



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO 103 OF 2001**

**TRUST BANK LIMITED (in liquidation) .....PLAINTIFF**

**VERSUS**

**AJAY SHAH .....1<sup>ST</sup> DEFENDANT**

**ARUN JAIN.....2<sup>ND</sup> DEFENDANT**

**PRAVIN MALKAN.....3<sup>RD</sup> DEFENDANT**

**JIGNESH DESAI .....4<sup>TH</sup> DEFENDANT**

**NAYAN MURTHI SABESAN.....5<sup>TH</sup> DEFENDANT**

**RENUKA SHAH.....6<sup>TH</sup> DEFENDANT**

**AZIM VIRJEE.....7<sup>TH</sup> DEFENDANT**

**DIAMOND JAMAL.....8<sup>TH</sup> DEFENDANT**

**ANIL VAKIL.....9<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The 1<sup>st</sup> Defendant's Notice of Motion dated 26<sup>th</sup> July 2013 and filed on 29<sup>th</sup> July 2013 was brought under the provisions of Section 3A of the Civil Procedure Act, Order 51 Rule 1 and Order 17 Rule 2 (3) of the Civil Procedure Rules. It sought the following orders:-

- 1. THAT this Honourable Court be pleased and (sic) dismiss the Plaintiff's suit as against the First Defendant for want of prosecution.**
- 2. THAT the costs of this application be awarded to the First Defendant/Applicant in any event.**

## THE 1<sup>ST</sup> DEFENDANT'S CASE

2. The 1<sup>st</sup> Defendant's application was supported by the Affidavit of M. Billing, an Advocate of the High Court. It was sworn on 26<sup>th</sup> July 2013. The application was also supported by the Supplementary Affidavit of Wycliffe O.Ojore that was sworn on 5<sup>th</sup> August 2014. He reiterated the contents of the affidavit of M. Billing sworn on 26<sup>th</sup> July 2013. The 1<sup>st</sup> Defendant also filed a List of authorities dated 16<sup>th</sup> October 2013 on even date. On 30<sup>th</sup> October 2014 the 1<sup>st</sup> Defendant filed its written submissions dated 29<sup>th</sup> October 2014.
3. The 1<sup>st</sup> Defendant averred that the Plaintiff had now not prosecuted its claim in against it for over seven (7) years. It stated that it was more than one and a half (1½) years since the Plaintiff invited it to fix a hearing date for the suit. It contended that the Plaintiff chose not to diligently prosecute its case and deliberately preferred to instead invite it for fixing hearing dates on other suits between the two parties.
4. It submitted that the failure by the Plaintiff to prosecute its suit was causing it prejudice and anxiety. It averred that the invitation by the Plaintiff to fix the suit for hearing after filing of the current application was a poor effort on the part of the Plaintiff to try to circumvent the present application and urged the court to allow the same as prayed.

## THE PLAINTIFF'S CASE

5. In response to the said application, on 15<sup>th</sup> October 2013, the Plaintiff filed its Replying affidavit sworn on its behalf by Micah L. Nabori on even date. He also filed a Further Affidavit on 15<sup>th</sup> February 2014. Its written submissions were dated and filed on 6<sup>th</sup> October 2014.
6. The Plaintiff contended that the application had no merits and that it was to a large extent an abuse of the court process. It stated that after the ruling of Honourable Lady Justice H.M Okwengu (as she then was) on 10<sup>th</sup> May 2007, it had taken steps to fix the case for trial.
7. It indicated that the suit was fixed for trial on several occasions but the trial did not proceed and that as early as February 2011, the Plaintiff had invited the 1<sup>st</sup> Defendant to fix a date for hearing but unfortunately the court diary was full as was in 2012.
8. It averred that there were seven (7) cases between itself and the 1<sup>st</sup> Defendant and that to date a number of the said cases had been fixed for trial.
9. The Plaintiff thus contended that the 1<sup>st</sup> Defendant was stopped from going back on its election and seeking to prosecute the present application. The Plaintiff urged the court to take into consideration the fact that this suit was brought for the benefit of a large number of the Plaintiff's depositors who lost their savings when the Plaintiff was placed in liquidation.

## LEGAL ANALYSIS

10. The dismissal of a suit is at the discretion of the court as envisaged under Order 17 Rule 2 of the Civil Procedure Rules, 2010. The court is alive to the fact that the dismissal of a suit is a draconian step as it denies a party the right to be heard. The court is enjoined under Article 159(2) of the Constitution to do justice to all parties.
11. This was a view that was taken by the Court of Appeal in Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 Others (2013) eKLR where it was observed as follows:-

**“...The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”**

12. It was evident that the Plaintiff had in one way or another made efforts or taken steps to set this matter for hearing. This was clear from the Plaintiff's Replying Affidavit contents which had not

- been controverted by the 1<sup>st</sup> Defendant. There were several other cases between the 1<sup>st</sup> Defendant and the Plaintiff in which the Plaintiff had sent invitations to fix hearing dates. The 1<sup>st</sup> Defendant responded to the Plaintiff's request to attend the Registry and fix a date for the trial of the case after the present application was filed. This case was then fixed for trial on 5<sup>th</sup> December 2013. It therefore could not be said that the Plaintiff had slept on its rights in terms of prosecuting its suit.
13. The 1<sup>st</sup> Defendant had not been diligent in prosecuting the current application. This was evidenced by the many delays occasioned by its filing its documents in support of the said application.
  14. Having considered the pleadings, affidavit evidence, written submissions and case law in support of the respective parties' cases, the court was of the view that it was in the public interest that this matter be heard and determined on its merits as the case involved many other parties who were customers of the Plaintiff.
  15. However, the Plaintiff cannot be allowed to go scot free. The 1<sup>st</sup> Defendant had suffered prejudice and anxiety by having the Sword of Damocles hanging over his head for over fourteen (14) years. This prejudice can be compensated by an award of costs which the court finds ought to be paid by the Plaintiff.

### **DISPOSITION**

16. In the circumstances foregoing, the upshot of this court's ruling was that the 1<sup>st</sup> Defendant's Notice of Motion dated 26<sup>th</sup> July 2013 and filed on 29<sup>th</sup> July 2013 was not merited and the same is hereby dismissed. However, there will be no order as to costs as the Plaintiff was equally to blame for not prosecuting its case for almost fourteen (14) years.
17. The parties are hereby directed to comply with the provisions of the Practise Directions Kenya Gazette Notice No 5179 of 28<sup>th</sup> July 2014 within the next sixty (60) days from the date of this ruling.
18. The Plaintiff is hereby ordered to pay the 1<sup>st</sup> Defendant thrown away costs in the sum of Kshs 50,000/= within fourteen (14) days from the date of this ruling.
19. Case Management Conference is hereby fixed for 22<sup>nd</sup> May 2015.
20. It is so ordered.

**DATED and DELIVERED at NAIROBI this 19<sup>th</sup> day of March 2015**

**J. KAMAU**

**JUDGE**