REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE NO. 73 OF 2018

JAMES KIPRUTO LAGAT .....1ST PLAINTIFF

ELIZABETH JEBET CHERUTICH.....2ND PLAINTIFF

VERSUS

CONSOLIDATED BANK .....RESPONDENT

RULING

1. The applicants filed this application dated 27th August 2018 seeking for orders:-

    i. That the orders of temporary injunction made on 15th April, 2016 pending the hearing and determination of this suit be discharged, reviewed, varied and or set aside.

    ii. That the plaintiffs case against the defendant be dismissed with costs for want of prosecution.

    iii. That in the alternative and without prejudice to prayer (ii) above, this honourable court be pleased to review, vary, discharge and or set aside its orders made on the 15th April, 2016 by allowing the bank to exercise its statutory power of sale upon issuance of fresh statutory notices to the plaintiffs acknowledged postal address.

    iv. That the cost of this application and the entire suit be borne by the plaintiffs/respondents

2. The application is premised on the grounds that:-

    a. The plaintiffs/respondents had been issued with a temporary injunction restraining the defendant/applicant from exercising its statutory power of sale over that parcel of land known as Baringo/Sabatia 103/155.

    b. The plaintiffs/respondents have however enjoyed the temporary orders granted without prosecuting the suit to the detriment of the defendant/applicant since the loan granted in consideration of the suit land as security continues to accumulate in arrears due to non-payment.

    c. The plaintiffs/respondents have since the grant of the injunctive orders deliberately failed to set down the suit for hearing nor taken any steps towards having the suit determined.

    d. The respondents/Applicants are using the temporary orders of injunction to restrain the applicant from recovering what is lightly and justifiably owed, as no positive efforts are being made towards settling the outstanding amounts.

    e. The delay is inordinate and consequently prejudicial to the defendant/applicant and the onus is on the Respondents/plaintiffs not only to prosecute the suit but do so expediently.

    f. The plaintiffs/Respondents have lost interest in prosecuting this case and this court should therefore dismiss the same with costs to the defendant/applicant.

    g. Lastly, that the respondent shall not be prejudiced should the application herein be allowed as they have had ample time to prosecute the suit and they will also have an opportunity to redeem the suit land upon discharge or temporary orders as the applicants shall issue them with proper statutory redemption notices.

3. The application is supported by a replying affidavit sworn by Benard Oliko and the grounds that the plaintiffs/respondents instituted this suit on 10th September 2015.

4. On 15th April, 2016 the court gave a ruling granting the plaintiffs/Respondents temporary injunction pending the determination of the suit on the grounds that there were procedural irregularities on the exercise of the defendant statutory power of sale.

5. Since the delivery of the ruling, the matter has never proceeded for hearing thus subjecting the bank to losses. That due to the temporary orders of injunction and failure by the plaintiff to prosecute their case, the defendant have been deprived off its statutory power of sale that has legally and property accrued by reasons of default on the part of the plaintiffs/Respondents.

6. The principal debtor and the plaintiff have not taken any steps towards redeeming the loan amount and maintaining his suit without prosecuting it is an abuse of the court process.

7. The plaintiffs/Respondents are guilty of in ordinate delay and indolence and should not be excused for their inaction.

8, The application is opposed through a replying affidavit sworn by David Tanui that negotiations have been going on so as to settle the matter out of court and the last date was on 4th April 2018.

9. Fixing a hearing date while negotiations were ongoing, would have been construed by the defendants as in bad faith for all intent and purpose. The matter ought to have been withdrawn as the principle debtor has not reneged on payment.

10. It is not the preserve of the plaintiffs/Respondents to set the matter down for hearing, as the defendants who upon feeling that negotiations were not bearing fruits should have gone ahead and set down the case for hearing.

11. Lastly, the court should not be drawn into favouring one side of the negotiators, its role is impartial and should be allowed to remain as such. If the defendants feel that the negotiations have broken down, should have fixed the matter for hearing.

