



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 605 of 2003**

**WINFRED WAMBUI KINGORI.....PLAINTIFF**

**VERSUS**

**PARAMOUNT UNIVERSAL BANK LTD..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

The application is a Notice of Motion dated 20<sup>th</sup> May, 2008 wrongly expressed to be brought under **Order XXIX rule 4 of Civil Procedure Rules** instead of **Order XXXIX rule 4**. It is also expressed to be brought under **Order XVI rule 5 of Civil Procedure Rules**.

It seeks to have an order of injunction granted to the Plaintiff on 2<sup>nd</sup> June 2006 discharged and to have the suit against the 1<sup>st</sup> Defendant dismissed for want of prosecution.

The grounds for the application are:

- a) The applicant is entitled to enforce the securities it holds from the Plaintiff
- b) The right has however been unjustifiably hamstrung by the Order of injunction made on the 2<sup>nd</sup> of June 2006 as set out below.
- c) There has been inexcusable delay and sheer nonchalance if not deliberate delay on the part of the plaintiff in prosecuting this matter thereby unjustifiably restricting the Applicant from enforcing securities that the Plaintiff gave it since the order of 2<sup>nd</sup> of June 2006 was made.
- d) As such, the Plaintiff is undeserving of the equitable interim relief the court gave it on the 2<sup>nd</sup> of June 2006.

- e) The Plaintiff has in spite of having interim Orders of Injunction since 2<sup>nd</sup> June 2006 failed to prosecute its own injunction application and or the main suit.
- f) A fair trial of the Plaintiff's claim against the 1<sup>st</sup> Defendant cannot be achieved as a result of the delay.
- g) Overall, justice delayed, as is manifest here, is justice denied.
- h) It will take less than 10 minutes to present this application.

The application is supported by an affidavit of one MICHAEL TITUS RITHO.

The application is opposed. The Plaintiff has sworn a replying affidavit dated 18<sup>th</sup> June 2008 in which an explanation is offered for the delay in setting down the suit for hearing.

I have considered both the supporting affidavit of Riitho and the replying affidavit of the Plaintiff Mr. Kingori. The law is well established regarding the factors that should be considered in applications for dismissal of suits.

The issue is whether there has been prolonged and inordinate delay in the prosecution of this case and whether the Plaintiff has given any reasonable explanation for the same and whether justice can still be done despite the delay. The 1<sup>st</sup> Defendant has also an added duty to show what prejudice it has or will suffer as a result of the continued delay in the prosecution of the case.

Regarding delay, I note that the last time any step was taken in the case was on the 28<sup>th</sup> February, 2008 when the Plaintiff made an application to have an earlier application filed on 25<sup>th</sup> September 2003 reinstated. That application was heard and a ruling delivered on the 2<sup>nd</sup> June 2006. Since then no other action was taken until the 1<sup>st</sup> Defendant filed this Chamber Summons application dated 20<sup>th</sup> May, 2008 seeking the dismissal of the suit for want of prosecution. The delay under consideration is two years. The issue is whether two years is inordinate and/or prolonged stay and what explanation the Plaintiff has offered in its regard.

I have considered the Plaintiff's replying affidavit. The Plaintiff has gone to great pains to explain the reason for the delay. The Plaintiff is blaming her previous Advocates for failure to take any steps to set down the suit for hearing. The Plaintiff explains that she had to change her Advocates to the current ones in 2006. The record bears the Plaintiff out that indeed her application filed in 2003 was dismissed for want of prosecution. The record also shows that it is after she changed her advocates to the current ones that the application heard in 2006 was filed and prosecuted. The Plaintiff has also explained that the current advocate was unable to take any further steps due to the failure or neglect of her previous advocates to release her file to them.

The case of IVITA VS. KYUNGU sets out the principles that a court should apply when considering an application of this nature.

*"A defendant who has waived or acquiesced in delay is not entitled to a dismissal of the action for want of prosecution but mere inaction on the part of such defendant does not amount to a waiver or acquiescence. The test applied by the courts is an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court."*

Having considered the explanation offered by the Plaintiff, I am of the view that she has been able to demonstrate the difficulties that she has encountered in the prosecution of the matter and which were

occasioned by her previous advocate. The explanation in my view is reasonable and acceptable. I am also of the view that the delay of two years is long but is not inordinate or prolonged.

Regarding the Defendant/Applicant, they have an obligation to demonstrate that the delay in the matter has caused them prejudice or some damage or loss or is likely to cause them prejudice.

I have considered the supporting affidavit. No attempt has been made to demonstrate what prejudice the 1<sup>st</sup> Defendant is likely to suffer or has suffered due to the delay in the prosecution of this matter. All the 1<sup>st</sup> Defendant's Senior Credit Officer, Mr. Riitho, has averred in the replying affidavit is that a fair trial will not be achieved as a result of the delay. No reason has been given why a fair trial cannot be achieved and therefore this is a bare statement. The 1<sup>st</sup> Defendant has not discharged its obligation and I therefore find that it has not demonstrated that it will suffer any prejudice due to the delay in the prosecution of this case.

The dismissal of a suit for lack of prosecution is a drastic measure. It is also a discretionary power and one which ought to be exercised judiciously. Considering that the delay involved in this matter is not inordinate, I do find that the justice of the case that the application should not be allowed but this suit should not be dismissed at this stage.

The result is, I dismiss the 1<sup>st</sup> Defendant's application dated 20<sup>th</sup> May, 2008 and order as follows:

1. That the Plaintiff should set down its application dated 25<sup>th</sup> September, 2003 within 14 days from the date of the delivery of this ruling.
2. The 1<sup>st</sup> Defendant will have leave to apply.
3. The costs of the application will be borne by Plaintiff/Respondent.

Dated at Nairobi this 4<sup>th</sup> day of July, 2008.

**LESIIT, J.**

**JUDGE**

*Read, signed and delivered, in the presence of:*

Mr. Ogunde for Applicant/1<sup>st</sup> Defendant

Mr. Kosgey holding brief for Mr. Bundotich for Respondent

**LESIIT, J.**

**JUDGE**