



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 296 OF 2008

DR. JOSEPH ARAP NG'OK.....1ST PLAINTIFF/RESPONDENT

ALICE NG'OK.....2ND PLAINTIFF/RESPONDENT

-VERSUS-

EABS BANK LIMITED.....DEFENDANT/APPLICANT

RULING

[1] The Notice of Motion dated **24 February 2016** was brought herein by the Defendant for orders that the Plaintiffs' suit be dismissed with costs for want of prosecution. It was filed pursuant to **Order 17 Rule 2(3)** of the **Civil Procedure Rules, 2010**, on the ground that, for a period exceeding one year now, the Plaintiffs have not made any application or taken any step towards the prosecution of this suit. The application is supported by the Affidavit of the Defendant's Advocate, **Mr. Daniel Kimani Kanyagia**, annexed thereto, sworn on **24 February 2016**.

[2] It is the contention of the Defendant that whereas this suit was commenced on **3 June 2008** under Certificate of Urgency, the Plaintiffs have not been eager to have it prosecuted to conclusion. The Defendant averred that it was for that reason that it successfully moved the Court for the dismissal of the suit vide its application dated **29 October 2013**, but that the Plaintiffs thereafter filed an application dated **17 April 2014** seeking its reinstatement. It was further averred that the Plaintiffs' application was conditionally allowed by the Court in a Ruling delivered on **28 January 2015**, a copy of which was annexed to the application. The Defendant contends that, in spite of the magnanimity of the Court, the Plaintiffs reverted to indolence and have let time pass without taking any action towards the prosecution of their suit.

[3] It was further the contention of the Defendant that the continued pendency of this suit is prejudicial to it, in that it continues to suffer the anxiety of defending the suit even as it stands the risk of losing potential witnesses and evidence due to lapse of time. It was therefore urged, on behalf of the Defendant, that this suit be dismissed with costs for want of prosecution.

[4] In opposition to the application, the Plaintiffs relied on the Replying Affidavit sworn on **22 April 2016** by the 1st Plaintiff. He deponed that after the Ruling of the Court of **28 January 2015**, they embarked on negotiations with the Defendant with a view of an amicable settlement of this dispute; and that pursuant to those negotiations, they made a proposal to the bank towards the end of **March 2016**. It was thus their case that, in the circumstances, it was dishonest for the Defendant to make and prosecute the instant application. The Plaintiffs further averred that the suit property is well worth over **Kshs. 30**

million, and that it would be unfair and unjust to dispose of it for a debt of **Kshs. 1,208,000/=**, which they are willing to pay off in 90 days as per their proposal marked **Annexure JK1**.

[5] The Defendant, in response to the Replying Affidavit, filed the Supplementary Affidavit sworn by **Jack Kimathi**, contending that no plausible explanation had been proffered by the Plaintiffs for their inaction of over one year. The Defendant drew the Court's attention to the fact that the outstanding sums continue to attract interest, and therefore is more that the **Kshs. 1,208,000** referred to in the letter marked **JK 1**.

[6] The application was urged ex parte on **19 September 2016** after the Plaintiffs failed to attend court on a date that was taken by consent. Having perused the pleadings and the proceedings to date, there is no gainsaying that this is the second time this suit is coming up for dismissal for want of prosecution; or that since the Ruling of **28 January 2015**, by which the suit was reinstated after the initial dismissal, no steps have been taken by the Plaintiffs to progress the suit. In that Ruling, the Court directed that steps be taken by the parties to prepare the suit for trial, and that the suit would stand dismissed in the event of failure to comply with the court's directions and/or orders, which orders included the payment of thrown away costs.

[7] Needless to say that the Plaintiffs did not take any step towards preparing the suit for hearing. Although they did show that negotiations were ongoing between the parties, and that a proposal for settlement of the outstanding sums of money had been made by them, that, by itself was no excuse for not preparing the suit for trial as directed by the Court. It is noteworthy too that the proposal was only made after the instant application had been filed, and therefore, I would agree with the Defence that no explanation had been given to explain the Plaintiff's inaction between **28 January 2015** and **8 April 2016** when the proposal per **JK1** was made.

[8] Lethargy, in whatever form it may present itself in a suit, must be deprecated, and the alacrity demonstrated by the Defendant herein is to be commended. Indeed in the case of **Nilani –vs- Patel (1969) EA page 341**, the Court made the observation that;

“it is only too trite to say that as in every civil suit, it is the Plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a Defendant ought to invoke the process of the court towards that end as soon as is convenient by either applying for its dismissal or setting down the suit for hearing.....Delay in these cases is much to be deplored. It is the duty of the Plaintiff's advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died...documents may have been mislaid, lost, destroyed and the memory tends to fade” (emphasis supplied)

[9] In the result, I would allow the Defendant's application dated **24 February 2016** and grant orders as prayed therein, with the result that the Plaintiffs' suit is hereby dismissed with costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 4th DAY OF NOVEMBER, 2016

OLGA SEWE

JUDGE