



REPUBLIC OF KENYA



KENYA LAW
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Chumba v Equity Bank (Kenya) Limited & 2 others (Civil Case 15 of 2022) [2024] KEHC 7057 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 15 OF 2022
RN NYAKUNDI, J
JUNE 13, 2024**

BETWEEN

ENOCK KIPLAGAT CHUMBA PLAINTIFF

AND

EQUITY BANK (KENYA) LIMITED 1ST DEFENDANT

MERCY BOIYON T/A RAZOR SHARP AUCTIONEERS 2ND DEFENDANT

TRANS COUNTRY VALUERS LIMITED 3RD DEFENDANT

RULING

1. I am called to determine an application dated 21st March, 2024 brought under the provisions of Order 17 Rule 2(3) and Order 51 of the *Civil Procedure Rules* and Sections 1, 1A, 3 & 3A of the *Civil Procedure Act* seeking the following reliefs;
 - a. That the Plaintiff's suit against the Defendants be dismissed with costs for want of prosecution.
 - b. That the costs of the entire suit be borne by the Plaintiff/Respondent.
 - c. That the costs of this application be borne by the Plaintiff/Respondent.
2. The Application is anchored on 5 grounds enumerated in the following order: -
 - a. That the Plaintiff/Respondent has inordinately delayed in prosecuting this suit;
 - b. That the delay is unmerited and consequently prejudicial to the defendants.
 - c. That the onus is on the Plaintiff not only to prosecute the suit but to do so expediently.
 - d. That the Plaintiff has lost interest prosecuting this suit and this court should therefore dismiss the same with costs to the Defendants/Applicants.



- e. That it is the interest of justice that the orders sought herein be granted.
3. In response to the application,

Decision

I have read through the application together with the affidavit in support. Dismissal of suits for want of prosecution is founded on the principle that Litigation must be conducted expeditiously and concluded in time so that the parties are accorded justice and fairness. The legal foundation of dismissal of suit is traced in Order 17 Rule 2 which provides as follows: -

- “2. In any suit in which no application has been made or step taken by
- (1) 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.”

4. Several authorities have equally addressed this question. Just to mention but a few; The court in *Mwangi S. Kimenyi -vs- Attorney General and Another*, Civil Suit Misc. No. 720 of 2009 held as follows:

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

5. In the case of *Ivita – Versus - Kyumbu* [1984] KLR 441 the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated: -

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is 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 be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done 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 delay is prolonged if the court 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”.

6. Further, in the case of *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] eKLR the court remarked and observed as follows:

“Where there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given to the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word “inordinate” in its dictionary meaning, but in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases. See the case of *Allen Versus Alfred McAlphine & Sons* (1968) 1 ALL ER 543; where a delay of 14 days was considered inordinate and inexcusable. But see also the cases of *Agip (Kenya) Limited v Highlands Tyres Limited* (2001) KLR 630 and *Sagoo v Bhari* (1990) KLR 459, where delay of eight (8) months and five (5) months, respectively was considered not to be inordinate, And also NBI HC ELC case No. 2058 of 2007 where delay of about 1/1/2 years was considered not to be inordinate. At this point, I think I should examine the circumstances of this case and the amount of delay involved to determine whether it is inordinate and inexcusable.”

7. In the present case, this court is satisfied the delay is inordinate but is it excusable? From the record, the Plaintiff's pursuit of the action is only traceable to an interlocutory application on injunctive orders which was duly heard and determined on 24th April, 2023. That was basically a preliminary issue which was tried meant to tidy up the proceedings and give way to the hearing and determination of the substantive issues in the suit. There are certain factors to take into account. First and foremost, the timeline set by the *Civil Procedure Act* and *Civil Procedure Rules* is for the efficient, effective, fair and proportionate determination of disputes without undue delay where no compelling or exceptional circumstances exist. The right to a fair trial in Art 50(2)(e) of *the Constitution* also implores the parties to have any trial begin and be concluded within a reasonable time. That is also the constitutional imperative of Art 159(2)(c) which expressly states that justice delayed is justice denied. At a glance of the record, there is evidence that the nature of the delay by the Plaintiff exposes the defendant to the possibility of unfair trial given the fact that the substratum of the suit is on Mortgagor and Mortgagee commercial contract in which the Plaintiff secured a loan from the 1st defendant bank and did offer Title No. Burnt Forest/65 & Title No. Burnt Forest Township/66. The loan amount remains unpaid to this date without any steps being taken to liquidate the amount. Therefore, inordinate delay by itself occasions prejudice and injustice to the defendant bank in the instant case for the impossibility of not being able to exercise its statutory power of sale to realize the terms of the mortgage contract. The court finds that the defendant bank is prejudiced by the long delay and is unable to have the matter tried



fairly for reason of the Plaintiff being guilty of laches. Delay and laches is one of the factors which is to be borne in mind by the high court when exercising its discretionary powers under Order 17 Rule 2 of the Civil Procedure Rules. This court in exercise of its discretion cannot ordinarily assist the tardy and the indolent or the acquiescent and the lethargic litigant like in this case, the inordinate delay on the part of the Plaintiff has not been satisfactorily explained for the court to decline to intervene and grant any relief of extending time for the pending suit to be heard and determined. The court should bear in mind though that in dismissing the suit for want of prosecution, it is exercising an extraordinary and equitable jurisdiction. This court also sits as a constitutional court and it has therefore a duty to protect the rights of citizens under the right to a fair trial in Art 50 and on access to justice in Art 48 when parties want to use it as a shield not to prosecute the claims within a reasonable time. Therefore, simultaneously the court is to keep itself alive to the primary principle that when an aggrieved person without adequate reason approached the court at his/her own pleasure or leisure without litigating the issues within a reasonable time on the merits, the court will be under a legal obligation to dismiss the claim or as commonly referred to the suit for reason of inordinate delay without sufficient cause being shown to the satisfaction of the court. In the circumstances of this case, delay and laches is profound and fatal to the suit filed way back on 16th November, 2022.

8. Hence, I am of the considered view that being the position, it is evident that this suit is no longer sustainable and it is therefore good for dismissal with costs to the defendants.

9. The costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF JUNE 2024.

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R. NYAKUNDI

JUDGE

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