



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 478 OF 2004

GIRO COMMERCIAL BANK LIMITED.....PLAINTIFF

- VERSUS -

BENLUCKS (K) LIMITED.....1ST DEFENDANT

AMRATLAL BHANJI LAXMAN.....2ND DEFENDANT

MRS INDU LAXMA.....3RD DEFENDANT

RULING

1. The defendants by their *notice of motion* dated **20th March, 2018**, seek the dismissal of the plaintiff's suit for want of prosecution. The application is based on the ground that the plaintiff has not taken any step in the suit for more than one and half years; that the plaintiff has been indolent lacking in diligence which has inordinately delayed prosecution of this suit since the year 2004; and that the delay has gravely prejudiced the defendants.

2. The application is supported by an affidavit of the learned advocate *Idris Ahmed*, sworn on **20th March, 2018**. In that affidavit, the said advocate set out the chronology of this matter as follows:

- i. The suit was filed on **30th August, 2004** and pleadings closed on **6th April, 2005** when the Plaintiff filed a Reply to the 1st, 2nd and 3rd Defendants' defence;
- ii. On **29th May, 2006** the Defendants served a request for particulars on the Plaintiff and a reply to the same was only furnished by the Plaintiff almost 6 years later on **17th May, 2012**;
- iii. The Reply to request for particulars was insufficient and did not comply with the law;
- iv. On **23rd July, 2012** the Defendants served a request for further and better particulars on the plaintiff and a reply to the same was furnished by the plaintiff on **27th September, 2012**;
- v. Since **November, 2012** the Plaintiff has not attempted to fix the matter for trial which is more than 5 years ago;
- vi. The suit was dismissed by Honourable Mr **Justice S. Riechi** for want of prosecution on **17th June, 2015** upon the court's own motion;
- vii. The said order for dismissal was set aside by the Honourable **Mr. Justice F. Ochieng'** on **2nd February, 2016** upon the Plaintiff/Respondent's Application and the suit reinstated giving the Plaintiff/Respondent another opportunity to prosecute its case which it has failed to do to date;
- viii. That it is now almost fourteen years since the suit was filed and the Plaintiff/Respondent has failed and/or neglected to prosecute its case."

3. The deponent then deponed that the defendants are not guaranteed a fair trial in this matter in view of that delay.

4. The application was opposed. The replying affidavit sworn on **9th April, 2018**, was by the plaintiff's learned advocate *Martin Munyu*. In that affidavit the learned counsel stated that after this suit was reinstated by this court's ruling of **2nd February, 2016**, the plaintiff took

necessary steps to have the matter heard. The deponent set out the steps the plaintiff took as follows:

- a. On **1st April, 2016**, the plaintiff filed its witness statement.
- b. On **2nd February, 2017**, the plaintiff filed its list of issues.
- c. On **10th February, 2017**, the plaintiff filed a case management check list.
- d. The plaintiff by its letter of **31st January, 2017**, invited the defendant for case management, but on that occasion the file was not traced at the registry. It was reported to be at the typing pool.
- e. Once the file was released from the typing pool, the plaintiff fixed the case management conference for **22nd May, 2018**.

5. The plaintiff's learned advocate further deponed that the court file was detained at the typing pool from **2nd February, 2016** until **19th January, 2018** and a certificate of delay setting out that fact was annexed to the replying affidavit.

6. The learned advocate for the defendant, filed a supplementary affidavit sworn on **18th May, 2018** countering the depositions of the plaintiff's replying affidavit and stated that the fact the case file was in the typing pool was not a reason for the plaintiff to fail to take action in this matter. Learned counsel further deponed that the defendants were elderly and were suffering grave illnesses and were therefore not able to effectively participate in the trial and will suffer prejudice.

ANALYSIS AND DETERMINATION

7. I have considered the affidavit evidence, oral submissions and the defendant's authorities.

8. It is important to state that the plaintiff's suit was dismissed for want of prosecution on **17th June, 2015**. The plaintiff by its application dated **12th October, 2015** sought reinstatement of the suit. This court by its ruling of **2nd February, 2016**, reinstated the suit on the main ground that the plaintiff had not been served with notice of that dismissal and had been denied opportunity to show cause why the suit should not be dismissed.

9. The defendants were aggrieved with that reinstatement and filed an application dated **11th February, 2016** seeking an order for leave to appeal against that ruling of **2nd February, 2016**, which reinstated the plaintiff's suit and also sought for an order that the court would certify that a point of law of general public importance is involved in the proposed appeal and also sought stay of further proceeding of this case.

10. This court by its ruling of **1st September, 2016** granted the defendant leave to appeal against its ruling of **2nd February, 2016** but declined to stay the suit.

11. It is clear from the court file that this file was removed from the court registry and taken to the typing pool from **10th February, 2016** to **19th January, 2018**. This is confirmed by the this court's Deputy Registrar's certificate of delay dated **20th February, 2018**.

12. From the outset I need to make it clear that as I consider the defendant's application dated **20th March, 2018**, I will not consider the period from inception of this case until **2nd February, 2016**. This is because this court by the ruling of **2nd February, 2016**, reinstated this suit. The defendants being aggrieved by that reinstatement filed a notice of appeal against that ruling. It follows that the act of reinstating the suit by the ruling of **2nd February, 2016** is before the court of appeal. I shall therefore steer clear from considering that period. The defendants, I believe appreciated that fact because in their grounds in support of the application under consideration seek the court to find that the plaintiff's delay of one and half years, and not the 14 years, is inordinate and inexcusable.

13. The question that will concern me in this ruling is whether the plaintiff has showed cause as required under **Order 17 rule 2(1) of the Civil Procedure Rules**, to my satisfaction, why this suit should not be dismissed for want of prosecution for non activity for one and half years.

14. The ruling reinstating the suit was delivered on **2nd February, 2016**. The defendant thereafter on **11th February, 2016**, filed an application for leave to appeal and stay of proceedings. Ruling of that application was delivered on **16th September, 2016**.

15. As stated before, the Deputy Registrar of this court has signed a certificate of delay certifying that this file was at the typing pool until **19th January, 2018**. It is no wonder that the plaintiff's letter of invitation to fix case management conference yielded no date, because the file was not at the court registry.

16. The period it would seem that the file was available at the registry was from **19th January, 2018**.

17. In my view the plaintiff has, shown cause to the satisfaction of this court why this suit should not be dismissed for want of prosecution. This is a suit that needs to be heard on merit for justice to be done. The parties will therefore be ordered to comply with case management conference and at the reading of this ruling a hearing date of this suit will be fixed.

18. In the end,

- (a) the defendant's application dated **20th March, 2018** is dismissed but the costs will be in the cause

(b) the parties are directed to file their witness statements cross referenced with their bundles of documents, which documents shall be paginated within 30 days from today.

(c) at the reading of this ruling this suit shall be set down for hearing.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of July 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendants

MARY KASANGO

JUDGE