



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 822 OF 2010

CANUK HOLDINGS LIMITED.....PLAINTIFF

V E R S U S

PATRICK T/A LUTHA & COMPANY ADVOCATES.....1ST DEFENDANT

ENOCK TUITOEK.....2ND DEFENDANT

MAURICE ALDOUS OPAR.....3RD DEFENDANT

RULING

1. Before this Court is the Notice of Motion Application dated **14th April, 2020** by which **CANUK HOLDINGS LIMITED** (the Plaintiff) seeks the following orders:-

1. SPENT

2. THAT an Order do issue vacating the stay orders granted by the Court pending inter parte hearing and determination of this application.

3. THAT the Honourable Court be pleased to issue an order dismissing the application dated 9th October 2015 for want of prosecution pending determination of this application and suit.

4. THAT an order do issue compelling the 2nd and 3rd Defendants to deposit the decree mental sum of Kshs. 60,360,570/- in court pending the hearing and determination of this application.

5. THAT this Honourable Corut be pleased to Order the 2nd and 3rd Defendants to deposit the 12% accrued interest on the decree sum from 9th October 2015 to todote pending the hearing and determination of the application.

6. THAT the costs of this application be provided for.

7. THAT such other and/or further relief be granted as this Honourable Court may deem fit and just to grant in the circumstances of this matter.

2. The application which was premised upon **Order 22 Rule 25, Order 51 Rule 1** of the **Civil Procedure Rules, Sections 1, 1A, 3A and 63(e)** of the **Civil Procedure Act** and all other enabling provisions of the law was supported by the Affidavit of even date sworn by **ZOHER PIRBHAI** an employee of the Plaintiff Company.

3. The 2nd Defendant **ENOCK TUITOEK** opposed the application through his Replying Affidavit dated **8th July 2020**. The 1st Defendant **PATRICK T/A LUTHA & COMPANY ADVOCATES** and the 3rd Defendant **MAURICE ALDOUS OPAR** did not file any replies to the application. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions dated **10th August 2020** whilst the 2nd Defendant filed submissions dated **18th September 2020**.

BACKGROUND

4. The Plaintiff herein filed this suit against the Defendants way back in the **year 2010**. The suit was fully heard and on **21st September 2015**, **Hon. Justice Alfred Mabeya** delivered his Judgment in favour of the Plaintiff. The 2nd Defendant being aggrieved by the said Judgment filed the application dated **9th October 2015** seeking a stay of execution of the Judgment of **21st September 2015**. The Court did grant an interim stay of said Judgment and from that time to the present the 2nd Defendant has not taken any steps to have the application of **9th October 2015** set down for inter partes hearing. The Plaintiff/Applicant now prays that the application dated **9th October 2015** be struck out to enable it proceed to execute the Judgment of **21st September 2015**.

ANALYSIS AND DETERMINATION

5. I have carefully considered the submissions filed by both parties in this matter. The Plaintiff/Applicant submits that as a consequence of the interim stay of Judgment, the Defendant /Respondent has enjoyed an indefinite stay of the said Judgment from the **year 2010** to date. The Plaintiff submits that the failure by the Defendant to prosecute the application of **9th October 2015** or even to set the same down for mention is a move calculated to deny the Plaintiff the fruits of its Judgment.

6. On his part the 2nd Respondent submits that the stay was granted upon consent of **both** parties to allow the Plaintiff to file its Reply to the application of **9th October 2015**. That the Plaintiff has infact never filed any Reply to the said application and are thus equally responsible for the delay in hearing of said application. The 2nd Defendant submits that its application raises triable issues and prays that the same be heard and determined on its merits.

7. There can be no disputing the fact that an order of stay of execution of Judgment is not meant to be a permanent order. A stay of Judgment is normally granted pending the occurrence of some future event in this case pending the inter partes hearing of the application dated **9th October 2015**. In the application of **9th October 2015**, the 2nd Defendant sought to have the Judgment delivered by **Hon. Justice Mabeya** on **21st September 2015** set aside on grounds that the 2nd Defendant despite having filed a defence to the suit, did not participate in the trial and did not cross-examine any of the witnesses. The 2nd Defendant claims that it was never served with and did not receive the hearing notices hence his failing to participate in the trial. Undoubtedly the application raises triable issues which would warrant a hearing on merit.

8. On the other hand it is not in dispute that after obtaining the stay the 2nd Defendant went to sleep (obviously because the stay was in his favour) and took no steps to have his application set down for hearing and/or for mention. As a consequence the stay has persisted for five (5) years. Clearly the intention was to deny the Plaintiff the fruits of its Judgment.

9. In **NILESH PREMCHAND MULJI SHAH & ANOTHER T/A KETAN EMPORIUM –VS- MD POPAT & OTHERS (2016)eKLR** it was stated as follows:-

“Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.”

10. Similarly in **MWANGI S. KIMENYI –VS- ATTORNEY GENERAL & ANOTHER MISC. CIVIL SUIT No. 720 OF 2009** the Court held that:-

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.” [own emphasis]

11. In my view the delay of **five (5) years** from **2010** to date in prosecuting the application dated **9th October 2015** has been inordinate and unwarranted and has caused great prejudice to the Plaintiff/Applicant. In the circumstances, I find that there is no justification for the orders of stay to remain in force. Accordingly I vacate the orders of stay of Judgment and dismiss the application dated **9th October 2015** for want of prosecution. The costs of this application are awarded to the Plaintiff/Applicant.

Dated in Nairobi this 22ND day of JANUARY, 2021.

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MAUREEN A. ODERO

JUDGE