



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 59 OF 2014**

**THE REGISTERED TRUSTEES OF THE KENYA RAILWAYS**

**STAFF RETIREMENT BENEFITS SCHEME.....PLAINTIFF/RESPONDENT**

**VERSUS**

**HIGHER EDUCATION LOANS MANAGEMENT BOARD.....DEFENDANT/APPLICANT**

**RULING**

1. The Defendant/Applicant filed a notice of motion dated 11<sup>th</sup> January 2016 in which it seeks the following reliefs:-

- (1) That this Honourable court be pleased to dismiss this suit for want of prosecution.1**
- (2) That in the alternative, this Honourable Court be pleased to set aside the orders made on 12<sup>th</sup> November 2014 in favour of the Plaintiff.**
- (3) That in addition to prayer 2 above, the Honourable Court be pleased to order the Plaintiff to give security for costs in favour of the defendant herein and in default thereof the suit be struck out.**
- (4) That the Plaintiff be condemned to pay the costs of this application and costs of the suit as appropriate.**

2. The applicant contends that the respondent has not bothered to prosecute its case which was filed on 27<sup>th</sup> January 2014. That the respondent obtained injunctive orders against it on 12<sup>th</sup> March 2014 which injunctive orders prohibited it from constructing an office complex on its land. That the applicant is incurring a lot of expenses in terms of renting space to keep its files in industrial area when the respondent seems not to be in a hurry to conclude its case because it is enjoying injunctive orders.

3. The applicant's application is opposed by the respondent through a replying affidavit sworn on 8<sup>th</sup> June 2016. The respondent contends that soon after it obtained injunction orders, it embarked on the process of moving the case forward. In its efforts to undertake pre-trial of the case, it engaged the services of surveyors to determine the extent of its land. Before this process could start, the applicant served it with a notice of appeal. That it has not proceeded to fix this case for pre-trial or hearing because it has been waiting for the appeal case to be determined first.

4. I have considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the submissions by the parties. The first issue for determination in this case is whether there has been delay in prosecution of this case which has not been explained. The Civil Procedure Rules provide that where there is no step taken by either party to set down the suit for hearing for over one year, either party can set it down for hearing or apply for its dismissal.

5. In the instant case, the last step taken in this case before the application for dismissal was made was on 12<sup>th</sup> March 2014 when a ruling was delivered. Since then until 11<sup>th</sup> January 2016 when this application was made, the plaintiff had not taken any steps towards prosecution of this suit. A period of close to two years had elapsed. The question which then begs for an answer is whether this delay has been explained and if so has the delay caused any serious prejudice to the defendant?

6. The respondent has explained the delay by stating that it had started the process of engaging surveyors to determine the extent of its land. As the process was going on, the applicant served it with a notice of appeal. The respondent could not move as it wanted for the applicant to finish its appeal process. Besides this appeal, the respondent has stated that it took time to obtain documents from the Survey of Kenya.

7. The applicant has argued that this explanation cannot help the respondent as there was no stay pending the appeal. That a notice of appeal does not amount to an appeal. This may be so but in as far as good practice is concerned, a party who has manifested his intention to exercise his right of appeal ought to be left to go on with the appeal even where there is no stay. The respondent cannot therefore be blamed for observing this rule of best practice.

8. I have read the ruling of the Court which was delivered on 12<sup>th</sup> March 2014. The Judge did not strictly give injunctive orders as there were serious conflicts in respect of each Party's case. The judge gave an order of maintenance of *status quo* with a further order that there was to be no construction or interference pending hearing and determination of the suit. It cannot therefore be argued that the orders lapsed after 12 months. It is only injunctive orders which may lapse after 12 months but the order of *status quo* obtains until the event it is protecting is sorted out. I therefore see no basis of discharging the orders of *status quo*.

9. The judge who issued orders of *status quo* did not order security for costs. I do not also see the basis for ordering the respondent to deposit security for costs failing which the suit should be struck out. At times there are applications like the present one which unnecessarily delay prosecution of cases. The applicant had the option of moving the court to have the suit heard. Instead of going that route, it decided to bring this application well aware that it had already manifested its intention to appeal the ruling of 12<sup>th</sup> March 2014. I do find that the applicant's application lacks merit. The same is hereby dismissed with costs to the respondent. Parties should ensure that they set down this suit for pre-trial before the Deputy Registrar within 45 days from the date hereof.

It is ordered

Dated, signed and delivered at Nairobi on this 22<sup>nd</sup> day of **June**, 2017

**E.O. OBAGA**

**JUDGE**

In the presence of:-

Mr. Odongo or Mr. Maruti for Defendant/ Applicant

Court Assistant; Hilda