REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 28 OF 2013

1. ECOCARE INTERNATIONAL LIMITED

2. LEMMY KABURI MBOGORI

3. MARY KANYIRI MURIUKI............................PLAINTIFFS

-Versus-

CHASE BANK LIMITED....................................DEFENDANT

RULING

1. This is a Ruling on the application dated 30.11.2018 by the Defendant seeking for the following Orders:-

> *1. The Plaintiff suit against the Defendant be dismissed for want of prosecution.*
>
> *2. Without prejudice to (1) above, and in the alternative, the honourable Court be pleased to vacate or discharge the orders of injunction granted on the 11.8.2014 and any other injunctive order granted in the above matter.*

2. The grounds supporting the application are contained in the Affidavit sworn on the 30.11.2018 by **Mr. Alex Thande,** the Senior Manager – Debt Recovery, to the Defendant Bank herein. Those same grounds are on the face of the application.

3. It is deponed in the affidavit in support that the Plaintiffs were granted an ex-parte injunction on the 11.8.2014 restraining the Defendant from exercising its statutory power of sale over **Land Reference No. Mombasa/BlockXIII/68 and Mombasa/Section II/9 Mainland North** pending the hearing and determination of the plaintiffs' Application dated 11.8.2014.

4. It is further deponed that the matter was last in Court on the 15.12.2015 for hearing of the plaintiffs Application for injunction when the Court did not sit. Since then, the Plaintiff has not taken any step to have the Application or the suit heard and it is now close to three (3) years since and therefore, the delay of three (3) years is inordinate.

5 it is further averred and deponed that the plaintiffs have intentionally abused the ex-parte injunction granted on the 11.8.2014 by failing to make any deposit towards the repayment and reduction of the loan that has now accrued and continue to accrue outstripping the value of the security held by the defendant.

6. In accordance with the provisions of Order 40 Rule 6 of the Civil Procedure Rules, the defendant asserts, the injunctive order then issued lapsed on 11.8.2015, and is therefore null and void. The 1st Defendant deponed that it would be in the interest of justice that the suit be dismissed with costs and the injunction be discharged.

The Response by the Plaintiff

7. The Plaintiffs opposed the application via a Replying Affidavit sworn on the 3.10.2019 wherein it averred that the delay in prosecuting the matter was not deliberate but due to unavoidable circumstances on the part of the Plaintiffs relating to their legal representation in that the counsel who used to represent them passed on and it took considerable time to retrieve the their file from the offices of that previous counsel.

8. It further averred that the Plaintiffs have always been willing and ready to prosecute this matter and they are willing to abide by any condition that this Court will impose in granting them an opportunity to prosecute this case.

The Issues and Determination

9. I have carefully considered the pleadings filed and oral submissions made by Counsel. The issue for determination is whether there has been inordinate delay in prosecuting the suit herein for which no reasonable explanation has been offered, to render the suit liable for dismissal.

10. Order 17 Rule 2 of the Civil Procedure Rules provides for dismissal of a suit for want of prosecution in the following words:

> ***"2. (1) 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.***
>
> ***(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.***
>
> ***(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.***
>
> ***(4) The court may dismiss the suit for non-compliance with any direction given under this Order."***

11. In the case of **Ivita vs Kyumbu [1975]e KLR** it was held:-

> ***"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 he 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."***

12. Earlier on, the then East African Court of Appeal in case of **Mukisa Biscuit Manufacturing -vs- West End Distributors (1969) EA 969** held that it is the Plaintiff's duty to bring the suit to early trial and he cannot absolve himself of this primary duty.

13. The decision in the case of **Ivita vs. Kyumbu (supra)** set out the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution. This is firstly, whether the delay is prolonged and inexcusable, and, secondly if the delay is excusable, whether justice can still be done to the parties despite the delay. This decision is still applicable even after the coming into force of the Constitution of 2010, as the provisions of Order 17 Rule 2 of the Civil Procedure Rules have only been modified with regard to the threshold required for culpable delay to arise, which is now one year instead of three months as was previously the case.

14. Relying on the principle in **Ivita vs. Kyumbu (supra)** I will determine the first limb of the principle which is whether the plaintiff taken any step to prosecute it Application dated 17th June 2015?

