



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**WINDING UP CAUSE NO. 17 OF 2012**

**IN THE MATTER OF TAUNTON (MANAGEMENT) LIMITED**

**AND**

**IN THE MATTER OF A PETITION BY MINORITY SHAREHOLDER**

**AND**

**IN THE MATTER OF THE COMPANIES ACT CAP 486 LAWS OF KENYA**

**RULING**

1. The application before me is brought by the Company, **TAUNTON (MANAGEMENT) LIMITED**. It seeks the dismissal of the petition for want of prosecution.
2. The company pointed out that the petitioner had failed to take any steps to prosecute the case since 21<sup>st</sup> April 2014, when the court had ordered that the dispute be determined through arbitration.
3. In the alternative, the company asks the court to declare that the Injunctive Orders dated 18th July 2012 had lapsed, by operation of the law.
4. By his replying affidavit, the petitioner informed the court that he used to communicate with his advocate, Mr. Manjit Billing even whilst the petitioner was outside the country for long periods of time.
5. According to him, the communication between them would be by phone, and his advocate used to assure him that the case was on track.
6. Regrettably, Mr. Manjit Billing passed away on 29<sup>th</sup> March 2015.
7. In the circumstances, as this application was brought on 6<sup>th</sup> August 2015, the petitioner submitted that the same was brought prematurely.
8. In principle, when no steps had been taken in a case for a period of 12 months, it is open to the defendant or respondent to apply for its dismissal for want of prosecution.
9. However, the courts have made it clear that when the delay was not inordinate, the case would not be dismissed. That implies that although the application for dismissal of a suit for want of prosecution may be brought after the lapse of 12 months, the chances of success for such an application improves when the

delay increases.

10. The petitioner has explained that the failure to take steps in this case was attributable to the fact that his advocate was ailing, and later passed away.

11. As the advocate succumbed to his ailment on 29<sup>th</sup> March 2015, it follows that by the date when that sad incident took place, the period of time which had lapsed since the court gave the order on 21<sup>st</sup> April 2014, was less than a year.

12. And the period between the demise of Mr. Manjit Billing and the time when the company brought the current application, was 5 months.

13. In my considered view, in the light of the circumstances prevailing in this case, the company has not demonstrated inordinate delay, on the part of the petitioner.

14. On the other hand, I note that the petitioner was not inclined to proceed to arbitration. His position is that the Winding-Up proceedings are not amenable to arbitration.

15. In my considered view, the petitioner should not have kept away from the arbitral process when the court had directed the parties to go to arbitration. The petitioner ought to have either participated in the arbitral process or he should have applied to the court to set aside the order.

16. By keeping off the process of arbitration, the petitioner frustrated the said process, and that may well have led to the conclusion that the petitioner did not wish to prosecute his case.

17. Having come to the conclusion that the delay in the prosecution of the petition was not inordinate, the application for the dismissal of the petition fails.

18. Meanwhile, as regards the Interim Injunction Orders which were granted on 18<sup>th</sup> July 2012, Order 40 Rule 6 of the Civil Procedure Rules is categorical;

**“Where in a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for sufficient reason the court orders otherwise”.**

19. In the case of **MARIA LWANDE & OTHERS Vs TELEPOSTA PENSION SCHEME, E & L CASE No. 1321 of 2013**, Justice L. Gacheru held that when the court has not ordered that an interlocutory injunction order be extended beyond the 12 months from the date when it was granted, the same lapses by operation of the law.

20. In my understanding, that is the correct legal position. In other words, an interlocutory injunction can only remain in force for a maximum of 12 months from the date it is issued, unless the court orders otherwise.

***21. Does that mean that if the court states expressly that the interlocutory injunction will be in force until the suit is heard and determined, the order will remain in force beyond 12 months?***

22. The answer is in the negative.

23. In the case of **ERICK KIMINGICHI WAPANG’ANA & ANOTHER Vs EQUITY BANK LIMITED & ANOTHER, CIVIL APPEAL No. 23 of 2015**, the Court of Appeal said that;

**“Rule 6 of Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months**

**“unless? as the Rule further provides ‘for any sufficient reason the court orders otherwise’.**

24. In the light of the fact that the interlocutory injunction lapses by operation of the law, the only way that it could be sustained is through the beneficiary of the order moving the court to have it extended. If the court was satisfied that there was sufficient reason to warrant the extension of the order, then only would the court make such order as deemed appropriate.

25. In this case, the petitioner did not move the court before the interlocutory injunction had lapsed. Therefore, by operation of the law, the interlocutory injunction lapsed.

26. Finally, as the company has succeeded in one limb of the application, whilst losing on the other limb, I order that each party will pay his own costs of the application dated 31<sup>st</sup> July 2015.

**DATED, SIGNED and DELIVERED at NAIROBI this 16<sup>th</sup> day of May 2017.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Shah for the Applicant

Gachugi for the Petitioner

Collins Odhiambo – Court clerk.