



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 853 OF 2009**

**MARGARET MUMBI KARANJA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NATIONAL BANK OF KENYA LTD....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**GARAM INVESTMENTS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JOSPEH MWANGI KIRIMI.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. The Ruling is pursuant to the notice of motion application dated 11<sup>th</sup> May 2018, filed by the 3<sup>rd</sup> Defendant (herein “the Applicant”) under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, Order 17 Rule 2(1) and (3) and Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law.
2. The Applicant is seeking for orders that, the suit be dismissed for want of prosecution and the costs of both the application and the suit be provided for. The Application is supported by the grounds on the face of it and the affidavit of the same date, sworn by Daniel Sitati Sifuma, an Advocate of the High Court, practicing as such with the firm of M/S Nyachae & Ashitiva Advocates.
3. He deposed that, this matter was last in Court on 17<sup>th</sup> February 2017, for directions on the hearing of the Plaintiff’s Chamber Summons Applications dated 19<sup>th</sup> November 2009 and 24<sup>th</sup> May 2010, and Notice of Motion Applications dated 7<sup>th</sup> June 2010. That on the same date, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (herein “the Respondents”), were granted leave to file an Application to lift the order of injunction granted herein on 20<sup>th</sup> November 2009.
4. However, the Respondents did not file the Application, and from 17<sup>th</sup> February 2017, the Plaintiff/Respondent has not taken any step to generally prosecute the Application and/or the suit generally, so as to bring it to a logical conclusion.
5. As such, it is clear that, the Plaintiff/Respondent has lost interest in the matter and it ought to be dismissed, as the continued pendency of the suit is prejudicial to it, in that, it is continuously being taxed on account of charges and related disbursements.
6. However, the application was opposed vide a Replying affidavit dated 24<sup>th</sup> July 2018, sworn by the Plaintiff/Respondent. She deposed that, the Court file has been missing and that her Advocate has been following it up diligently. However, despite frantic efforts to trace the same has been in vain. She argued that, the mistake on the part of the Registry should not be visited on her. Further, that although the matter has been fixed for hearing on several occasions, it has not been heard due to the Court’s failure to list it.
7. Finally, she averred that she is desirous of prosecuting the suit and the dismissal thereof will be “tantamount to condemning” her unheard and “infringing upon her right to be heard”. Therefore, in the interest of justice, the suit should be heard.
8. Subsequently, the parties disposed of the application filing submissions. I have considered the same alongside the affidavits filed in support and in opposition to thereto. I have also considered the history of the matter and find that, the suit was commenced vide a plaint dated 19<sup>th</sup> November 2009, and filed in court on 20<sup>th</sup> November 2009. Thus it is about 10 years old.
9. Further the pleadings reveal that the Plaintiff seeks for orders inter alia; that the auction held on 10<sup>th</sup> November 2009, by the 1<sup>st</sup> Defendant on behalf of the 3<sup>rd</sup> Defendant “be declared null and void” (though these words are not evident from the prayers, but are presumably to be intended bearing in mind, the following prayers) and that, the entries, at the Lands Registry, in relation to the same be

corrected accordingly.

10. Further that, the Defendants be restrained from dealing in the suit property in any manner prejudicial to the Plaintiff and that the Plaintiff be allowed to remain in possession of the suit property.

11. The matter was heard *ex parte*, on the 20<sup>th</sup> November 2009, and interim orders granted in terms of prayer (2) of the chamber summons application dated 19<sup>th</sup> November 2009. As a result thereof, the Defendants were restrained from further dealings, transferring or conveying or registration of any dealings over the suit property; LR Kajiado/Olootikoshi/Kitengela/1678, pending the hearing and determination of the suit.

12. The Court record further shows that, since then, the case has never been set down for hearing. The only Application heard was a Notice Of Motion Application dated 20<sup>th</sup> January 2010 filed by the Applicant, seeking that the firm of M/S Khaminiwa & Khaminiwa Advocates be disqualified from representing the Plaintiff or any other party proceeding against it. The ruling on that Application was delivered on 17<sup>th</sup> October 2014, whereby the Application was dismissed with costs to the Plaintiff/Respondent. It is therefore clear that, the matter has never been set down for hearing at all, since the 17<sup>th</sup> October 2014.

13. The Court record further shows that, on the said date, the Learned Counsel Dr. Khaminiwa who represents the Plaintiff/Respondent, sought for an adjournment as he was held up in Criminal Case No. 27 of 2016. The adjournment was allowed with directions given that, the three Applications be disposed of *vide* written submissions. The matter was stood over to 18<sup>th</sup> October 2016.

14. On that date, the Learned Counsel representing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was granted an adjournment to file a replying affidavit. All in all, the matter did not progress until October 2018.

15. In the meantime this Application was filed. It is brought under the procedural provisions of Order 12 Rule 2 of the Civil Procedure Rules which states:-

*“If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—*

*(a) that notice of hearing was duly served, it may proceed ex parte;*

*(b) that notice of hearing was not duly served, it shall direct a second notice to be served; or*

*(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.*

16. The Applicant in such a matter therefore ought to prove inordinate and unexplained delay in prosecuting the suit. The Respondent on the other hand has to render a reasonable and satisfactory explanation for the delay.

17. As aforesaid, there has a long delay in prosecuting the matter. Although the reason advanced is that the Court file was missing,

the Plaintiff/Respondent has annexed only one letter dated 4<sup>th</sup> April 2018 in relation to the same. This single letter cannot conclusively support the prolonged delay.

18. Even then, the letter was written in the year 2018, yet the matter has been in Court since 2009. I therefore find that the Plaintiff's explanation lacks substance.

19. Be that as it were, it is however clear that, the Defendants too have contributed to the delay in that, it has taken the 3<sup>rd</sup> Defendant/Applicant 10 years to make this Application. Similarly, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who were to file an Application to set aside the interim orders given 10 years ago, have not done so. The principles of equity states that; “he who goes to equity must go with clean hands.” And “Equity looks on that as done, which ought to be done”.

20. It is against this background and in the spirit of Article 159 2(b) of the Constitution and Section 1A and 1B of the Civil Procedure Act that I decline to allow the Application for dismissal of the suit.

21. However, in order to expedite, the hearing of this matter that, I order that, the Plaintiff should set down the suit for hearing with sixty (60) days of this order. In that regard, the parties should conduct the Case Management Conference within twenty one (21) days of this order.

22. Further, all pending Applications should be disposed of within thirty (30) days of this order; and in default of compliance with the directions given; the suit shall stand automatically dismissed for want of prosecution under Order 17 rule 2 of the Civil Procedure Rules without further recourse to the court.

23. Further, any interim orders issued herein (which should have lapsed in view of the provisions of Order 40 Rule 6 of the Civil Procedure Rules) shall automatically lapse after a period of sixty (60) days.

24. The costs of this application to abide the outcome of the suit;

25. It is so ordered.

**Dated, delivered and signed in an open Court this 6<sup>th</sup> day of March 2019.**

**G.L.NZIOKA**

**JUDGE**

In the presence of:

Ms. Wekesa for Dr. Khaminwa----- for the Plaintiff/Respondent

Mr. Gaita -----for the 1<sup>st</sup>Defendant/Applicant

No appearance for -----the 2<sup>nd</sup>and 3<sup>rd</sup> Defendants

Dennis----- Court Assistant