



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 454 OF 2008

EMILY WAMBUI KABUTHU.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....1ST DEFENDANT

DUNCAN MUGAMBI T/A WRIGHT AUCTIONEER.....2ND DEFENDANT

R U L I N G

The application before the court is the 1st Defendant Notice of Motion dated 1st February 2011, brought under Order 2 Rules 15 (1)(a), (b) and (d) and Order 17 Rule 2 (1) (3) (4) of the Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the Civil Procedure Act. It sought the following reliefs: -

1. **That the honorable court be pleased to strikes out the plaint herein and consequently dismiss the suit.**
2. **That in the alternative, this honorable court be pleased to dismiss the suit for want of prosecution.**
3. **That the cost of the application and the suit be borne by the Plaintiff.**
4. **That other orders be granted as the honorable court shall deem just and appropriate in the circumstances of this case.**

The application is supported by the affidavit sworn by Elizabeth Hinga, the Head of Debt Recovery unit of the 1st Defendant. She states that the claim herein arose from the execution of a decree in **High Court Civil Case Number 803 of 1999**. She claims an auctioneer acting as bailiff in the execution of lawful acts and in the capacity of an agent of the court and the decree holder, cannot under ordinary circumstances be held liable for his official conduct as such agent of the court. She states that the particulars of fraud pleaded by the Plaintiff, could be properly and effectively corrected by the court issuing the decree.

The Applicant further claims that the cause of action arose on 15th October 2005 and the same became time barred at the fall of midnight on the 14th October 2008 which marked the end of three years by dint of section 4(2) of the Limitation of Action Act, Chapter 22 of Laws of Kenya. She further stated that since the filing of the statement of defence in 25th November, 2008, the Plaintiff has not taken any steps to prosecute the matter for two years. She asserts that the Plaintiff has lost interest in this matter.

The application is opposed. The Respondent/Plaintiff's case is that she instituted the impending suit

against the Defendant vide a plaint dated 2nd September 2008 claiming delivery up of her lawfully attached and sold goods. She states that the current suit arises out of the conduct of the Defendant in the execution and enforcement of a decree obtained in **Milimani Commercial Court, Civil case No. 803 of 1999, Diamond Trust Bank Ltd Versus John Kimani Waichigo**. The 2nd Defendant's servant acting on the instructions of the 1st Defendant, unlawfully attached and sold her goods at a purported public auction. She lodged a complaint with the auctioneers licensing board which investigated the conduct of the 2nd Defendant in relation to the execution of the said court decree being **Disciplinary Cause No 16 of 2005, Emily Wambui Kabuthi vs Mugambi T/a Wright Auctioneers**. The Board held that the auctioneer acted contrary to the prescribed rules governing the auctioneers.

The Respondent also stated that a court bailiff is a court officer and is only protected from a suit of a lawful or authorized act done in execution of orders of the court. The Respondent further argued that the question whether a court bailiff should be exempted from blame is a point of law suitable to be canvassed at a full hearing and not at the interlocutory stage. The Respondent maintains her complaint at the Auctioneer Licensing Board informs the current suit and should continue to do so until the conclusion of the case.

I have set out the respective parties' positions as above which positions I have carefully considered.

The Applicant has submitted that the suit is statute barred on account of the provisions of **Section 4(2) of Limitation Act** which provides that an action founded in tort may not be brought after the end of three years from the date the cause of action accrued. The Applicant further submitted that the auction occurred on the 15th October, 2005 and she was expected to have filed his suit on 14th October, 2008.

The Respondent on her part submitted that the suit was filed on 15th October 2008, and the tortious actions were allegedly perpetrated about 15th day of October 2005. She submitted that the date when the cause of action arose is not certain and thus the same cannot be used as an excuse to crucify the Plaintiff. She further submits that if the court assumes the 15th October 2005 to be the exact date when the cause of action arose the said delay which is barely even more than 24 hours is not inordinate delay and the same is excusable.

In my view the cause of action arose on 15th October 2005 when the 2nd Respondent agents/servant sold the attached goods in an auction. In the plaint dated 2nd September 2008, the Respondent/Plaintiff claim clearly lies in tort and an action founded on tort has a limitation of three years according to Section 4(2) of the Limitation Act. The current suit was filed on 10th October 2008, three years after the cause of action arose.

A cause of action that is time barred can be saved if the conditions set out in **Section 27 of the Limitation of Actions Act** are fulfilled. That section provides as follows:

(1) Section 4 (2) does not afford a defence to an action founded on tort where -

(a) The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of

action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Plaintiff until a date which –

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect -

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

The plain reading of the section shows that limitation period under section 4(2) of the said Act can be extended under certain circumstances and that extension of time only applies to claims made in tort and even in tort the claims must be in respect of claims for personal injuries arising from negligence, nuisance or breach of duty. Also in cases where the claim falls under the aforesaid provisions time will not be extended unless the Applicant proves that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge of the Plaintiff. The Plaintiff did not attempt to bring himself under the saving part of Section 27 of the Limitation of Action Act.

The Applicant has also submitted that the suit should be dismissed for want of prosecution. They claim since the suit was filed on 15th October 2008, the Respondent has not prosecuted the matter until the instant application which was filed on 10th March 2011. The Respondent on the other hand submits that the reasons for delay are valid and excusable. She stated that the decision of the board is tangible evidence that will be placed before the court as evidence and since the said decision has been challenged the same has inadvertently delayed the prosecution of the suit.

The law on dismissal of a suit for want of prosecution is set out in **Order 17 Rule 2 of the Civil Procedure Rules** which provides as follows:

“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.”

From the above provision, there are two tests to be satisfied for the dismissal of a suit for want of prosecution. The first one is whether the threshold of one year's delay in prosecuting a suit has been met. The second test is that the delay must be inexcusable.

The current suit was filed in 15th October 2008 and the Applicant filed its defence on 21st November 2008. Since then the Respondent did not take any steps to prosecute the matter until the Applicant filed the current application. The reasons given for the delay are not satisfactory. If the Respondent was interested in prosecuting this matter she could have done so. These court is bound by **Article 159 (2) a) & (b) of the Constitution** to do justice to all and not to delay justice. The delay in this case is inexcusable and inordinate and the reasons for such delay have not been explained sufficiently.

In the circumstances of this case accordingly, the court finds that the suit was first and foremost time-barred by the time it was filed. Secondly, no proper or reasonable causes have been demonstrated to prevent it from being dismissed for want of prosecution. For either or both grounds, this application has no merit and is hereby struck-out and dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 13th day of May, 2015.

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D A ONYANCHA

JUDGE