



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL SUIT NO. 59 OF 2009**

MURUGU M'TWARUCHIU.....1ST PLAINTIFF

BAITURU BARON INVESTMENT LTD.....2ND PLAINTIFF

VERSUS

EQUITY BANK LTD.....1ST DEFENDANT

ZAIN KENYA LTD.....2ND DEFENDANT

ROBERT KINYUA GACHAU.....3RD DEFENDANT

**R U L I N G**

This application is dated 20.11.2013 and seeks orders:

- 1. THAT this Honourable court be pleased to dismiss this suit for want of prosecution.**
- 2. THAT the costs of this application be provided for.**

The application is supported by an affidavit sworn by John Njenga for the 1st defendant and has the following grounds:

- (i) THAT the Plaintiff's Advocates have not taken any step towards the prosecution of this suit for one year.**
- (ii) THAT the Plaintiff have (sic) failed to comply with the orders of this honourable court that they expedite the prosecution of their suit.**
- (iii) THAT the Plaintiffs have lost interest in their claim and are not desirous to have the matter determined on its merits.**
- (iv) THAT when a similar application to dismiss the suit, was heard over an year ago the plaintiffs pleaded with the court to be allowed to prosecute the matter, an undertaking they have since taken for granted, ignored and/or neglected.**
- (v) THAT in furtherance of the overriding objective all claims be disposed off expeditiously as dismissal would not be unwarranted or draconian in the circumstances of this suit as the plaintiffs have been blatantly indolent.**

***(vi) THAT the delay in vindication of the defendants particularly the 1st defendant is a clear case of justice delayed and justice ultimately denied.***

***(vii) THAT the honourable court has the power to grant the orders prayed for.***

On 24th day of May, 2012, in a ruling concerning two applications dated 8th March, 2012 and 26th March, 2012 respectively, the Hon. J. A. Makau Judge refused to dismiss this suit and gave the following orders:

***1. I order that the plaintiffs and defendants do within the next 21 days file and exchange a list of witnesses to be called at trial, written statements signed by witnesses excluding expert witnesses and all copies of documents to be relied on at the trial.***

***2. I further order that parties do take steps within the next 45 days to comply with Order 11 of Civil Procedure Rules and set this case down for hearing.***

***3. Due to peculiar circumstances of this case costs shall be in the cause.***

This ruling was delivered over 3 years ago. In his submissions the defendant buttressed the grounds set out in his application. He pointed out that the 1st and 2nd defendants had on different occasions applied to this court for orders to dismiss this suit for want of prosecution. He proffers that on all these occasions the plaintiff was given fighting chances, all of which the plaintiffs had squandered.

The defendants have submitted that there has been inordinate delay in the prosecution of the suit and that the suit merits dismissal in terms of Order 17 of the Civil Procedure Rules. He argues that the plaintiff has not shown any cause that can satisfy the court not to dismiss the suit. He says that for well over one year the plaintiff had not taken a step in the prosecution of his case as required by the law. He points out that despite an order by the Hon Justice Makau requiring the plaintiff to comply with Order 11 and fix the matter for hearing he had not done so.

The 1st defendant further submits that equity does not aid the indolent (***vigilantibus non dormientibus acqutitas subvenit***). He further submits that the 1st defendant is suffering extreme prejudice having given a loan to the Plaintiff who had defaulted in payment and then through a Court process halted the sale of a collateral. He stated that the reality was that the Plaintiff had failed to prosecute the suit and had also failed to pay the balance of the Loan amount.

Finally the 1st defendant opined that the delay to prosecute the suit by the Plaintiff was an abuse of the Court Process which should not be condoned to continue as the 1st defendant had suffered extreme damage and loss through the Plaintiff's inexplicable and unreasonable delay in facilitating the hearing and determination of this suit, which event would ultimately vindicate his claim.

The Plaintiff has opposed the application and cited the case of Utalii Transport Company Limited and 3 others Versus NIC Bank & Another (Nairobi HCCC No 32 of 2010) as having laid down the applicable principles that guide the Court when considering an application of this nature as:-

***i. Whether there was inordinate delay on the part of the Plaintiffs in prosecuting the case.***

***ii. Whether the delay is intentional, contumelious, and therefore inexcusable.***

***iii. Whether the delay is an abuse of the Court process.***

***iv. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant.***

***v. What prejudice will the dismissal occasion to the Plaintiff?***

*vi. Whether the Plaintiff has offered a reasonable explanation for the delay.*

*vii. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the Court.*

The plaintiff submits that there has not been inordinate delay in prosecution of this suit. He has cited the case of **Utalii Transport Company Ltd (Supra)** for his submission that for a suit to be dismissed for want of prosecution the inordinate delay should be one which is beyond acceptable limits.

