REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 48 OF 2009

GEORGE OMWANZA KINANGA.....APPELLANT/RESPONDENT

VERUSUS

FAMILY BANK LIMITED.....DEFENDANT

RULING

1. This suit was filed on the 10th February 2009 by the plaintiff seeking injunctive orders against the defendant bank restraining the bank from selling or dealing in any way with his property that had been held out as security and a charge registered in its favour.

Temporary orders of injunction were granted pending hearing and determination of the suit on the 23rd February 2009 which orders have over the period been extended over and over.

From the record of proceedings as stated in the defendants affidavit in support of the application, the applicant had not been actively pursuing hearing of the case.

2. By its application dated 2nd March 2016, the Defendant Family Bank Limited pursuant to **Order 17 Rule 2(3) and Order 51** of t**he Civil Procedure Rules** seeks an order of dismissal of the suit with costs for want of prosecution upon grounds that it is over one year since the matter was last in court and that the plaintiff has failed to set down or take a hearing date for the suit and thus had lost interest in the same and the continued pendancy of the case in court is prejudicial to its interests.

3. In opposing the application, the plaintiff filed a Replying Affidavit sworn on the 30th June 2016. Other than his disposition that he has an interest in the suit, it is not explained why since June 2011 no action has been taken to progress the suit. Equally, in his written submissions by counsel, no explanation has been tendered to explain the delay in prosecuting the case to finality.

4. The applicant/defendant in its submissions has taken the court through a chronology of court proceedings.

I have also perused the proceedings on record.

The last time this case was listed for hearing was on the 22nd June 2011 when Hon. Emukule J directed counsel to take a hearing date for the suit at the registry on priority basis. No such date was taken. The plaintiff was only awoken from the peaceful sleep by the application filed by the defendant on the 2nd March 2016, a period of almost five years.

5**. Order 17 rule 2 of Civil Procedure Rules** provides:

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.

(3) any party to the suit may apply for its dismissal provided in sub-rule 1.

6. For a party to succeed in an application for dismissal of a suit for want of prosecution, it must be shown that:

(a) the delay is inordinate

(b) the inordinate delay is inexcusable or

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

The above principles were stated in the case **Ivita -vs- Kyumbu**(**1984) e KLR,** and followed in numerous judicial pronouncements.

7. The Respondent/Plaintiff has not stated any reason at all why from 22nd June 2011 no action was taken. A case belongs to the plaintiff who is the one who drugged the defendant to court. It is his duty to take all necessary steps to progress the suit. Stating that the defendant could as well have taken a hearing date is bad argument in both fact and law.

The delay for five years without any plausible explanation can not be excusable, it is inordinate.

8. The plaintiff has been riding on and enjoying the orders of temporary injunction since 23rd February 2009 which in any event expired 12 months from the date of the grant or extension that is the 22nd June 2011 as provided in **Order 40 rule 6 of the Civil** Procedure Rules.

There is no doubt that the defendant is prejudiced by the inordinate delay.

The I**vita -vs- Kyumbu** case further went to state that:

"So 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 plaintiff and the defendants so both parties to the suit must be considered and the position of the judge too---."

9. In my considered view, there is no justice by allowing the case to remain in the court registry shelves, adding to the backlog for more than it has. There is no justice at all to the defendant. The plaintiff has completely lost interest in the case. It must be dismissed for want of prosecution.

10. I therefore allow the defendants application dated 2nd March 2016 and order that the plaintiff's suit is hereby dismissed with costs for want of prosecution. The plaintiff will also pay costs of this application.

Dated, Signed and Delivered this 16th Day of February 2017.

J.N. MULWA

JUDGE