



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 138 OF 2000**

**EMILY JEROBON BETT ..... PLAINTIFF**

**VERSUS**

**RAEL CHEROP MARITIM ..... 1ST DEFENDANT**

**V. K. SAINA ..... 2ND DEFENDANT**

**POST BANK CREDIT LIMITED (IN LIQUIDATION) ..... 3RD DEFENDANT**

**RULING**

The application for determination is Notice of Motion dated 11th May, 2012 brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 17 Rule 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 together with all enabling provisions of the law.

The 2nd Defendant prays that the suit be dismissed for want of prosecution, costs and any other order the court may deem fit and just to grant.

The application is premised on grounds that the plaintiff has not taken any step to prosecute the case for over one year and has lost interest in the case, that litigation must come to an end and that the pendency of the suit is prejudicial to the 2nd Defendant.

The application is further supported by the affidavit of one Tony K. Kwambai, advocate having the conduct of the suit on behalf of the 2nd Defendant on 11th May, 2012. He depones that as at the time of filing the application, the file had last been placed in court two years before and that since that time, no further step had been taken to prosecute the suit. He states that the Plaintiff has lost interest in the suit and the same should be dismissed with costs.

Before I delve into the Plaintiff's response, I wish to point out the poor draftsmanship exhibited by the Applicant. The application is filed by M/s. Ngala & Company Advocates, who in the Notice of Motion say they act for the Plaintiff. The Supporting Affidavit is however sworn by Mr. Tony Kwambai Advocate for the 2nd Defendant.

Further, on the date of the hearing, Mr. Kiboi Advocate represented the 1st Defendant, Mr. Kwambai the 2nd Defendant and M/s. Rono the 3rd Defendant. Mr. Sifuna Advocate appeared for the Plaintiff. Whereas the application slated for hearing is that dated 11th May, 2012 filed by M/s. Ngala & Company Advocates, Mr. Kwambai Advocate who swore the Supporting Affidavit told Court that he did not oppose the application. Interestingly, it is Mr. Kiboi, Advocate for the 1st Defendant who prosecuted the application. His opening remarks were "***Our application is dated 11th May, 2012. We pray that suit be dismissed for want of prosecution.***" So, where was Mr.

Kwambai, Counsel for the Applicant?

In the course of his submissions, Mr. Kiboi referred the court to a list of authorities filed on 3rd August, 2012. This list is dated 4th July, 2012 and is filed by M/s. Chemitei & Company advocates for the 1st Defendant. The question then is, was Mr. Kiboi prosecuting the 2nd Defendant's application on behalf of Mr. Kwambai? Why did he refer to authorities filed on behalf of the 1st Defendant, yet it was the 2nd Defendant's application that was coming up for hearing?

Only one thing stands to salvage the Applicant's case. The 1st Defendant too, by a Notice of Motion dated 6th January, 2012 sought similar orders as the 2nd Defendant in the instant application. I think counsel for the Applicants in both applications failed to prepare themselves well and were not quite keen on which application was dated when. Again, the respective counsel for the Defendants were unanimous that the suit should be dismissed for want of prosecution. For this reason, although it is Mr. Kiboi who argued the application, I will deem it as having been properly prosecuted.

In opposing the application, counsel for the Plaintiff/Respondent filed Grounds of Opposition dated 12th June, 2012. The said grounds of opposition are as follows:-

- 1. The application is incompetent, misconceived and fatally defective.*
- 2. The application is also mischievous and made in bad faith.*
- 3. Applications touching on the subject matter of this suit and the cause of action herein have been in court until recently.*
- 4. The honourable court has recently ordered that suits relating to the subject matter of this suit namely Motor Tractor Reg. No. KZQ 780 be heard and determined.*
- 5. The delay in hearing this case was partly occasioned by the defendants' incessant applications and partly also by the lawyers' boycott of the Eldoret High Court, and in which the defendants' lawyers played an active role. (See the Annexed copies of Public Notice by the 1st Defendant's relating to the boycott marked "EJB 4).*

The application is also opposed vide a Replying Affidavit sworn by Emmy Jerobon Bett, the Respondent herein on 13th June, 2012. She states that this suit is related to other cases namely **ELDORET HIGH COURT CIVIL CASE NO. 340 OF 1997, ELDORET SENIOR PRINCIPAL MAGISTRATE'S CRIMINAL CASE NO. 669 OF 2000** which gave rise to **ELDORET HIGH COURT CRIMINAL APPEAL NO. 24 OF 2007**. That the suits culminated into a ruling dated 6th October, 2011 delivered by Hon. Justice Azangalala (as he then was) in **HIGH COURT CRIMINAL APPEAL NO. 24 OF 2007** in which he directed that the civil suits should proceed to hearing so that the ownership of the tractor Reg. No. KZQ 780 can be determined. She stated that the Defendants often requested that the above referred suits be dismissed on grounds of technicalities so that she is not accorded justice through hearing of the cases by merit.

The Respondent further avers that she is keen in prosecuting the suit so that her proprietary rights in the tractor can be restored. She adds that the firm of Ngala & Company, Advocates who seek the dismissal of the suit have themselves not demonstrated concern for a speedy trial and have never requested for a hearing date.

In addition to the depositions contained in the Supporting Affidavit, Mr. Kiboi advocate for the Applicant submitted that the non prosecution of the suit has caused a lot of hardship on the Applicant as the tractor which is the subject matter herein continues to deteriorate at the Police Station parking yard. He submitted that the fact that there were other pending suits was not good reason why this suit was not prosecuted. That it was now thirteen (13) years since the suit was

filed and that any further delay would amount to injustice.