The Plaintiff has submitted that the delay in the prosecution of this case was not intentional, contumelious and hence inexcusable. He has blamed his former firm of Advocates for continued failure to fix the suit for hearing . He cites the case of **Charles M. Kahuruka Versus Wilson Mugo Mwangi [Nairobi HCCC No. 455 of 2012]** as his authority that a party, unless he had contributed to his mistake ought not to be punished for the mistake of his Counsel. The plaintiff extends the blame for delay in prosecution of the suit to the defendant and cites the case of **Empress Dandeger Co. Ltd. Versus Kenya Cultural Centre (Nairobi H.C.C.C 670 of 2001)** as his authority for his proposition.

The Plaintiff has also submitted that the delay in the prosecution of the suit was not an abuse of the Court process. He further submits the non-dismissal of the suit will not prejudice the defendant as dismissal, as demonstrated in his pleadings would lead to the public auction of his properties, one of which was his house. The Plaintiff has said that he had offered reasonable cause as to why this suit should not be dismissed and has once again sought to ascribe the blame to the plaintiffs former counsel. He has cited the cases of **Common Carrier Satellite Service Ltd Versus Telkom Limited [Nairobi H.C.C.C NO. 114 of 2006]**, **Janet Gacheri Kithela versus Nation Media Group and Another [NAIROBI H.C.C.C NO. 311 of 2013]** and **Umbisa Moses Gwehona versus Seventh Day Adventist Church of East Africa Union [Nairobi H.C.C.C No. 254 of 2009]** in support of the submission that litigants ought not to be punished because of the infractions of their Counsels.

Finally the plaintiff has submitted that if the Court finds that there was delay, the interest of justice dictates that the suit should not be dismissed as his prime properties would be sold by public auction. He has also alleged that the defendants had colluded to defraud the Plaintiff. He has submitted that the law gives the Court unfettered discretion to exercise leniency and not to dismiss the suit. He also submits that Section 159 ( 2) enjoins the Court to administer substantial justice without regard to technicalities.

The 1st defendant has cited the case of **Fitzpatrick Versus Bartner & Co Ltd (1967) 2 All ER 657** at page 659 for the proposition that “ **it is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the Courts should be concluded with expedition**”.

The cases of **Safina Ltd Versus Jamnadas K Ltd [2006] e KLR**, **Peter Mwendia Muinami Versus Barclays Bank Ltd, H.C.C.C No. 1046 of 1999**, **Mukisa Biscuits Co. Versus West End Distributors [1969] EA 696**, **Ivita V Kyome [1984] KLR 44** and **Allen Versus Sir Alfred MCApine and Sons Ltd [1968 / ALLER 543]** have been proffered as authorities on consequences of non diligent and inexcusable delays in prosecution of cases by Plaintiff's.

The 1st defendant quotes **Salmon, L.J** as case of **Allen Versus Sir Alfred MC Alpine & Sons Limited(Supra)**:

**“ a defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with rules of the superior Court or (b) under the Courts inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: in order for such an application to succeed , the defendant must show:-**

***1.THAT there has been an inordinate delay, it would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and lesser period of the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary***

*infinitely from case to case but it should not be too difficult to recognize inordinate delay when this occurs.*

**2. THAT this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.**

**3. THAT the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the Plaintiff, or between each other, or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater likelihood of serious prejudice at the trial.”**

I have carefully examined the pleadings and the averments of the parties. I have also carefully considered the authorities the parties have submitted to buttress their respective propositions. I find that all the authorities have merit in the right circumstances. However, cases have their distinct peculiarities and may not always come squarely within the ambits for which they are proffered as authorities.

