



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Suit 147 of 2002

SAMUEL MBUGUA IKUMBU.....PLAINTIFF/RESPONDENT

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT/APPLICANT

RULING

By the Notice of Motion dated 3/10/2011, the defendant/applicant prays that this court do dismiss the plaintiff/respondent's suit for want of prosecution and the costs be awarded to the applicant. The grounds upon which the application is predicated are that the suit was filed on 23/5/2002, an order of injunction was granted in favour of the applicant in May 2004, restraining the applicant from selling, developing, subdividing, transferring or in any way dealing with the suit property, Nakuru/Municipality Block 15/133 pending the full hearing of the suit; that it is now 9 years and the plaintiff has not been keen to prosecute this suit and that the suit was last in court on 26/7/2010 when it was adjourned generally; That 14 months have lapsed and no steps have been taken towards the prosecution of this suit and the debt owed by the respondent is still unpaid. The application is supported by the affidavit of Nereah Okanga, Legal Counsel in Barclays Business Support & Corporate Recoveries department in the defendant company.

The plaintiff/respondent filed a replying affidavit through the firm of Koceyo & Co. Advocates. The respondent denies being responsible for the delay in the prosecution of the suit. The respondent depones that the ruling on the application for an injunction was made on 21/5/04, the suit was then fixed for hearing on 4/5/2010 but was adjourned to 26/7/10 when it was adjourned for dates to be taken in November 2010. Due to the ill health of his wife he was not able to proceed. His wife died in December 2010 and in 2011 the parties started attempts to settle the matters out of court but efforts were frustrated by the applicant (SMI 4). On 17/1/2012, the respondent tried to take dates at the registry but was advised that the court diary was full as evidenced by the letter (SM1 and 5) addressed to the court dated 6/1/2012 requesting for a hearing date. Mr. Koceyo added that the applicant sent to the respondent a statement of agreed issues which the respondent signed but the applicant has failed to approve. Counsel urged that the court do allow the suit to be heard on the merits because it involves land.

The application dated 22/5/2002 was heard on 23/4/04, and the ruling was rendered on 21/5/04. Nothing seems to have taken place from 23/5/02, when the suit was filed. The application for injunction was adjourned for all that period. From the 21/5/04, the respondent having been granted orders of injunction pending hearing of the suit, went to sleep again till 11/11/09 when a date for hearing was taken. About 4 years just slipped by. On 4/5/10 when the matter came up for hearing before J. Maraga, the plaintiff's counsel asked for an adjournment for the reason that the plaintiff's wife was sick. When the matter came

up for further hearing on 26/7/10 the plaintiff's counsel again sought an adjournment on account of the plaintiff's wife's illness. The respondent avers that the wife died in December 2010, but by the time this application was filed on 3/4/2011 the respondent had not moved the court for a hearing date. A perusal of the court file does disclose that there has been indolence by the plaintiff in this matter. The respondent's wife's illness only came up in 2010 but for 8 years no serious steps had been taken towards having this case heard.

The respondent has exhibited a letter dated 6/1/2012 inviting the applicant to take a hearing date at the registry. There is no evidence that there were no hearing dates available. This court is aware that even to date, the diary for 2012 is still open and dates are available. It is untrue for the respondent to claim that hearing dates are unavailable.

This application is brought pursuant to **Order 17 Rules 2(1) and (3)** of the **Civil Procedure Rules. Rule 2(1)** provides that if no steps have been taken by either party to a suit for one year, the court may give notice in writing to the parties to show cause why the suit cannot be dismissed for want of prosecution. It means that neither the applicant or respondent could have moved the court to have the suit heard and it is only the court which has the discretion to issue notice to show cause why a suit cannot be dismissed for want of prosecution. The above provision does not grant the applicant capacity to bring this application.

Although the applicants had no capacity to bring this application this court observes that the respondent has exhibited indolence in the prosecution of this case. The applicant has been enjoying injunction orders for the past 10 years. Attempts to fix a hearing date were only made after the applicant filed the instant application. The court would in exercise of its inherent jurisdiction go ahead and dismiss the application even though the court was moved by the respondent. However, the court will give the respondent one chance to have this suit fixed for hearing in default it will stand dismissed. Hearing dates be taken at the registry. Case be heard within 90 days hereof in default suit stands dismissed. The plaintiff will bear the costs of this application.

DATED and DELIVERED this 13th day of July, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for the plaintiff/respondent

Mr. Otieno holding brief for Koceyo for the defendant/applicant

Kennedy – Court Clerk