAH v.s. MBOGO (1969) E.A. at pg 116** will be exercised in favour of the applicant.

From the court record I note that there was vibrant action in the beginning when the plaintiff sought a temporary injunction to stop the sale of his property. That was upto 25/07/2007. There then followed the letter dated 31/7/2007 from the Deputy Registrar calling for further court fees of Kshs.70,000/- and stopping any further action in the file. The plaintiff Advocate's letter of the 01/08/2007 calling for a computation of the further fees was never responded to by the Deputy Registrar of the court and counsel for the plaintiff was content to leave matters at that and leave the case at abeyance.

It may well be true that there was no reply to the advocate's letter by Deputy Registrar of the

court. However, some sort of activity was expected on the part of the plaintiff's counsel. He sent no reminder. But it is not the court's duty to instill discipline on parties and mistakes do sometimes happen as was noted by APALOO JA as he then was in the case of **PHILIP CHEMWOLO & ANOTHER v.s. AUGUSTINE KUBENDE (1982 – 88) KAR 103 pg. 1042** in the following words, which position I here adopt;-

**“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter is that unless there is fraud, or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”**

I note further that there were negotiations going on between the parties for a while with a view to settling the case by allowing a sale by private treaty.

In these circumstances I take the view that the delay is explained, it has not caused any prejudice to the defendant as at the end of things the defendant must be paid the money he advanced to the plaintiff with the attendant interests and I therefore would endeavour to give an opportunity to the plaintiff to have his case heard on merit as it is not the duty of the court to shut out a party who wants to be heard, as I find this plaintiff still wishes to have his case heard. I do not find that the delay has been prolonged and inexcusable and further I do not find that it has caused grave injustice to either party herein. I have no doubt that there can still be a fair trial of the issues in contention. However and so that the plaintiff does not continue in his slow pace it is hereby ordered that the plaintiff will sort out the issue of the payment of the further court fees within 21 days of the date hereof and finalise the preliminaries to ready the suit for hearing. If the suit will not be set down for hearing within ninety (90) days of the date hereof the same shall stand automatically dismissed. To that extent the application under consideration is dismissed. The plaintiff will pay the costs of the application to the defendant.

Orders accordingly.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 28<sup>TH</sup> DAY OF JULY, 2010.**

**P.M. MWILU  
JUDGE**

**In the presence of;**

**Mr. Sila holding brief for Rotuk Advocate for the Defendant/Applicant**

**Mr. Kiboi holding brief for Kalya Advocate for the Plaintiff/Respondent**

**Andrew Omwenga – Court Clerk**

**P.M. MWILU  
JUDGE**