Regarding the Plaintiff's submissions, it is noted that this Court had dismissed several earlier applications for dismissal for want of prosecution. The last dismissal of such an attempt was through a ruling delivered by the Hon. Justice Makau, Judge, on 24/05/2012. Upon perusal of the ruling, it seems to me that one of the reasons for his decision not to dismiss the suit was predicated upon a directive issued to the Registry Staff that only suits filed before the year 2007 were being listed for consideration. Another matter mentioned by the Hon. Judge was the Plaintiffs' contention that the Civil Procedure Rules , 2010, did not apply retroactively and had been promulgated after the suit had been filed in 2009. This was a probable cause for delay on the part of the Plaintiff in prosecuting this suit.

However, in dismissing the two applications dated 8th March, 2012 and 26th March 2012, the Honourable Judge ordered the parties to file and exchange lists of witnesses, all written statements and all copies of documents to be relied upon during the trial within 21 days. He also ordered parties to take steps within the next 45 days after the delivery of his ruling to comply with order 11 of the Civil Procedure Rules and set this case down for hearing.

That the orders issued by the Hon Justice Makau were ignored by the parties is not controverted. But it is common practice that for a defendant to comply with order 11, normally the Plaintiff has to comply first. Ideally the Plaintiff is the owner of the case.

I do note that the main reason the Plaintiff has proffered for non-diligent prosecution of this case is that the mistake lies upon the his former Advocates. The Plaintiff has strenuously submitted that he should not be punished just because his Advocates made a mistake . The authorities proffered on this case are good law but they do not fit in the circumstances of this case. In this case, several times applications for dismissal have been dismissed and the Plaintiff, on each occasion, has been offered a chance to prosecute his case. The last chance was offered with conditions that the parties do comply with Order 11 of the Civil Procedure Rules and do set this case down for hearing within 45 days. I find that the Plaintiff failed or refused to take advantage of this ruling.

The Plaintiff has argued that the defendant was also to blame as he had also not complied with order 11 of the Civil procedure Rules. As I have already said, it is always the duty of the plaintiff, who in simple language is the principal or primary owner of his suit to comply first. The argument that the defendant was also indolent is to me not a satisfactory cause as to why a suit should not be dismissed.

A ground that the plaintiff felt was compelling with regard to the non-dismissal of his suit is that if the suit is dismissed, his three prime properties would face imminent sale by the 1st defendant. I opine that when a person borrows money from a bank, such a person does that with the knowledge that the collateral he has offered so that he can obtain a loan, can be sold if the Loan Agreement terms are breached and in accordance with the agreed modalities. I do not agree that in the present circumstances, this submission offers a satisfactory cause as to why a suit should not be dismissed for want of prosecution.

As I have already said , the authorities submitted by the plaintiff to support the proposition that a litigant ought not to be punished because of his Counsel's infractions is good Law where circumstances permit. I find that the circumstances of this case do not allow that proposition to have merit. The plaintiff has been given several chances by the Court but he has refused to take advantage of them. He egregiously ignored orders of this Court issued by the Hon. Justice Makau ,Judge , on 24th May ,2012. I opine that, if by mere sleight of hand, through a litigant changing his advocate, a plaintiff is excused from his duty to diligently ensure that his suit is properly, diligently and expeditiously prosecuted, this would spawn veritable confusion regarding implementation of Order 17 of the Civil Procedure Rules.

I find the 1st defendant's submissions and the authorities it has proffered full of merit. I find that there has been inexcusable inordinate delay, which is prejudicial to the 1st defendant, in the prosecution of this suit by the Plaintiff. I also find that the plaintiff has not offered satisfactory cause to this Court regarding why this suit should not be dismissed.

The plaintiff has submitted that this Court should be guided by the provisions of sections 1 A, 1B and 3A of the Civil Procedure Rules and Article 159(2) of the constitution . He has laconically submitted that Article 159 (2) enjoins Courts to administer substantive Justice without regard to technicality. I agree with this submission. However this matter does not concern a mere technicality. It is predicated upon legal provisions. The sword of Justice cuts both ways irrespective of whether it will fall in favour of the plaintiff or the defendant. The interest of justice leans towards the dismissal of this suit.

In the circumstances, this suit is dismissed. I award costs to the defendants.

It is so ordered.

**Delivered in Open Court at Meru this 16th day of July, 2015 in the presence of:-**

Cc. Danie/Lilian

Carlpeters Mbaabu h/b F. K. Gitonga for 1st Defendant

**P.M. NJOROGE**

**JUDGE**