Mbau v Faulu Kenya Deposits Taking Microfinance Limited & another (Civil Appeal 21 of 2019) [2025] KEHC 6554 (KLR) (19 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6554 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 21 OF 2019

DKN MAGARE, J

MAY 19, 2025

BETWEEN

PETERSON WANYEKI MBAU ..... APPELLANT

AND

FAULU KENYA DEPOSITS TAKING MICROFINANCE LIMITED .... 1ST RESPONDENT

ROBERT WAWERU MAINA T/A ANTIQUE AUCTIONEERS .... 2ND RESPONDENT

(Appeal from the Ruling and order of the Hon. W. Kagendo dismissing the suit for want of prosecution on 13th March 2019, in Nyeri CMCC 250 of 2019)

JUDGMENT

1. This is an appeal from the Ruling and order of the Hon. W. Kagendo dismissing the suit for want of prosecution on 13th March 2019, in Nyeri CMCC 250 of 2019. The ruling dismissed the suit for want of prosecution. The grounds of appeal set out in the Memorandum of Appeal dated 26.03.2019 filed on the same day and set out the grounds as follows:

    a. The learned trial magistrate erred in law and in fact in failing to take cognizance of replying affidavit to the notice of motion.

    b. That the learned trial magistrate erred in law and in fact in allowing an application that was not even prosecuted.

    c. The learned trial magistrate erred in law and in fact in dismissing the suit for want of prosecution pursuant to an application by respondent without considering that there was two other pending application by the defendants that had been filed but never prosecuted.

d. The learned trial magistrate erred in law and in fact in failing to find that the appellants would not have fixed the matter for hearing of his suit with the pending applications by the respondents.

e. The learned trial magistrate erred in law and in fact in finding that the application was meritorious whereas the defendant had not even filed a defence to the suit.

f. The learned trial magistrate erred in law and in fact in dismissing the suit for want of prosecution whereas the matter was not ready for hearing owing to the pending applications.

2. The plaintiff filed suit on 27/07/2015 against the respondents, challenging the sale of the charged property, Othaya/Kiahugu/2364. On 02/09/2015, Hon. Orimba issued interim orders of injunction pending the determination of the suit. These interim orders have persisted for almost nine years, both in the lower court and in this court.

3. Upon obtaining the temporary injunction, the appellant (plaintiff) took no steps to prosecute the suit. After waiting for some time, the respondents filed an application dated 29/01/2019 seeking to dismiss the suit for want of prosecution.

4. The appellant did not appear serious in pursuing the matter, as they failed to respond to the application or explain the nearly four-year delay. A belatedly filed replying affidavit did not offer any satisfactory explanation for the delay.

5. The court found the Appellant had never proceeded and dismissed the suit was for want of prosecution. This resulted in this appeal. the appeal was heard by way of submissions which are prominent in their absence than presence.

6. The appeal herein had also been subject to dismissal. The court's directions on hearing the appeal averted this. the directions was deposit of security for the appeal of Ksh 4,400,000/=.

Analysis

7. The Appeal raises one issue only. Whether the court erred in dismissing the suit for want of prosecution.

8. The Appellant never pursued the hearing the matter in the court below institution of the case. They obtained temporary orders and went to sleep. The Appellant was not even jolted by the application to dismiss the suit for want of prosecution. The court was thus under a duty to stamp its authority to obviate unnecessary hardship. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696: -

> In cases falling outside the specific provisions quoted above. Farrel, J., adopted this view. Dalton, J., in Saldanha's case purported to follow the decision of Windham m C.J. in Mulji v Jadavji, [1963] EA. 217, but all that case decided was that the courts inherent jurisdiction could not be invoked where an l alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the courts inherent jurisdiction can be said to be fettered, as no alternative remedy existed.

9. The matter herein is a classic study of how not to deal with a suit. The period of 4 years is too long for a suit to period. The appellant raises an issue that the matter could not have been fixed for hearing with pending application from the Respondent. The respondents had also not filed defence. That may be so. However, there was already a request for judgment. The Appellant did nothing for a period of

four years. nothing stopped the appellant from setting down the suit for formal proof. In the case of Samson S. Maitai & Another -vs- African Safari Club Ltd & Another [2010] eKLR, the High Court in trying to defining Formal Proof stated thus:

> " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

10. Therefore, the prosecution of the suit was not predicated upon the efficiency of the defence but a burden on the plaintiff. The Defence may fix the matter down for hearing or apply for its dismissal. they opted for the later. such kind of prosecution was the raison d'être for introduction, vide L.N. 22/2020, rule 15 of Order Rule 17 rules 2(5) of The Civil Procedure Rules. The suit rules provides as follows:

    (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

    (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

    (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

    (4) The court may dismiss the suit for non-compliance with any direction given under this Order.

    (5) A suit stands dismissed after two years where no step has been undertaken.

    (6) A party may apply to court after dismissal of a suit under this Order.

11. I find no evidence of any effort to prosecute the suit for a period of 4 years. The excuses given are lame and are no basis for maintaining a suit that serves only to delay the ends of justice. this is more so, that the Appellant had an injunction. he had a duty to prosecute the suit within one year. order 40 rule 6 provides as follows:

> Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

12. A party who has been granted an interlocutory injunction should be able to prosecute their suit within 12 months. The laxity on party of the appellant cannot be countenanced. I do not find any merit in the appeal. The same is accordingly dismissed.

13. As regards costs, section 27 of the *civil procedure act* provides as follows: -

    1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction

to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

14. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

15. The respondent has suffered hardship of waiting for 10 years to have the right to exercise the statutory power of sale. it must be remembered as held in the case of Bank of Africa Limited v Juja Coffee Exporters Limited & 4 others [2018] eKLR, that:

> The Court observed in the process, that 'a bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.' And so it is in this case.

16. In order to assuage the Respondents, it is only appropriate that the court vacates all interim and temporary orders in situ. Given that the dispute was based on a sum of Kshs. 2,435,137/=, I find that the Respondents shall have costs of 145,000/= in these circumstances. Therefore, I direct that all interim orders in this court and the court below are vacated for the avoidance of doubt.

Determination

17. The upshot of the foregoing is that I make the following orders:

    a. The Appeal is dismissed for lack of merit.

    b. The Respondents shall have costs of 145,000/=.

    c. All interim orders in this court and the court below are vacated.

    d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 19TH DAY OF MAY, 2025.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Ms Swaka for the Respondent

Court Assistant – Michael