



REPUBLIC OF KENYA



**KENYA LAW**  
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**Samuel & another v Family Bank of Kenya & 2 others (Civil Suit  
2 of 2016) [2023] KEHC 17586 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17586 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL SUIT 2 OF 2016  
SC CHIRCHIR, J  
MAY 17, 2023**

**BETWEEN**

**HEXROPN MUNANGA SAMUEL ..... 1<sup>ST</sup> PLAINTIFF**

**EZEKIEL MUNANGA MABURU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FAMILY BANK OF KENYA ..... 1<sup>ST</sup> DEFENDANT**

**PAWABA AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**DEMONDE AGENCIES AND AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Defendants' Application dated December 7, 2021 seeks for dismissal of the suit for want of prosecution. It is supported by the grounds appearing on the face of the application and supporting affidavit sworn by Wycliffe Minishi Lijoodi, Counsel for the defendants.
2. It is deponed that the suit herein was filed on January 12, 2016 and the defence was filed on February 30, 2016, that the matter was last in court on August 4, 2020 for directions on the hearing and that since then, no further steps have been taken towards the prosecution of the suit.
3. The defendant further argues that the plaintiff is enjoying injunctive reliefs since May 31, 2017; that the delay in prosecuting the suit has been inordinate and inexcusable. It is pointed out that the plaintiff is not servicing the loan facility and that the loan could outstrip the principal amount due to the delay. Thus, it is argued, the delay has occasioned prejudice to the defendants.
4. The Application is opposed by way of replying affidavit sworn by the 1<sup>st</sup> plaintiff. It is the contention of the plaintiff that he has complied with the orders of the court given on February 8, 2016 directing him to resume payment of the loan and further directing the parties to subject themselves to Alternative dispute resolution mechanism.



5. The plaintiff further argues that he resumed paying the loan which has now been settled. He has annexed a statement of account to support his assertion. He contends that the present Application therefore has been brought in bad faith; that in any event pleadings have not been closed, so as to warrant the present application. It is finally submitted that the liability of the respondent has already been settled and therefore the Application is unnecessary.

### **Applicant's Submissions**

6. It is the Applicant's submission, that the suit was filed on January 12, 2016 and that the matter last came up in court on August 4, 2020 for purposes of taking directions; that the plaintiff never took any further steps since then and had not done so by the time of filing this Application on December 9, 2021.
7. It is further submitted that the Applicant's inaction contravenes sections 1A, 1B and 3A of the Civil Procedure Act. The applicant has also relied on several past decisions, to buttress their submissions.
8. On whether the delay is excusable the applicant submits that no sufficient cause has been shown as to why the suit was not prosecuted. Whereas the applicant admits that the matter was referred for alternative dispute resolution mechanism, they contend that no agreement was reached and the matter was referred back to court.
9. That in any event it was upon the plaintiff to list the case for directions and they should not be heard to say that directions on the matter have not been taken. It is further submitted that the delay poses substantial risk to fair trial and hence prejudicial to the defendants.
10. The respondent did not file any submissions.

### **Determination.**

11. I have considered the parties' pleadings, Applicants submissions and the Authorities relied on.
12. The Application is brought under order 17 rule 2 of the Civil Procedure Rules. Order 17 Rule 2 sub-rule 1 as read with sub-rule 2 gives the defendant the right to apply for dismissal of a suit where no steps have been taken towards the prosecution of the suit for a period of one year.

### **Back ground**

13. This suit was filed on January 12, 2016 and accompanying the suit was a Notice of motion seeking restraining orders against the respondents from selling or disposing in anyway motor vehicle registration number KCD 457K. On February 2, 2016, the court ordered for the release of the Motor Vehicle forthwith. Thereafter the vehicle was again repossessed after an apparent further default. Again, by further orders of this court (Njagi J), the defendant was directed to release the vehicle and the defendants were further restrained from repossession it. At the same time the court directed the parties to submit themselves to Alternative dispute Resolution mechanisms (ADR) and the costs of the suit was to be met by the unsuccessful party in the ADR.
14. The orders of 31<sup>st</sup> May 2017 are still in place. It is apparent that ADR did not resolve all the issues, as the Mediator referred the matter back to court. Through the report dated February 20, 2020 the mediator informed the court that the issue of Auctioneer's fees and the accrued interest should be resolved by the court.
15. There is nothing indicating that further steps were taken thereafter until the present application was filed on December 9, 2021.



16. The plaintiff's assert that they have settled the loan. I have perused the loan statement (NM2) it shows that as at January 9, 2020, the loan balance was Zero. The statement also shows that the auctioneers fees and storage charges had been added onto the then outstanding loan balance. This was done on July 21, 2017. In effect, the Auctioneer's fees has already been paid by the plaintiffs, as per the directions of Njagi J on May 31, 20217. The issue of Auctioneers fees should therefore stand resolved, unless the plaintiffs think that they are entitled to a refund.
17. The mediator indicated that the issue of interest is also unresolved. The plaintiff's loan statement did not show any outstanding interest. The applicant did not file any defence or counterclaim and therefore whether or not some interest is outstanding is not certain . However, what is certain is that the issue of costs remains unresolved. The plaintiff, therefore was obligated to prosecute the suit to conclusion for the court to determine the pending issue(s).

### **Is the delay inordinate?**

18. The report by the mediator reporting on the deadlock is dated February 20, 2020 and the current application was filed on December 9, 2021. This is a delay of almost 2 years. The delay was indeed inordinate. Even after they had been notified about the present application, plaintiffs have not taken any steps towards the prosecution of the suit. Nothing stopped the plaintiffs from taking some necessary steps in the suit during the intervening period. Failure to do so is a clear demonstration of indolence.

### **But can justice still be served despite the delay?**

19. In *Argan Wekesa Okumu v Dimo College & 2 others* [2015] eKLR ,  
The court considered the principles for dismissing suits for want of prosecution and stated as follows. "The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long time of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delays. As such the 3<sup>rd</sup> defendant in this case must meet the burden of proof. In Seeking the dismissal of the plaintiff's case for want of prosecution. (See the case of *Ivita v Kyumbu* [1984] KLR 441). Further to this the decision whether to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating it"
20. In the case of *Ivita vs. Kyumbu* (supra) the court held "..... 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 time. It is a matter in the discretion of the court".
21. The transaction giving rise to the present suit is commercial in nature. Thus, unlike other engagements or transactions, such commercial transactions and in particular, bank transactions like this one, are ordinarily documented. Moreover, in the circumstances of this case, it is expected that the documents are still intact, considering that the dispute is still alive. If necessary the witnesses 'memories can be refreshed by reference to the documents. I find support in the case of In *Paxton v Ayisop* [1971] 3AYI ER cited with approval in *Sanjotab Shah v Credit Agricole Indosuez Ltd* [2019] eKLR) where the court expressed the view that whether justice can still be done despite delay is an overriding consideration.
22. In the present case, despite the delay, owing to the nature of the claim as I have sated before, I am of the view that justice can still be done. Also considering the pending issues, which are mainly costs of



the suit and interest, I consider it in the interest of justice that the plaintiff should be given a chance to bring this matter to conclusion, on merit.

23. Consequently, I make the following orders.

a. The defendant application herein is hereby disallowed

b. This matter will be given a date for mention upon delivery of this ruling which mention is for directions on the prosecution of this suit.

c. Costs of this Application is awarded to the Applicant

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF MAY 2023**

**S. CHIRCHIR**

**JUDGE**

**in the presence of :-**

**Erick- Court Assiistant**

**Ms. Lodorot for the Applicant**

**No appearance by the Respondent**

