



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 1648 OF 1987**

**MICHAEL KANYI DANIEL.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....DEFENDANT**

**RULING**

1. Before me is a Notice of Motion dated 8<sup>th</sup> October, 2014 seeking to dismiss this suit for want of prosecution. The motion is supported by the grounds set out in the body of the application and the supporting affidavit of the Assistant Legal Manager of the Defendant, Ms. Jasmine Ogutu. The Defendant's gravamen is that this suit was last in court on 23<sup>rd</sup> May, 2000. That since then, the Plaintiff has taken no steps to prosecute the suit. He averred that the trial of this case will occasion the Defendant prejudice as it will have difficulty in locating its witnesses who have since left employment.
2. Ms. Mwathane learned counsel for the Defendant submitted that the delay in prosecuting this matter is inexcusable. In addition to inability to trace witnesses, Counsel stated that there is also a risk of memory lapse.
3. In response thereto, Michael Kanyi Mwarano swore a Replying Affidavit and a Supplementary Affidavit. He contended that this application has been brought in bad faith since the Defendant is aware that there has been negotiations taking place on the issue of calculation of how interest was applied on the loan. He lamented that to date the Defendant has not furnished him with any loan and interest amortization record and an offer to negotiate and establish the truth. He averred that due to the agreement on the said settlement, the Defendant has never advertised his property again for sale and he was given the impression that this matter would be settled out of court. He further stated that he has cleared the loan of KShs. 1.4 Million and the Defendant is not entitled to any claim against him and should discharge his property.
4. Mr. Kamau Learned Counsel for the Plaintiff reiterated the averments in the affidavits of his client and urged that this application be dismissed. In response thereto, Ms. Mwathane submitted that the Plaintiff should have prosecuted the suit if negotiations collapsed and further that there is no evidence of ongoing negotiations.
5. The applicable test in dismissal of a suit for want of prosecution was set out in the Court of Appeal case of **Ivita Vs Kyumbu (2004) KLR 441** to be whether there has been inordinate and inexcusable delay in prosecuting a suit and whether the Defendant will suffer prejudice as a result of the delay. In determining whether or not the delay is excusable, the court should assess the entire circumstances of the case for purposes of doing justice. The court in **Alice Mumbi Ng'ang'a v. Damson Chege Ng'ang'a & another [2006] eKLR** observed as follows:-

***“This court has ruled in several cases that a civil case once filed is owned by a litigant and not his advocate. It behooves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client, then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not per se make this court to exercise its discretion in favour of an aggrieved litigant. This court will exercise its discretion in favour of such a litigant after taking into consideration all the factors that are applicable in the case.”***

6. It follows therefore that a Plaintiff's primary responsibility is ensuring that a suit is set down for hearing without undue delay. In this case, the Plaintiff explained that the delay was occasioned by the negotiations between the parties. He produced in his Supplementary Affidavit mortgage amortization which he stated had been requested by the Defendant. That the Defendant too was to come up with its own amortization whereby the two parties were then to hold a meeting together with their respective auditors. He further stated that it is for this reason that the Defendant had not advertised his property for sale.
7. The said allegations were not rebutted by the Defendant. They therefore remained uncontroverted and are to be taken to be correct. In view thereof, I am inclined to believe that the delay in prosecuting this case was occasioned by the process of negotiation which Article 159 2 (c) of the Constitution encourages. While I note that the delay was rather long, I take into consideration that property disputes are very emotive in our jurisdiction and have to be treated with utmost care. I am also alive to the fact that it may have been for the alleged negotiations that the Defendant did not attempt to realise its security.
8. In the circumstances, I decline to dismiss the suit and since negotiations seem to have reached a dead end, I order that the Plaintiff do take pre-trial directions within the next sixty (60) days from the date of this ruling in default the suit shall stand dismissed with costs. Costs of the application shall be in the cause.

**Dated, Signed and Delivered at Nairobi this 10th day of July, 2015.**

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**A. MABEYA**

**JUDGE**