



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2085 OF 2014

DOMINIC KIRAGU WARUI CLAIMANT

VERSUS

K-REP BANK LIMITEDRESPONDENT

RULING

1. The respondent, K-REP Bank Limited by application and Notice of Motion filed on 14th February, 2017 and made under the provisions of section 1A, B, 3, 3A of the Civil Procedure Act, Order 17 Rule 2(1) an (3), Order 51 Rule 1 of the Civil Procedure Rules and seeking for orders that;

a. This court be pleased to dismiss the claimant's suit as against the Respondent for want of prosecution.

b. Costs of this application and of the entire suit be awarded to the respondent/applicant.

2. The application is supported by the annexed affidavit of Diana Kimaru, Counsel for the Respondent and on the grounds that the Claimant has not shown any intention of further prosecution of this suit and has never been brought before court to any reason. The filing and closing of pleadings closed and up and until the filing of this application the Claimant has not taken any step in prosecuting this suit.

3. The suit should be dismissed for want of prosecution. Costs be awarded to the respondent.

4. In reply the Claimant filed Grounds of Opposition to the application on the grounds that the claim is meritorious and with high probabilities of success. The Claimant has not deliberately neglected to bring the claim for prosecution. Since his dismissal from employment the Claimant has been facing a myriad of financial challenges including not being able to meet the advocate fee and other attendant costs.

5. The Claimant should be given a chance to prosecute the claim and application be dismissed. The Claimant is also aware that the Respondent rebranded to Sidian Bank and will be making application to amend his pleadings to reflect these changes.

6. On 30th March, 2017 both parties attended court for the hearing of the application and agreed to file written submissions. Only the Respondent as the applicant filed written submissions.

7. The Respondent submits that in June, 2014 the Claimant filed suit against the Respondent and a defence was filed on 25th February, 2015. Since, no step has been taken to prosecute suit. There is no evidence of any effort taken to take hearing dates. The law and rules allow the Respondent to file application seeking the dismissal of the claim for lack of prosecution as held in **Agip (Kenya) Limited**

versus Highlands Tyres Limited [2001] KLR. The principles to be followed are that there must be inordinate delay; the delay is inexcusable; and the Respondent is likely to be prejudiced by the delay caused.

8. In this case it has been over 3 years since suit was filed and the Claimant had not followed to have the same heard or give reasonable cause for the delay and why the application should not be allowed. By keeping this suit the Respondent is incurring costs for advocate and attendant costs and thus prejudiced as held in **Inter versus Kyumba (1984) KLR.**

Determination

9. The court in exercise of its jurisdiction to dismiss suits for want of prosecution is guided by the principles laid out in **Utalii Transport Company Limited & 3 Others versus NIC Bank Ltd & Another [2014] eKLR** that the court must examine if there is inordinate delay in prosecution of the case; the delay is intentional and not excusable; delay is in abuse of court process; delay gives rise to substantial risk to fair trial or prejudice to the respondent; no prejudice shall be occasioned to the claimant; there is no reasonable explanation offered for the delay; and the court should consider what is in the interests of justice. See also findings in **Ruth Ndegwa versus Development Alternatives Incorporated, Cause No.2039 of 2015.**

10. The upside of filing grounds of opposition to an application and failing to file an Affidavit, the court is denied of crucial facts that could have explained the true picture of things. The grounds set out by the Claimant that he has been impecunious since his termination thus unable to file amendments or get fees for his advocate and attendant costs. These grounds are left bare as without the claimant's own affidavit confirming such averments as matters of fact, then the Respondent as the applicant is left without any chance to challenge the same. In any event where such grounds are to be taken on their simple meaning and implication, that the Claimant is not able to sustain his claim as he is unable to pay advocate fees and other costs and has had the intention of filing amendments to his suit, should the Respondent stand aside and await? The intentions of the Claimant have not been put into action. There is no amendment sought and up until the Respondent moved court with their application, no action has been taken by the Claimant in this regard from 2014 to this date.

11. The law protects both parties in court. On the one hand, the Claimant has right to file suit while the Respondent has the right to have suit against them finalised and not have it left hanging over their heads as the sword of Damocles to be unleashed at the opportune moment. Such would not meet the ends of justice. Where the Claimant felt aggrieved by the actions of the Respondent way back in 2014 when filing suit, where such has abated, the suit should not be left alive and parked in the court shelves.

12. In the Ground of Opposition, the court is also denied of material as to whether the Claimant is aware of this application and its implications and if he is keen to have the same prosecuted. The bare grounds lack the veracity of an affidavit.

13. I find no justifiable cause to warrant the maintenance of the suit.

14. The Respondents/Applicant application filed on 14th February, 2017 is hereby allowed. The suit herein is dismissed for want of prosecution. Costs to the respondent.

Dated, signed and read in open court this 25th day of May, 2017

M. MBARU

JUDGE

In the presence of:

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