



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO 17 OF 2012**

**COMMERCIAL BANK OF AFRICA.....PLAINTIFF**

**VERSUS**

**PAYLESS CAR HIRE & TOURS LIMITED.....1<sup>ST</sup> DEFENDANT**

**JAI SURYAKANT RADIA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Defendants' Notice of Motion application dated 10<sup>th</sup> June 2014 and filed on 7<sup>th</sup> July 2014 was brought pursuant to the provisions of Order 17 Rule 2 (1) and (3) of the Civil Procedure Rules and all other enabling provisions of the law. It sought the following prayers:-
  1. **THAT the Plaintiff's suit against the Defendants be dismissed with costs for want of prosecution.**
  2. **THAT the Plaintiff to pay the costs of this application.**

**THE DEFENDANTS' CASE**

2. The application was premised on the grounds on the face of the application and supported by the affidavit of Kelvin Moeni (sic) that was sworn on 24<sup>th</sup> June 2014. Its written submissions were dated 22<sup>nd</sup> September 2014 and filed on 24<sup>th</sup> September 2014.
3. The Defendants' case was that the Plaintiff had not taken any steps to set down the matter for hearing in two (2) years. It said that this was a clear indication of the Plaintiff's loss of interest to prosecute the suit herein.

**THE PLAINTIFFS' CASE**

4. In opposing the said application, on 2<sup>nd</sup> September 2014, Ronald Mworira, the Plaintiff's Head, Remedial Management Unit filed a Replying Affidavit on behalf of the Plaintiff. It was filed on 4<sup>th</sup> September 2014. Its written submissions were dated 27<sup>th</sup> September 2014 and filed on 29<sup>th</sup> September 2014.
5. The Plaintiff averred that the Defendants had not demonstrated any prejudice or injustice they had suffered in the two (2) years it had not prosecuted the suit herein. The delay to prosecute the case was because it was necessary for it to carry out investigations and research as it acquired the entire

shareholding of First American Bank of Kenya in 2005, which included the Defendants accounts. It therefore prayed that it be given an opportunity to prosecute the case.

## **LEGAL ANALYSIS**

6. Order 17 Rule 2 (3) of the Civil Procedure Rules, 2010 reads as follows:-

**“Any party to the suit may apply for its dismissal as provided in sub-rule 1.”**

7. The aforementioned sub-rule (3) is read together with sub-rule (1) of Rule 2 in which it is stipulated as follows:-

**“In any suit in which no application has been made or step taken by either party for one year, (emphasis court) 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.”**

8. It is therefore the duty of any party or an advocate in a suit to take steps in adding the court achieve the overriding objective as provided under Section 1A of the Civil Procedure Act Cap 21 (Laws of Kenya) for the just, expeditious, proportionate and affordable dispensation of matters.
9. The court did note the holdings in the cases of **HCCC No David Oyakapeli Imwene vs Caroline Abade** (unreported), **Netplan East Africa Limited vs Investments & Mortgages Bank Limited [ 2013] eKLR** amongst several other cases that were relied upon by the Defendants wherein the respective courts dismissed suits for want of prosecution.
10. Similarly, the court also had due regard to the case of **HCCC No 279 of 1996 A R Rebelo vs United Touring Co Limited & Another** (unreported) where the court therein declined to dismiss the suit and directed parties to complete all pre-trial procedures and list the matter therein for hearing.
11. It is therefore evident from the foregoing cases that it is within the discretion of the court either to dismiss a suit for want of prosecution or not to depending on the circumstances of the case.
12. The failure or the delay by the Plaintiff to prosecute the suit herein did appear inordinate. However, its averments on the cause of the delay were not rebutted by the Defendants. In any event, whereas there is a greater burden on a party that files suit, nothing prevented the Defendants from fixing the matter herein after they filed their List and Bundle of Documents, List of Witnesses and Witness Statements on 27<sup>th</sup> April 2012.
13. Notably, although the Defendants may have suffered anxiety due to the non-prosecution of the matter herein, they did not demonstrate what prejudice or injustice they had suffered in the period the Plaintiff failed to take active steps to prosecute this matter. Appreciably, it is the duty of the court to sustain rather than terminate suits. Denying a party an opportunity to be heard, which is a right that is enshrined in Article 50 of the Constitution of Kenya, 2010, is a draconian step and must be exercised only as a last resort.
14. Accordingly, having considered the pleadings, the affidavit evidence and the written submissions and the cases that were relied upon by the parties, the court came to the conclusion that this was not a suitable case where the suit should be dismissed for want of prosecution. A perusal of the court file shows that the Plaintiff herein had already filed a Notice of Motion application dated 8<sup>th</sup> August 2014 seeking to amend its Complaint, having obtained the information that it had been tracing. It would therefore be in the best interests of justice that the suit herein be sustained.
15. However, in view of the inordinate delay bearing in obtaining documents against the backdrop that the Plaintiff acquired the First American Bank Limited in 2005, the Plaintiff cannot be allowed to go scot-free. It was the view of the court that an award of costs would be adequate to compensate the Defendants for the inconvenience that they had suffered as a result of the Plaintiff's inaction in the matter herein.

## **DISPOSITION**

16. The upshot of this court's ruling is that the Defendants' Notice of Motion application dated 10<sup>th</sup>

- June 2014 and filed on 7<sup>th</sup> July 2014 was not merited and the same is hereby dismissed.
17. The court hereby directs that the parties comply with the Practice Directions High Court of Kenya Commercial & Admiralty Division Kenya Gazette Notice No 5179 of 28<sup>th</sup> July 2014 within thirty (30) days of the date of this ruling and thereafter take a date for the Case Management Conference at the registry.
18. The Plaintiff is hereby ordered to pay the Defendants' advocates thrown away costs in the sum of Kshs 5,000/= within fourteen (14) days from the date of this ruling. In default thereof, the suit will stand dismissed for failure to comply with the court's directions and/or orders.
19. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of January 2015**

**J. KAMAU**

**JUDGE**