



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 358 OF 2012

ANTHONY MAINA MUTAHL.....PLAINTIFF/RESPONDENT

VERSUS

CO OPERATIVE BANK OF KENYA LIMITED.....1ST DEFENDANT/APPLICANT

CREDIT REFERENCE BUREAU AFRICA LIMITED.....2ND DEFENDANT

RULING

The 1st defendant/applicant filed a notice of motion dated 9th November 2020 brought pursuant to **Order 17 Rule 2 Order 17 Rule 4 and Order 51 Rule 1** of the Civil Procedure rules seeking for orders that;

a. That this honorable court be pleased to dismiss this suit for want of prosecution

b. That costs of this application and the suit be awarded to the 1st defendant

The application was supported by the affidavit of Kenneth Wilson. It was stated that the plaintiff instituted this suit vide a plaint dated 6th July 2012. The 1st defendant entered appearance and filed its statement of defence on 15th January 2013. The 2nd defendant filed its statement of defence on 31st August 2012. Through a notice of motion dated 15th may 2018 the 1st defendant sought to strike out this suit for being premature as the plaintiff had not exhausted the dispute resolution mechanisms but the said application was dismissed. The suit was thereafter dormant as the plaintiff seems to have lost interest in the suit.

Counsel for the 1st defendant submitted that **Order 17 Rule 2** of the **Civil Procedure Rules** provides that;

“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.”

Further **Order 17 Rule 2(3)** states thus:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”

In support the 1st defendant quoted the case **Agip (Kenya) Limited v. Highland Tyres Limited (2001) KLR 630** where it was stated that there are three governing principles governing the dismissal of suits for want of prosecution

(i) Delay must be inordinate

(ii) The inordinate delay is inexcusable; and

(iii) The defendant is likely to be prejudiced by the delay.

It was submitted that there was inordinate delay because the suit has been dormant for a period exceeding 2 years as the plaintiff has not taken any steps to prosecute the matter. That it was the plaintiff’s duty to take all practicable steps for the prosecution of the suit but his conduct shows that he has lost interest and neglected to pursue his claim as no evidence has been produced to show that he made efforts to fix the matter for hearing.

The 1st defendant added that the flagrant disregard by the plaintiff to the legal process has kept it anxious through aggravated costs and inflicted hardship as the suit hovers above it.

The 2nd defendant's counsel in his submissions supported the sentiments of the 1st defendant and urged this court to dismiss the suit herein as it is clear that the plaintiff has failed to take steps to prosecute his case.

The application was opposed by the plaintiff/respondent's replying affidavit dated 29th June 2021 sworn by George Kithi. Counsel for the plaintiff argued that the application herein is premature as it does not meet the legal threshold as the application is premised on the fact that the matter was dormant for the year 2020. It is common knowledge that the Covid 19 pandemic hit the nation causing a delay in fixing the matter for hearing.

The suit herein was last in court on 28th June 2019 where the suit had been scheduled down for a notice to show cause why it should not be dismissed. The honorable Kamau J indicated that the matter was not yet due for dismissal and proceeded to fix the matter for hearing.

Counsel for the plaintiff tried several times to fix the matter for hearing in 2020 but unfortunately the Covid 19 pandemic struck and most court operations were paralyzed. The delay that was caused was therefore beyond their control. The plaintiff argued that he has suffered greatly and the issues raised in the plaint need to be determined conclusively as they revolve around fraud and defamation of the plaintiff.

Analysis and determination

The only issue for determination before this court is whether the Plaintiffs' suit should be dismissed for want of prosecution. Order 17 Rule 2(1), 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.”

Further Order 17 Rule 2(3) states thus:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”

In **Argan Wekesa Okumu vs Dima College Limited & 2 others [2015] eKLR** the court considered the principles for dismissal of a suit 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 line 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 delay. As such the 3rd 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 –vs-Kyumbu (1984) KLR 441. Further to this, the decision of whether or not 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 the same.”

It is the 1st defendant case that this matter was last in court when the Hon. Kamau J delivered her ruling on 13th December 2018. On perusal of the file this court noticed that the matter was in court on 28th June 2019. This application herein is dated 9th November 2020 and hence it has been 1 year 4 months since the matter was last in court. This therefore establishes that there was indeed a delay in the prosecution of the suit.

The plaintiff however explained the delay to have been caused by the strain on the registry due to the Covid 19 pandemic. I agree with Azangalala J. (as he then was) in **Naftali Opondo Onyango vs National Bank of Kenya Ltd [2005] eKLR**, where the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows:-

“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.”

The suit has been pending for some time now. There is no prejudice established by the 1st and 2nd defendants and therefore this court finds that it is in the interest of justice the suit herein is determined on its own merit.

Accordingly, I decline to allow the application for dismissal of the suit. The application dated 9th November 2020 is hereby dismissed with no orders as to costs. The Plaintiffs to fix the matter for hearing within ninety (90) days hereof.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2021.

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S. CHITEMBWE

JUDGE