REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO 71 OF 1998

PATRICE KIPKEMEI CHEPKWONY…..……..……PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED……..…….…….…..…….DEFENDANT

RULING

1. The plaintiff prays that the suit be reinstated. The suit was dismissed on 8th April 2015 for want of prosecution. This followed a notice issued by the court under Order 17 of the Civil Procedure Rules. On the date of the dismissal, learned counsel for the plaintiff, Mr. Ngige Mbugua, attended court. He urged the court to dismiss the suit.

2. Learned counsel has now made a complete about-turn. He has presented a notice of motion dated 3rd June 2015 praying that the suit be resuscitated. The pith of the motion is that due to the short notice of the dismissal, the lawyer had not received full instructions from the plaintiff. There is filed an affidavit sworn by Mr. Ngige Mbugua in support of the motion. He avers at paragraph 5 that the plaintiff has *"always been ready and willing to proceed with the suit but the delay was occasioned by circumstances not under [his] disposal"*. It is further averred that no prejudice will be suffered by the defendant if the suit is restored.

3. The defendant opposes the application. There is a replying affidavit sworn by Mr. Akenga Collins, an advocate from the firm acting for the defendant. He deposes that the suit was last in court on 8th May 2013; that the suit was lodged way back in the year 1998; that the plaintiff has enjoyed the benefit of an interim order of injunction against the bank issued on 24th April 1998; that the suit had earlier been dismissed on 4th July 2007 but reinstated by consent; and, that it is evident that the plaintiff has lost interest in the suit. He avers that the delays are prejudicial to the interests of the defendant.

4. On 25th May 2016, learned counsel for the applicant and respondent made brief oral submissions. The plaintiff's counsel said he took "personal and professional responsibility" for conceding to the dismissal of the suit on 8th April 2015. He submitted that the mistakes of the advocate should not be visited upon his client. I enquired from the defendant's counsel about the fate of its counterclaim. The defendant's counsel replied that the suit should be dismissed.

5. I have considered the rival arguments. I have also paid heed to the records before me, the pleadings, and depositions.

6. The plaintiff filed the suit nearly *seventeen* years ago. To be more precise, the plaint was filed on 24th April 1998. Contemporaneously with the suit, the plaintiff presented a chamber summons praying for

interlocutory injunction. The Court (Nambuye J, as she then was) granted the order. The main suit has *never* been heard. True, the suit was listed for hearing on a number of occasions. But it never took off. It is not lost on me that this is a commercial claim over a charge debt. There is a counterclaim by the bank for Kshs 5,802,014.95. The defendant has *not* also taken steps to prosecute the counterclaim. At some point, the parties intimated to the court that they were negotiating a settlement. The suit was last in court on 8th May 2013 when the parties were granted one month to record a settlement. It was not forthcoming.

7. Under Order 17 Rules 2 (1) and (2) of the Civil Procedure Rules 2010, if *no* step is taken in any suit by either party for one year, the court, upon notice to the parties, may *dismiss* the suit. Both parties concede receipt of the notice for dismissal. In fact, the plaintiff's learned counsel, Mr. Ngige Mbugua, attended court on the date the suit was dismissed; and, interestingly, urged the court to *dismiss* his suit. A period of nearly two years had elapsed from the day it was last in court. Granted the circumstances, the court was entitled to dismiss the suit.

8. It is common ground that the suit was *last* in court on 8th May 2013. A period of nearly *two years* lapsed without any concrete step being taken by either the plaintiff or defendant to fix the suit for hearing. The laches has not been well explained. The defendant presented the motion for reinstatement of the suit on 4th June 2015, nearly *three months* after the last dismissal. That delay is not also explained.

9. This court has wide and *unfettered* discretion to set aside an *ex-parte* order. As stated in *Shah v Mbogo (No. 1)* [1967] E.A 116, the discretion *"is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice"*. That decision by Harris J was upheld by the Court of Appeal in *Mbogo and another v Shah* [1968] E.A 93. See also *Kimani v Mc Connell* [1966] E.A 547, *Patel v East African Cargo Handling Services* [1974] E.A. 75, *Magunga General Stores v Pepco Distributors Limited* [1987] 2 KAR 89.

10. The other test in a matter of this nature was well laid out in *Ivita v Kyumbu* [1984] KLR 441. It is whether the delay is *prolonged* and *inexcusable*, and if it is, whether justice can still be done. In that event, instead of dismissal, the court may exercise its discretion to set the suit down for hearing.

11. I have studied the record of the court. Facts can be very stubborn. The truth of the matter is that the plaintiff has *not* taken any steps to set down the matter for hearing since 8th May 2013. The matter could not lie in abeyance *ad infinitum*. The plaintiff's counsel, Mr. Ngige Mbugua, attended court on the date of dismissal. He *expressly* urged the court to dismiss the suit. He conceded there was *inordinate delay* in prosecuting the suit. He made those submissions in good faith. He knew the consequences. He has been conducting this suit from its inception. I find it quite dishonest that he is now trying to *resile* from his admission that the plaintiff was disinterested in the suit. The plaintiff sat pretty because he was enjoying an interlocutory injunction.

12. The defendant bank is not a virtuous virgin either. It neglected its counterclaim of 5,802,014.95. So much so that both parties went into a deep slumber; and, exhibited little desire to prosecute the suit. The point is this; there was nothing to prevent the plaintiff or the defendant from taking a hearing date in the suit. Being a commercial claim for a substantial sum, and also a land matter, I would have expected the parties to be a little more diligent.

13. It is thus apparent that the blame for failure to progress the suit rests entirely at the plaintiff's doorstep. Inordinate delay by the plaintiff has thus been established. The delay has *not* been well explained. It is thus *inexcusable*. See *Ivita Vs Kyumbu* [1984] KLR 441, *Allen v McAlpine* [1968] 1 All ER 543, *Ramuka Agencies Ltd v Esther Wanjira Maina and another* Nairobi, High Court ELC 1187 of 2007 [2012] eKLR.

14. In *Fitzpatrick v Batger & Co. Ltd* [1967] 2 ALL ER 657 Lord Denning, citing his decision in *Reggentine v Beecholme Bakeries Ltd* [1967] 111 Sol. Jo. 216, said as follows;

> *"It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that*

the business of the courts should be conducted with expedition ……. the delay is far beyond anything we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution".

15. The court has inherent power to strike out such a dormant suit. The power was well explained in *Mukisa Biscuit Manufacturing Company Vs West End Distributors Ltd* [1969] EA 696. In the instant case, the portrait of lethargic and disinterested litigants emerges. I thus find that the court acted judiciously in dismissing the entire suit.

16. There is an overriding objective to do justice to the parties. It is in the interests of a fair trial that disputes be resolved expeditiously. The defendant here is obviously prejudiced by the existence of a stagnant suit. The converse is also true. The plaintiff is prejudiced by the inert counterclaim. There are costs that go with it.

17. In the end no proper foundation has been laid for exercise of my *discretion* to set aside the order dismissing the suit. The plaintiff has *deliberately* obstructed or delayed the course of justice. And so has the defendant in its *counterclaim*. The delays in this case are too lengthy. They are not well explained or at all. The delays cannot be attributed to *inadvertence, excusable mistake or error*. Resuscitating the suit or the counterclaim will offend the overriding objective of the court to do justice. The notice of motion dated 3rd June 2015 is thus devoid of merit. It is hereby *dismissed*. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 16th day of June 2016.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

No appearance for the plaintiff.

Mr. Odhiambo for the defendant instructed by Nyaundi Tuiyott & Company Advocates.

Mr. J. Kemboi, Court Clerk.