



REPUBLIC OF KENYA



KENYA LAW
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**Odhuno v Housing Finance Corporation of Kenya Limited & another
(Civil Suit 18 of 2014) [2023] KEHC 22196 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 18 OF 2014
F WANGARI, J
JULY 7, 2023**

BETWEEN

CAROLINE AWUOR ODHUNO PLAINTIFF

AND

HOUSING FINANCE CORPORATION OF KENYA LIMITED 1ST DEFENDANT

GUERNSEY ISLAND INVESTMENT LIMITED 2ND DEFENDANT

RULING

1. This ruling relates to an application dated August 7, 2019 which seeks the following orders: -
 - a. That Plaintiff's suit be dismissed with costs for want of prosecution;
 - b. In the alternative, the suit be dismissed with costs for being moot;
 - c. Costs of this Application be awarded to the 1st Defendant.
2. The application was opposed through a replying affidavit dated February 5, 2020 and filed on the same day. Directions were taken that the application be disposed off by way of written submissions. Both parties duly complied by filing detailed submissions as well as citing various decided cases in support of their rival positions. I have duly considered the said submissions and I am grateful to Counsel for their industry and time in preparing the submissions. They are a useful guide to the court in arriving at a just determination on the issue at hand.

Analysis and Determination

3. Having considered the application, the response, written submissions, cited authorities and the law, the following are the issues for determination: -
 - a. Whether the application dated August 7, 2019 is merited;



- b. Who bears the costs:
4. The Legal substratum for dismissal of suits for want of prosecution is founded on the principles that litigation must be expedited, and concluded by parties who come to court seeking for justice. Upon filing of cases parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim – Justice delayed is justice denied” Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should not be inordinate, unreasonable and inexcusable.
 5. Order 17 Rule 2(1) of the Civil Procedure Rules, which governs dismissal of suits for want of prosecution provides as follows:

“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.”
 6. Further Order 17 Rule 2(3) of the Civil Procedure Rules, states thus: “Any party to the suit may apply for its dismissal as provided in sub-rule 1” Clearly, the statutory threshold set out under Order 17 Rule 2 of the Civil Procedure Rules is that a suit qualifies to be dismissed for want of prosecution if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit. I have perused the file and I am satisfied that at the point the application dated August 7, 2019 was filed, the matter was last in court on April 15, 2016 after the court had delivered a ruling on a preliminary objection raised by the 1st Defendant. From the proceedings of the said date, the parties had agreed that the property subject of the suit had been sold and therefore there was no longer any need to pursue the application dated February 12, 2014. The court then directed that the matter be mention on April 29, 2016 for the parties to indicate the direction the matter was to take going forward.
 7. There was no activity until November 20, 2019 after the 1st Defendant had listed its application for hearing and it was ready to argue the same. I note that the Plaintiff’s sought for an adjournment to file a replying affidavit but the application was declined. The Plaintiff’s Counsel then made an application to have the Judge recuse himself. The file was then referred to the Presiding Judge to re-assign the file which was done. Therefore, I am satisfied that there had been an inaction for more than three (3) years which in my view is inordinate.
 8. To overcome the application, the Plaintiff ought to show that the delay was excusable. In responding to the delay, the Plaintiff averred that she was in negotiations with the 1st Respondent. I have considered the correspondences attached to the Plaintiff’s response and I do not agree that the said correspondences were negotiations. It appears there was a back and forth and the last letter is dated November 27, 2018. I agree that once the letter dated January 27, 2015 was rejected, it marked the end of any negotiations. The letter dated November 27, 2018 was never responded to and I am satisfied that the negotiations died on February 3, 2015. This is evidenced by the fact that after February 3, 2015, a ruling on the 1st Defendant’s preliminary objection was rendered on April 15, 2016.
 9. The powers of court in such an application are discretionary and just like any other discretion, it must be exercised judicially and fairly. In Ivita v 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..."

10. The 1st Defendant has indicated the prejudice it shall suffer if the suit is sustained. First, the suit is intertwined with the claim against the 2nd Defendant. I agree that the suit against the 2nd Defendant has abated by virtue that summons to enter appearance have never been served. There is no evidence that the summons dated February 20, 2014 were ever served upon the 2nd Defendant. I have gone through the affidavit of service dated February 13, 2014 sworn by one John Kombe and it does not make mention of service of any pleadings or summons upon the 2nd Defendant save for the application dated February 12, 2014. Even if I were to consider the amended plaint dated November 22, 2019, the summons dated February 26, 2020 had expired and thus the summons dated June 8, 2021 have no effect, null and void. The summons dated February 26, 2020 expired on February 26, 2021. Order 5 Rule 2 of the *Civil Procedure Rules* provides that summons other than concurrent summons are valid for twelve (12) months from the date of issue. Any party seeking extension or re-issue of summons must do so during the lifetime of the initial summons
11. In *Pauline Wanjiku Gatimu v James Kagunya Njoroge & another* [2021] eKLR, the court while dealing with a similar issue had the following to say: -

“...My understanding of the law as regards service of summons to enter appearance is that original summons is only valid for twelve months but where a party is not able to serve the summons within the stipulated period, he may seek to extend the same with concurrent summons. Concurrent summons is likened to an umbilical cord which can only be extended during the life of the original summons. A party cannot seek validity of summons after the expiry of its lifespan of 12 months. Extension of validity of summons can only happen by way of concurrent summons which are issued during the life of the original summons. A Court cannot resuscitate or bring to life summons after the expiry of twelve months...”
12. Therefore, there being no evidence of service of initial summons upon the 2nd Defendant and even the subsequent one, the suit against the 2nd Defendant has abated. The 1st Defendant may not have the benefit of the explanations that would have come from the 2nd Defendant. The witness who was to be relied on, one Ms. Rhoda Gathua left its employ. I note that an amended plaint, a statement of defence to the amended plaint and reply to the statement of defence have been filed. However, these were filed way after the current application was filed. However, the manner in which the said amendment was sought after and granted is not clear. I am satisfied that sustaining this suit would be a travesty to the 1st Defendant. I thus find merit in the application dated August 7, 2019.
13. As to the issue of costs, the same follows the event. That is what section 27 of the *Civil Procedure Act* decrees. However, this court has the discretion to direct otherwise. Though the application dated August 7, 2019 is merited, I exercise my discretion by directing that each party to bear its costs.
14. Flowing from the foregoing, I proceed to make the following orders: -
 - a. The application dated August 7, 2019 is merited and is hereby allowed.



- b. Consequently to (a) above, the suit instituted through the plaint dated 1February 2, 2014 is hereby dismissed for want of prosecution.
- c. Each party to bear their own costs.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 7TH DAY OF JULY, 2023.

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F. WANGARI

JUDGE

In the presence of:

Tindika Advocate for the Plaintiff

Cheruiyot Advocate h/b for Kongere Advocate for 1st Defendant

N/A for 2nd Defendant

Barile, Court Assistant