15. A step referred to in that Rule has received judicial interpretation severally but I chose to be guided by one of such cases. In **NEW KENYA CO-OPERATIVE CREMERIES LTD V CITY COUNCIL OF NAIROBI & 2 OTHERS [2012]e KLR** *Justice P. Nyamweya* held:

> ***"The step envisaged in Civil Procedure Rules is a step taken on the record, as was held in VICTORY CONSTRUCTION V DUGGAL [1962] EA 697. The filing of the Notice of Withdrawal is clearly reflected on the court record having been entered on 30th June 2011, and the same was indeed filed on the same date. The said filing therefore suffices as a step for purpose of Order 17 Rule 2 of the Civil Procedure Rules."***

16. A perusal of the court record in this suit shows that the last step taken herein before the filing of the Defendant's application was this suit being taken out from the cause list of 15.12.2014 because the Court was not sitting on that day. However, parties were directed to fix fresh dates at the registry. Therefore at the time of the filing of the Defendants' Notice of Motion on 30.112018 there had been a delay of more than 3 years in prosecuting the suit. I consider that inordinate delay which renders the suit amenable for dismissal under Order 17 Rule 2 of the Civil Procedure Rules.

17. On the second limb whether the delay is excusable and if justice can still be done to the parties despite the delay, I have taken regard of the plaintiff's statement that the reason for the delay is that Counsel who was previously on record passed on and it took some considerable amount of time to retrieve the file from the offices of the previous counsel. Even though, the Defendant has not controverted the statement on the death of previous counsel on record by the Plaintiff it is a matter the court must evaluate and determine if plausible. This Court has to carefully consider all the circumstances prevailing.

18. The dismissal of a suit denies a litigant the opportunity to be heard and as such, his or her rights under the provisions of Article 50 of the Constitution are put in jeopardy. Equally, the Court would not allow an indolent and sluggard litigant to fritter away judicial time. It is when considering this balance that the Court would exercise its discretion in a manner that would not violate the rights of the litigants to fair trial, and would in turn, not leave such indolent parties to walk without reprimand.

19. In **Utalii Transport Company Limited & 3 others v NIC Bank Limited & Another [2014] eKLR** it was held *inter alia*;

“But, the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgment-seat. It is, therefore, a matter of discretion by the court.”

20. In this matter the court notes that there has not been due explanation by dates when the former counsel died to enable the court evaluate how that unfortunate happening sits with the evident delay. However, I have been to this station since the last quarter of 2015 and do recall that the advocate died in late 2017. By that time the suit had become ripe for dismissal for want of prosecution. It thus cannot be said that it is the death that has occasioned the delay. The delay had occurred before death and continued thereafter yet the suit belongs to the litigant not his counsel. I do find the explanation offered to be implausible and not acceptable. On the foregoing findings, I do find the application to be merited and therefore accede to it and dismiss the plaintiffs’ suit with costs on account of want of prosecution.

21. There is a last matter the plaintiff argued on the interim injunction which I consider to have been unnecessary but this situation keep recurring and I thus consider it necessary to make a comment. I consider the arguments unnecessary because the law is expressed in mandatory terms that no ex-parte interim can last more than fourteen days and no injunction pending suit can last for more that twelve months. I do note that the Plaintiffs have not controverted the prayer to discharge the injunction at all in their Replying Affidavit sworn on the 3.10.2019. They have also failed to demonstrate, as a sign of good faith, that indeed they have been repaying the sum of Kshs. 26,963,068.94 which they admitted in the Application for injunction. That may be an indication that the position of the law is so clear as to be unchallengeable. In my determination, Order 40 Rules 4(2) and 6 of the Civil Procedure Rules require no novel interpretation. In fact the latter provision is not applicable here. It is not applicable because no injunction had been issued pending outcome of the suit. The ex-parte orders issued were issued pursuant to Rule 4(1). Applying that provision to the facts of this case, I do find that by operation of the law the interim orders given ex-parte on the 11.08.2014 could not last more than 14 days, did lapse on the 15.08.2014. That must have been the reason that when parties appeared before the court on the date set for inters partes hearing, on 12.11.2014, there were no orders to be extended and the judge ordered, afresh, that status quo respecting the suit property be maintained. If any order was to require being set aside, it could only be the orders of 12.11.2014. but even that order for status quo could not have been expected to last in perpetuity but was due for extension on the date fixed next when no extension was sought nor granted. Accordingly, the alternative prayer was wholly mistaken and cannot be granted.

22. In conclusion, the application succeeds and the suit is dismissed with costs for want of prosecution.

Dated, Signed and Delivered at Mombasa this 13th day December 2019

P J O Otieno

Judge