



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 451 OF 2017

MUKAVI WAYS CO. LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

FAMILY BANK LIMITED.....DEFENDANT/APPLICANT

RULING

1. Vide a Notice of Motion dated 2nd December, 2019 that was brought pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 17 Rule 2 (3) and Order 51 Rule 1 of the Civil Procedure Rules 2010, the Defendant/Applicant sought for the following orders:

a) That this suit be dismissed for want of prosecution.

b) That the cost of this Application and of the entire suit be awarded to the Defendant.

2. The Application was supported by the Affidavit of the Defendant's/Applicant's advocate who deponed that on 14th November 2017, the Plaintiff herein filed a Notice of Motion Application under a Certificate of Urgency; that the Application was filed alongside the Plaintiff and that the Notice of Motion was initially heard ex-parte and the Court granted the Plaintiff interim orders of injunction.

3. The Defendant's/Applicant's advocate deponed that the matter was scheduled for inter-partes hearing on 21st November, 2017; that on 21st November, 2017, when the Application came up for hearing, the same was adjourned to 12th February, 2018 and that the matter did not proceed for hearing on that day.

4. It was deponed that the Plaintiff's Application was eventually heard, and that on 26th October, 2018, this court delivered its Ruling in which the Plaintiff's Application was dismissed with costs to the Defendant. The deponent pointed out that since the Ruling was delivered on 26th October, 2018, the Plaintiff has refused, neglected and/or otherwise failed to take any steps to prosecute the suit.

5. The Defendant's/Applicant's advocate deponed that there are no justifiable grounds for the delay, refusal and/or neglect by the Plaintiff to prosecute the suit and that the suit should be dismissed with costs for want of prosecution.

6. In response, the Plaintiff's Director deponed that he was unable to get his documents in support of the claim from the bank and as such could not comply with the court directions to set down the suit for hearing; that he has since obtained the said documents and that he is desirous of prosecuting the suit.

7. The Application was canvassed vide written submissions. Learned counsel for the Applicant restated the provisions of Order 17 Rule 2(1) of the Civil Procedure Rules which provides as follows:

“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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

8. Learned counsel for the Defendant/Applicant submitted that the decision of whether or not to dismiss a suit is discretionary and that the Court must exercise such discretion judiciously. Learned counsel cited the case of *Argan Wekesa Okumu vs. Dima College Limited & 2 others [2015] eKLR* where it was held as follows:

“The Principles governing applications for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay.”

9. Counsel submitted that the Plaintiff has not taken any step to set the matter down for pre-trial or hearing for more than one (1) year since the matter was last in court. Counsel cited the case of *George Gatere Kibata vs. George Kuria Mwaura & another [2017] eKLR* where the court rendered itself as follows:

“The legal ramifications of the statutory threshold set out under Order 17 Rule 2 of the Civil Procedure Rules is that a suit qualifies to be dismissed for want of prosecution if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit.”

10. It was counsel’s argument that the instant matter was last in court on 26th October, 2018 when the court delivered its Ruling; that the instant Application was filed on 5th December, 2019 and that a period of one (1) year and one (1) month had lapsed before the Application was filed. Therefore, it was submitted, this suit should be dismissed for want of prosecution.

11. Counsel submitted that the Plaintiff has not exhibited any evidence to show that he requested for documents from the bank and that the delay in setting down the suit for hearing is inexcusable and prolonged.

12. On the issue of the prejudice that has been occasioned to the Defendant for the delay, counsel relied on the case of *Fran Investments Limited vs. G4S Security Services Limited [2015] eKLR* where Gikonyo J. held as follows:

“This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “sword of the Damocles”. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under Article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the Plaintiff.”

13. It was submitted that since the pendency of the suit, the Defendant’s law firm has been on retention, which retention is a costly affair and that if the instant matter proceeds to trial, it would be prejudicial to the Defendant because the Defendant has already used a lot of funds to defend the suit and the Application for injunction.

14. In response, counsel for the Respondent submitted that under Article 50 of the Constitution, it was the Respondent’s right to be heard. Counsel submitted that the delay in fixing the matter for hearing was excusable and that the Applicant will not be prejudiced if the suit is not dismissed.

15. The Defendant is seeking for the dismissal of the suit for want of prosecution. Order 17 Rule 2 (1) of the Civil Procedure Rules provides as follows:

“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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

16. This suit was commenced by way of a Complaint and an Application for injunction dated 14th November, 2017. The Defendant filed its Defence and a list of documents on 29th November, 2017. The record shows that on 26th October, 2018, this court dismissed the Plaintiff’s Application for injunction.

17. After the Ruling of the court of 26th October, 2018, the Plaintiff did not fix the matter for pre-trial directions or hearing. Indeed, by the time the Defendant filed the current Application on 5th December, 2019, the matter had remained inactive for over one (1) year.

18. As was held by Gikonyo J. in *Fran Investment (supra)*, the dismissal of a suit without hearing it on merit is a draconian act. However, the court has to balance the right of a party to a hearing and the constitutional demand that cases should be disposed of expeditiously, and without delay.

19. In determining civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. A “*speedy hearing*” means conducting a trial within a reasonable time. For the realization of this right, all parties, including the court, have a responsibility to ensure that proceedings are carried out expeditiously.

20. Where the reason for the delay in prosecuting a matter involves abusing the process of the court, such as that which may be evident in maintaining proceedings when there is no intention of carrying the case to trial, or delay that is intentional and contumacious, or where a party is guilty of inordinate and inexcusable delay, giving rise to a substantial risk that a fair trial would not be possible, or to serious prejudice to the other party, the court is entitled to dismiss the proceedings.

21. Although the Plaintiff stated that he did not fix this suit for hearing or for pre-trial directions within one (1) year because he had sought for documents from the Defendant, he neither annexed on his Affidavit a copy of the letter requesting for the documents nor the documents which he says he has now obtained from the Defendant.

22. Indeed, the record shows that the Defendant filed a list of documents, together with a bundle of documents alongside its Defence on 29th November, 2017. Those documents include the Plaintiff’s bank statements, the charge document, the further charge and the valuation report.

23. Having not shown that he made a request to the Defendant to be supplied with documents which are different from the documents that were filed by the Defendant, and considering that it is the Plaintiff who commenced this suit, it is my finding that the Plaintiff has not shown

any good cause why he did not fix this matter for hearing or mention for more than one year.

24. For those reasons, I allow the Application dated 2nd December, 2019. The Plaintiff's suit is dismissed with costs for want of prosecution.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE