



REPUBLIC OF KENYA



**Rono v Bank of Africa Ltd & another (Civil Case E025 of 2021)  
[2024] KEHC 1161 (KLR) (12 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1161 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE E025 OF 2021  
RN NYAKUNDI, J  
FEBRUARY 12, 2024**

**BETWEEN**

**PROF PHILIP RONO ..... PLAINTIFF**

**AND**

**LEGACY AUCTIONEERING ..... 1<sup>ST</sup> DEFENDANT**

**BANK OF AFRICA LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

Coram: Before Justice R. Nyakundi

Mr. Kenei & Associates

Nyaanga & Mugisha Advocates

1. The substantive notice of motion is dated 29/8/2023 expressed be brought under section 1A, 1B and 3A of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya, order 12 Rule 3(1) and Order 21 of the [Civil Procedure Rule](#), 210 and any other enabling provisions. The motion seeks two substantive orders;
  - i. That the honorable court be pleased to dismiss the plaintiff's suit for want of prosecution.
  - ii. That the costs of this application and the entire suit be borne by the plaintiff.
2. In support of the application is an affidavit by Victor Keitany Senior Recoveries Officer Bank of Africa Kenya Limited. Among the issues raised on oath include the following.
  - i. That the plaintiff herein filed the present suit via plaint dated 15/11/2021 concurrently with a Notice of Motion Application on even date. In response thereto, the 1<sup>st</sup> and 2<sup>nd</sup> defendant filed their statements of defence and a replying affidavit both dated 1/12/2021.



- ii. That parties were then directed to file submissions to the application and consequently, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their submissions dated 2/12/2021 and the plaintiff filed submissions dated 21/2/2022
- iii. That before ruling was delivered on the application sometime in 2022, parties decided to engage in negotiations with the intent of reaching a settlement.
- iv. That after several meetings and engagements, it was agreed between parties that applicant bank restructure the loan facility and subsequently, a restructures letter of offer dated 30/ 11/2022 was prepared and the respondent was supposed to execute the said letter of offer to facilitate commencement of the restructure of the loan facility.
- v. That parties also agreed the terms of the loan restructure and terms were supposed to be adopted as the consent of parties settling the matter is its entirety.
- vi. That however, upon the Bank forwarding to the respondent the said letter of offer containing the agreed terms restructuring the loan facility, the respondent became unresponsive and despite several calls and reminders, it has failed to return the executed copies and or communicate to the Bank as to why the respondent hasn't execute the said letter of offer.
- vii. That from the plaintiff's conduct, it appears that he plaintiff has abandoned this suit as he has failed to attend court on three separate occasions either by himself or through his counsel despite being served with 2 mention notices.
- viii. That the delay by the plaintiff is long and inordinate and his conduct has prejudiced the fair and just determination of this suit.
- ix. That there is no reason whatsoever for the long and inordinate delay in the prosecution of this suit and in view of the foregoing, it is evident that the plaintiff has completely lost interest in the suit.
- x. That the continued pendency of this suit is prejudicial to the defendants and it is only fair and just that the suit be dismissed for want of prosecution.

## Decision

### The law

3. The basic law regulating dismissal of suits for want of prosecution is traceable to order 17 rule 2 & 3 of the [Civil Procedure Rules](#) which states;
  - “1. In any suit in which no application has been made or step 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. Any part in the suit may apply for its dismissal as provided in sub-rule1.”
4. The fundamental principles to guide the court in exercise of discretion is an elaborated in the following authorities;



In the case of *Josphat Oginda Sasia v Wycliffe Kiiya* (2022) eKLR, the court held;

“but as has been held time and again before, all the court needs to do when a party does not take steps to prosecute his matter is for it to “give notice” of the intent to dismiss the matter. Such notice can be way of publishing the intent through the Cause Lists, Websites or even court notice boards. Similarly see *Fran Investment Limited v G4s Security Service Limited* (2015) eKLR and *Jim Rodgers Gitonga Njeru v AZ Husnain Motors Limited & 2 others* eKLR.

Similarly, in the case of *Ivita v Kyumbu* (1984) KLR 441 it's stated that;

“The test is whether the delay is prolonged and inexcusable, and if it is can justice be done despite such delay. Justice to both the plaintiff and defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and or witnesses may be missing and evidence is weak due to the disappearance of Human memory resulting from lapse of time. The defendant must however satisfy the court that it will not be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delays is prolonged if the court is satisfied with the courts is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

5. By way of several notices the plaintiff was served with the notice of motion referring to the events of filing the suit and failure to prosecute it. The continued delay by the plaintiff pleads the applicant that it has resulted in great prejudice and has placed the Bank in a position of uncertainty for almost 2 years. It was the applicant's contention that a lack of real intention to pursue a prosecution of the suit can be evinced from the failure by the plaintiff to take steps to progress hearing of the case and this can be seen from the record. In essence the default has been intentional given the factual matrix adduced in the affidavit by one Victor Keitany the Senior Recoveries Officer Bank of Africa Kenya Limited. I am satisfied that the applicant under the court is entitled to come to the conclusion that for reason of the plaintiff's inactivity in the civil claim for a period of more than 2 years his conduct constituted an abuse of the process. In my view the doctrine of Laches as defined in *Halsbury's Laws of England* applies that the circumstances of this application. Thus;

“A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent” or delay defeats equities, a court of equity refused its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (laches). The defence of laches is however, allowed only where there is no statutory bar.”

In determining whether there has been such delay as to amount to laches, the chief points to be considered are.

1. Acquiescence on the claimant part and
2. Any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. it is unjust to



give the claimant a remedy where, by his conduct, he has don't that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted.

Regard must be had to any change in the defendant's position which has resulted from the claimant's delay in bringing his claim. This may be, for example, because by the lapse of time he has lost the evidence necessary for meeting the claim. A court of equity will not allow a dormant claim to be set up when the means or resisting it, if it turns out to be unfounded, have perished... any change in the defendant's position tells more strongly against the claimant if the claimant has been acquainted with the circumstance so as to make it inequitable for him remain inactive. Laches will be imputed where the claimant, with knowledge of his rights, has allowed the defendant to expend money in the belief that no claim will be made."

6. Applying the above principles to the instant case, the plaintiff's delay in proceeding with the prosecution of the suit for some 2 years now is inexcusable and can be described as an abuse of process for which the court has power to dismiss the cause of action. Similar to this is the default by the plaintiff to file any replying affidavit or responses to the application by the applicant on dismissal of suit for want of prosecution. I find no reason not to have the claim discontinued against the defendant bank by virtue of inertia on the part of the plaintiff with costs.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2024**

In the presence of;

Nyaanga Advocate for the 1st defendant

**R. NYAKUNDI**

**JUDGE**