In reply, Mr. Sifuna, advocate for the Respondent referred to the case of **FANUEL AMIMO -VS- TAMASHA CORPORATION LIMITED (2008) e KLR**, a ruling by Hon. Justice Lesiit, which he said highlighted the principles for dismissal of a suit for want of prosecution; which is that the delay must be inordinate, inexcusable and prejudicial to the Defendant.

He also referred to the case of **LEE WAIGWA WARUINGI -VS- HOUSING FINANCE COMPANY OF KENYA LIMITED (2005) e KLR**, also a High Court ruling by Azangalala, J (as he then was). Applying the principles set out in this case, Mr. Sifuna submitted that the Applicant had not demonstrated what prejudice she would suffer should the application not be granted.

The only other relevant authority I find from the list of authorities dated 5th October, 2012 filed by counsel for the Respondent is case of **ESTHER WANDIA NJUGUNA & 2 OTHERS -VS- JAMES NGANDU MUTHIGANI & 6 OTHERS (2008) e KLR**, also a High Court ruling by Ang'awa, J. She cited the case of **MOBILE KITALE SERVICE STATION -VS- MOBILE OIL KENYA LIMITED & ANOTHER (2004) 1 KLR 1** in which it was held that dismissal of suit for want of prosecution is meant to prevent injustice and/or abuse of the process of court and that the same is at the discretion of the court. In **AGIP (KENYA) LIMITED -VS- HIGHLANDS TYRES LIMITED (2001) KLR, 630** three principles governing the dismissal of suit for want of prosecution were outlined as, (i) delay must be inordinate (ii) the inordinate delay is inexcusable and (iii) the Defendant is likely to be prejudiced by the law.

A list of authorities was filed by the firm of Chemitei & Company Advocates for the 1st Defendant. They referred to the following cases:-

1. **ET MONKS & CO. LIMITED -VS- EVANS (1985) KLR 584**
2. **AGIP (KENYA) LIMITED -VS- HIGHLANDS TYRES LIMITED (2001) KLR, 630**  
- discussed above

In the case of **ET MONKS (Supra)**, Kneller, J. as he then was held, inter alia,

1. ***Whether an application for dismissal of suit for want of prosecution should be allowed or not is a matter for the discretion of the Judge who must exercise it judicially. The Court shall among other things, consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was inexcusable. However, each case will turn on its own facts and circumstances.***
2. ***If an action is dismissed for want of prosecution, a Plaintiff may sue his advocate for negligence unless such Plaintiff has caused or consented to the delay which led to the dismissal of the action.***
3. ***The delay in this case was inordinate and inexcusable and a trial would be prejudicial to the Defendants, as important witnesses may no longer be traced.***

The above principles have been applied in case of **IRATA =VS= KYUMBU (1984) KLR, 441** by **Chesoni, J. (as he then was)**. He had this to say:-

***"The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."***

In the case of MOSES MURIIRA MAINGI & 2 OTHERS -VS- MAINGI KAMURU & ANOTHER - NYERI CIVIL APPEAL NO. 151 OF 2010. The Court of Appeal cited Chesoni, J. in IVITA -VS- KYUMBU, (Supra) and said:-

*"The power of the court to dismiss a suit for want of prosecution is discretionary power, but which should be exercised judicially."*

Again, in the ruling of Hon. Justice Azangalala (as he then was) in ELDORET HIGH COURT CRIMINAL APPEAL NO. 24 OF 2007 where the Appellant therein sought the release of the subject tractor KZQ 780, the Judge rightly observed that the tractor could not be released before the pending civil suits were determined.

In the ruling, the Respondent herein is referred to as the Interested Party, whom the court noted had an interest in the ownership of the subject tractor. It is marked as annexure 'EJB.3' to the Replying Affidavit. It is for this reason, I think, the Respondent herein ought to have expedited the hearing of the suit.

Mr. Sifuna also submitted that Eldoret High Court was clogged with boycott of the lawyers between the year 2010 and 2011. Prior to this though, the suit had not been fixed for hearing due to numerous preliminary applications. When the dust settled, the Respondent did not also do much to enlist the case for hearing, culminating into this application.

Moreso, contrary to the Respondent's submissions, the onus of setting the suit down for hearing weighs heavily on the Plaintiff as opposed to the Defendant. Even if the 2nd Defendant bothered not to fix the suit for hearing the Plaintiff must nonetheless give a satisfactory reason why she did not play his part. Further, the fact that there were other related cases to the instant suit did waive the Respondent's right in expediting the disposal of the suit. Perhaps all what she did was to gamble with the side that would probably swing her way. Unfortunately, time has caught up with her.

But applying the principles cited in the case law I have referred to, I will give the Plaintiff the benefit of doubt to the extent that she may have found herself carrying too much on her shoulders, and probably by oversight, overlooked to list the matter for hearing. After all, court should be focused on doing substantive justice as opposed to concentrating on technicalities that may vitiate the course of justice. And for justice to be seen to be done, I will rule in the favour of the Respondent, who shall however meet some conditions within a set timeline.

In the result, this application is dismissed with costs to the Applicant. The Plaintiff is ordered to ensure compliance with Order 11 of the Civil Procedure Rules within sixty (60) days. Thereafter, she must cause the suit to be listed for hearing within another sixty (60) days. The hearing date shall be fixed on a priority basis but having regard to the availability of a date in the court diary.

**DATED and DELIVERED at ELDORET this 6th day of March, 2014.**

**G. W. NGENYE - MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Sifuna Advocate for the Plaintiff/Respondent

Mr. Kiboi for the 1st Defendant/Applicant