



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT CIVIL CASE NO. 11 OF 2018

FORMERLY ELC NO. 357 OF 2015

REMMY K. SANG.....PLAINTIFF

VERSUS

FAMILY BANK & 12 OTHERS.....DEFENDANTS

RULING

1. The 1st defendant/applicant (**FAMILY BANK**) by an application dated 3rd October 2019 seeks for dismissal of suit for want of prosecution and costs. Its premised on the grounds that the 2nd defendant (**SOSIANI COMMUNITY DAIRY**) has neglected to service the loan, and the outstanding amount continues to accrue interest daily to the peril of the 1st defendant's costs, yet the plaintiff is enjoying orders of status quo orders. to the 1st defendant's detriment. That even though **REMMY K. SANG's** (the plaintiff) application for a temporary injunction was dismissed pending hearing of the main suit, he has failed to move the court since its ruling delivered on 15.6.2017. The applicant states that the motion is brought in good faith.
2. The counsel on record **LAURA ADONGO**, swore a supporting affidavit pointing out that the plaintiff had filed this suit on **14.9.2015** together with a notice of motion, dated **12.9.2015** seeking injunction orders. The court ordered that status quo be maintained and the entire application for temporary injunction was dismissed. The matter has not moved the court over one year now. The plaintiff has meanwhile continued to enjoy the status quo orders, thus delaying this matter and frustrating the applicant in its attempt to recover and or realize the outstanding loan from the plaintiff. Further, that the plaintiff's inaction is exposing the 1st defendant/applicant to economic risk and or losses.
3. The plaintiff in a replying affidavit insists that he is keen in prosecuting the suit but he has not been well for the last three years since 2017. He had therefore not given more instructions to his advocate. That this was a land and environment case, which was transferred to the civil court and it was not easy securing a date. The contends that the delay in setting down the suit for hearing was excusable and no prejudice will be occasioned to he 1st defendant. Further, that the court can exercise its discretion in the interest of justice as this instant application was filed in October when the suit had been transferred to the civil court.
4. The plaintiff laments that the continued retention of his title deed without his consent has contributed to his ill health and the fact that he may loose his property. That the application has been brought in bad faith and it did not meet the conditions to warrant dismissal for want of prosecution as was held in **Agip(Kenya)limited v. Highlands Tyres Ltd [2001] KLR 630**.
5. He deposes that this suit be allowed to proceed to full hearing and be determined on merit, citing the case of **Naftali Opondo Onyango v. National Bank of Kenya Ltd (2005) eKLR**, where the court held that it should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. He urges that the application be dismissed with costs.
6. The applicant was sued by a plaint, dated 12.9.2015 and filed on 14.9.2015. The said plaint was filed with a notice of motion application as averred by the 1st defendant.
7. The Environment and Land court issued an order on 15.6.2017 which stated as follows: ***"that this honorable court do issue an order of status quo as the plaintiff is likely to loose his property due to confusion between the company and the self help group whilst the defendant can recover his money from either the company or the self help group."***
8. The matter has never proceeded to hearing and it's for that reason that the 1st defendant filed suit to have the same dismissed with costs.
9. The plaintiff strongly opposed the said application stating that he has been sick and thus failed to instruct his advocate on record. The

court notes that he failed to annex any document to prove the same, let alone in this era, where technology has improved and the plaintiff did not require to go to the office in person to give instructions.

10. Order 17 rule 1(2) governs dismissal of suit for want of prosecution, the same 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.

Any party may apply for dismissal of suit for want of prosecution as provided under order **17 rule 2(3)** of the Civil Procedure Rules. Indeed, the plaintiff has not moved the court since the ruling was delivered in 2017. The 1st defendant deposed that he is enjoying the order to the detriment of them who is a financial institution.

11. The court has to exercise its discretion in such applications. The plaintiff urged the court to refer to the case in **Ivita v. Kyumba [1984] KLR 441**, where the court held as follows:

“the test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and excusable, and if it is, whether justice can be done despite the delay. 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 of and in discretion of the court”

12. There was delay by the plaintiff as discussed above since 2017 to the filing of the instant application. The plaintiff has given a winding explanation regarding the delay which does not really have a leg on which to firmly stand. I am aware of the sentiments expressed in **Invesco Assurance Co. Ltd v. Oyange Barrack [2018] eKLR**, regarding the exercise of discretion as follows: ***“11. Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice, regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.”***

13. I am alive to the fact that the present suit relates to property where the title being held by the 1st defendant, but surely, the claims being made about continuous ill health are not supported by any medical record, and is a lame-duck excuse which rings hollow. The applicant has pointed out to the outstanding un-serviced loan, and I cannot but take judicial notice of the financial implications in terms of accruing interest. The court in exercising its discretion is persuaded that it is in the interest of justice, regard being had to manifest conduct of the party instituting the suit that either he has lost interest in it, or the delay in prosecuting the suit is deliberate and inexcusable, and is likely to cause serious prejudice to the defendant. I hold and find that the application is merited and is allowed with the result that the suit is dismissed with costs to the defendants. The plaintiff shall bear the costs of this application

Delivered on-line upon written consent by counsel for all parties, and dated this 4th day of May 2020 at Eldoret

H.A. OMONDI

JUDGE