



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE NO. 123 OF 2007**

**STEVE OMACHE ONDITI**  
**OMWEGA.....PLAINTIFF**

**VERSUS**

**KENYA ECUMENICAL CHURCH LOAN**  
**FUND.....DEFENDANT**

**RULING**

The defendant's application dated 5<sup>th</sup> November, 2009, seeks dismissal of this suit for want of prosecution. It was brought under the provisions of **Order XVI rule 5, order L rule 1** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act**. The application is made on grounds that:

- “(i) It has been over three months since the last court attendance and the plaintiff has taken no step to fix the suit for hearing.**
- (ii) The delay by the plaintiff in prosecuting the suit is inordinate and inexcusable.**
- (iii) The continued pendency of the suit is prejudicial to the defendant.**
- (iv) It is just and in the interest of justice that this**

**suit be dismissed.”**

In the supporting affidavit sworn by **Rose Wanjohi**, the Chief Executive Officer of the defendant, she stated that the plaintiff filed the suit on 4<sup>th</sup> December, 2007 together with an application for an injunction under certificate of urgency. On the same day, the court granted the plaintiff an interim order of injunction restraining the defendant from alienating, selling and/or transferring the property known as **L.R. No. Central Kitutu/Daraja Mbili/1190** pending the hearing and determination of the application inter parties. The application was argued inter parties and the ruling delivered on 18<sup>th</sup> March, 2009 wherein the ex-parte orders of injunction were confirmed. The temporary injunction was to remain in force until the suit is heard and determined. Since then no step has been taken by the plaintiff towards prosecution of the suit. On the other hand, a loan that had been advanced to him is in arrears to the tune of Kshs.1,784,000/=. That was as at November, 2009 when the application was filed. In the circumstances, it was only fair that the suit be dismissed for want of prosecution.

The plaintiff filed a statement of grounds of opposition and stated, *inter alia*:

- **That the defendant’s notice of motion is misconceived and bad in law.**
- **That the defendant has not complied with the provisions of order X rule 11A of the Civil Procedure Rules.**
- **That the application offends the provisions of order XVI rule 5 of the Civil Procedure Rules.**
- **That there has been no inordinate delay in prosecuting the suit.**

When the application came up for hearing on 20<sup>th</sup> July, 2010, the advocates for the parties agreed that the same be disposed of by way of written submissions which they undertook to file within 14 days from the aforesaid date. The submissions were duly filed and I have carefully perused the same.

It is not in dispute that the ruling in respect of the plaintiff’s application for an interlocutory injunction was delivered on behalf of Gacheche, J. on 19<sup>th</sup> March, 2009. In the circumstances, the parties could not have done discoveries before delivery of the said ruling. The delay in prosecuting the suit which the plaintiff requires to explain is for the period between 19<sup>th</sup> March, 2009 when the ruling was delivered and 5<sup>th</sup> November, 2009 when the defendant filed its application.

Although the defendant filed its application on 5<sup>th</sup> November, 2009, it appears that the same was not served upon the plaintiff’s advocate until 1<sup>st</sup> December, 2009. The plaintiff’s advocate had on 23<sup>rd</sup> November, 2009 filed the plaintiff’s list of documents and served the same upon the defendant’s advocates on the following day. The defendant has so far not filed its list of document, if any. That notwithstanding, the plaintiff ought to have sought a hearing date soon after delivery of the ruling although the law does not bar a defendant from so doing.

Having said that, in an application of this nature, the court has to consider whether the delay in prosecuting the suit is inordinate and inexcusable and whether justice can be done despite the delay. See **IVITA –VS- KYUMBU** [1984] KLR 441. I think it is also important for the court to consider the nature of the case.

The background of this case is that on 21<sup>st</sup> October, 2005, the defendant granted a loan facility of **Kshs. 2,000,000** to Pace Primary school. The loan was secured by a charge registered over **L.R. No. Central Kitutu/Daraja Mbili/1190** which is registered in the name of the plaintiff. The borrower defaulted in repayment of the said loan and the defendant wishes to realize the security so as to recover the outstanding loan balance.

The plaintiff, having obtained an interim order of injunction to restrain the defendant from realizing the aforesaid security, ought to have moved with speed to prosecute his case. The defendant cannot be faulted at all for having filed the present application because it is genuinely interested in recovering its money.

That notwithstanding, I do not think that there has been inordinate delay on the part of the plaintiff in prosecuting the suit. The period between 19<sup>th</sup> March, 2009 and 5<sup>th</sup> November, 2009 is about seven months. In exercise of my discretion I will not dismiss the plaintiff’s suit but do hereby direct that the suit be set down for hearing on priority basis within the next three months from the date hereof. The plaintiff shall bear the costs of this application.

**DATED, SIGNED AND DELIVERED AT KISII THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2010.**

**D. MUSINGA  
JUDGE.**

**17/92010**

Before D. Musinga, J.

Mobisa – cc

Mr. Oguttu for the Plaintiff

Mr. Nyambati HB for Mr. Adan for the defendant

**Court:** Ruling delivered in open court on 17<sup>th</sup> September, 2010.

**D. MUSINGA  
JUDGE.**