



REPUBLIC OF KENYA



Guardian Bank Limited v Paramount Universal Bank Limited & 2 others (Civil Case 812 of 2000) [2024] KEHC 3514 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 812 OF 2000
PM MULWA, J
MARCH 21, 2024**

BETWEEN

GUARDIAN BANK LIMITED PLAINTIFF

AND

PARAMOUNT UNIVERSAL BANK LIMITED 1ST DEFENDANT

DG BHATTESSA 2ND DEFENDANT

MR KHAN 3RD DEFENDANT

RULING

1. Before the Court is the Notice of Motion dated 27th May 2021 brought by the 1st defendant, under Section 1A, 1B & 3A of the *Civil Procedure Act* and Order 17 Rule 2(1) of the *Civil Procedure Rules*, seeking the following orders that:
 - a. This suit be dismissed for want of prosecution.
 - b. Costs of the application and the suit be provided.
2. The application is anchored on the grounds on its face, the annexed affidavit sworn by the 1st defendant's chief executive officer, Ayaz Merali on 27th May 2021, written submissions dated 22nd October 2023 and supplementary written submissions dated 5th February 2024. In summary, the grounds are that the suit was last in court on 10th March 2020 when the hearing commenced; that the suit has remained inactive for over one year as the plaintiff has not taken any steps to prosecute the suit; that the delay by the plaintiff in taking the necessary steps is inordinate and inexcusable; that the continued pendency of the suit while the plaintiff is disinterested in its prosecution is an abuse of process and a gross affront to the constitutional imperatives of Articles 50 (1) & (2) (e) and 159 (2) (b) and (c) of the *Constitution*; that as the suit was filed on 3rd May 2000, it has been pending in court for



a period of twenty (20) years and the 1st defendant is greatly prejudiced by the lengthy and inordinate delay in finalizing the suit.

3. In opposing the application, the plaintiff filed a replying affidavit sworn by its legal officer, Edna Mokaya, on 16th October 2023 and written submissions dated 6th November 2023. The core depositions were that the plaintiff has always been keen on prosecuting this matter to its logical conclusion; that this case and the related case, HCCC No 813 of 2000 between the same parties herein were proceeding before Hon. Ochieng J. (as he then was); that it was agreed by consent of the parties herein recorded in the proceedings in HCCC No 813 of 2000 that HCCC No 813 of 2000 be heard first and the outcome thereto do apply to the instant case; that HCCC No 813 of 2000 culminated in the judgment delivered on 3rd September 2018 and which was in favour of the plaintiff therein (same plaintiff in this case) as against the 1st defendant herein; that its advocates sought the concurrence of the defendants' counsel to have the judgment apply to this matter. However, the defendants' counsel objected and sought to have this matter proceed for oral hearing.
4. Accordingly, the matter was fixed for hearing on 10th March 2020 and 24th April 2020. On 10th March 2020, the plaintiff's chief executive officer, Mr. Narayanmurthy Sabesan, gave his evidence and was cross examined by the defence counsel and the plaintiff's case closed. The defence case was scheduled for hearing on 24th April 2020. However, on Friday, 13th March 2020, the first Covid-19 case was reported in Kenya which resulted in downscaling of court operations. Consequently, the Chief Justice Emeritus David K. Maraga issued Gazette Notice No 3137: Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the risks associated with the global corona virus pandemic dated 20th March 2020 restricting physical access to open Court. All matters scheduled for hearing including this matter were taken out and listed for mentions on various occasions until such time as the Court would upscale its operations. It was not until late 2020 or early 2021 when the Court issued directives on upscaling of hearing of pending matters in the Commercial Division.
5. It was contended that the 1st defendant's application was filed on 27th May 2021 prematurely, barely nine months after the Court started hearing matters virtually; that as per Order 17 Rule 2(1) of the [*Civil Procedure Rules, 2010*](#), one (1) year had not lapsed from when the High Court started hearing matters virtually from 3rd August 2020; that given that this matter had proceeded in open Court the plaintiff's hoped that the matter would be given a hearing date in open Court. That when the Court reopened physical hearing of matters in 2022, the plaintiff's Advocate wrote to the Deputy Registrar on 16th May 2022 requesting for directions on hearing of this matter in open Court; that however, due to a technical hitch, the plaintiff's advocate was only able to upload the letter requesting for a date for directions on the judiciary e-filing platform and fixing this matter for directions on 2nd October 2023. That on 16th February 2023 the plaintiff's advocates learnt that an erroneous entry was made on 10th March 2020 that judgment was delivered on this matter and case closed; that this may have been the cause for the hitch in fixing the matter for further directions;
6. It was further contended that the 1st defendant filed Civil Appeal No 468 of 2018, Paramount Bank Limited v First National Bank Limited & 2 others against the Judgment in 813 of 2000; that the judgment of the Court of Appeal was scheduled for delivery on 6th October 2022 but was adjourned to be delivered on notice; that the said judgment will have a bearing on this matter as it addresses the same question of the Guarantees issued by the 1st defendant herein in favour of the plaintiff and that in the foregoing circumstances this matter is not ripe for dismissal and the application was filed prematurely.



Analysis and Determination

7. I have considered the application, the grounds, the rival affidavits and submissions. The issue arising for determination is whether this suit ought to be dismissed for want of prosecution.

8. Order 17 Rule 2 of the [Civil Procedure Rules](#) provides that:

“2.

(1) 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 should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.”

9. The primary considerations to be had in such an application were set out in [Ivita v Kyumbu](#) (1984) KLR 441, thus:-

“The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and the Defendant, so both parties to the suit must be considered and the position of the judge too...The Defendant must however, satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff’s excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time.”

10. In addition, the power of the Court to dismiss a suit for want of prosecution is a matter of discretion which must be exercised with reason and not on a whim. In [Argan Wekesa Okumu v Dina College Limited & 2 others](#) [2015] eKLR, the Court observed that:-

“...the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain rather than prematurely terminating the same.”

11. Having perused the record, I note that preceding the filing of the instant application dated 27th May 2021 this matter was last in Court on 10th March 2020. Although this was a period of more than a year, in the intervening period the country was grappling with the COVID-19 pandemic which indeed led to the downscaling of the courts’ operations. The plaintiff has clearly set out the reasons for the delay in listing the matter for hearing for the period after the upscaling of the courts’ operations. The plaintiff’s counsel issued a letter dated 16th May 2022 seeking a hearing date but due to a technical hitch, it was not uploaded until 16th February 2023, when it was discovered that the matter has been marked as closed on the CTS platform and that judgment had been delivered on this matter. It is plausible that this erroneous entry might have caused the hitch in fixing the matter for further directions.

12. Though there was a delay, I am not persuaded that the delay is inexcusable or that the 1st defendant is greatly prejudiced by the said delay in finalizing the suit. I am further minded that the matter is partly heard and only the defence case is pending.



13. In *Anthony Maina Mutahi v Cooperative Bank of Kenya Limited & another* [2021] eKLR, the Court observed:

“The plaintiff however explained the delay to have been caused by the strain on the registry due to the Covid 19 pandemic...a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay.

14. Accordingly, the application dated 27th May 2021 is dismissed for want of merit with no orders as to costs.

RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH 2024.

P. MULWA

JUDGE

In the presence of:

Mr. Ouma for plaintiff

Ms. Makori h/b for Mr. Ngatia SC for 1st defendant

Court Assistant: Carlos