12. In their submissions, the applicants stated that the main suit has been dormant for over two years and at the end the plaintiffs/Respondents have failed to carry out their duty to prosecute the suit expeditiously, to the detriment for the defendant.

13. Despite enjoying the interim orders, the plaintiffs have not taken any steps towards redemption of the loan account and thus the applicant is exposed to irreparable losses and there is a risk of outstanding loan overrunning.

14. The response is made by a stranger to the suit and therefore cannot depose to the pleadings on their behalf. The duty to prosecute suit lies with the plaintiffs and when such plaintiff fails to do so for a period exceeding one year, the defendant may apply for its dismissal.

15. There is no duty imposed upon the defendant to prosecute a defence. Its prayers are to dismiss the suit for want of prosecution.

16. Under *Order 40 rule 6* when suit to which an order of injunction has been granted and it is not determined within 12 months then any order of injunction issued ought to lapse unless the court for sufficient reason orders otherwise.

17. Further, that the applicant be allowed to re-issue statutory notices and sell the property should the plaintiff fail to redeem the property upon re-issue of notices.

18. Lastly, that the plaintiffs/defendants have not offered any reasonable explanation as to why the suit herein should not be dismissed for want of prosecution.

19. The interim orders issued by the court lapsed and ought to be discharged and/or set aside.

20. The respondent on their part submitted that immediately the stay orders were granted the parties started a negotiation in a bid to settle the matter.

21. That if the respondents went ahead to fix a hearing date, the applicant would have construed it as a sign of bad faith on the part of the plaintiffs.

22. The applicants had communicated to the principal debtor in their letter dated 14/4/2018 that the matter should be withdrawn, the parties having reached an agreement.

23. The main issues for determination in this application are:

a. Whether the orders issued on 15th April 2016 should be discharged, reviewed, varied or set aside.

b. Whether the plaintiffs suit should be dismissed for want of prosecution.

24. The jurisdiction of the court for review of orders is provided for in Order 45 rule 1(1) of the Civil Procedure Rules which provides:

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree of order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

25. The basis for an application for review, variation or setting aside of an order may be the discovery of new and important matters or evidence which after due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. An application may also be made on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

26. The Respondent/applicant has not placed any new and important matter or evidence before this court for consideration.

27. The applicant has not demonstrated that there is an error apparent on the face of the record and no other sufficient reason has been placed before the court to warrant the review, variation or setting aside of the order of 15.4.2016.

28. 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."

29. Further order 17 rule 2(3) states thus:

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

30. There is no dispute, in respect to the law on dismissal of suits for want of prosecution. Whether to exercise the power of dismissal for want of prosecution under order 17 is, however, a matter that is within the discretion of the court.

31. In ***Nilesh Premchand Mulji & Another t/a Ketan Emporium v M.D Popat and others & Another (2016) eKLR,*** the court stated 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. This is what the case of Ivita vs Kyumba (1984) KLR 441 espoused on, that:

"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 inexcusable, 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 the discretion of the court."

32. 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- Kyumba (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."

33. In ***Naftali Opondo Onyango vs National Bank of Kenya Ltd (2005) eKLR,*** 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."

…..Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate."

34. In the present case, a period of 2 years had lapsed between the filing of the suit and the filing of the present application. Order 17 rule 2 provides that a matter should have been pending for 12 months before the court, either on its own motion or on the application by a party, makes an order for its dismissal for want of prosecution.

35. The respondent has raised a reasonable explanation for the delay, that parties were negotiating and before such had collapsed or failed it would have been an expression of bad faith on their part to set the matter down for hearing. Given the explanation, and in interest of substantive justice, I do disallow the application. The Respondent should set it down for hearing by taking a hearing date within the next 7 days.

Costs in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 1st day of October, 2019.

In the presence of:-

Mr. Nyamweya for Plaintiff/Respondent absent

Ms Ndambuki for defendants/Applicants

Ms Abigael - Court clerk