REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 526 OF 1999

GALSHEET KENYA LIMITED ……..…….....……PLAINTIFF

VERSUS

KAYAM CHATUR ……..…….....…… 1ST DEFENDANT

SULTAN HARDWARE LIMITED …….....…. 2ND DEFENDANT

RULING

This ruling determines the defendant/applicant's application dated 26th January 2015 seeking to dismiss this suit for want of prosecution with costs to the defendants.

The application is predicated on the grounds that the suit was instituted on 1999 and that it was last in court on 20th September 2011 for mention when it was stood over generally and ever since 10th May 2012 when it was meant to be mentioned but not listed, no action has been taken which delay is inordinate inexcusable and denies the defendant a fair trial on the issues in the action, which continued pendency of the suit is prejudicial to the defendant hence it is in the interest of justice that the suit be dismissed of want of prosecution as the plaintiff has abused the court process.

The application is also supported by the affidavit of James Rimui advocate sworn on 26th January 2015 emphasizing that the plaintiff has lost interest in the suit since there is no explanation why it has taken them that long to have this suit prosecuted hence it is only fair and just that the suit be dismissed for want of prosecution.

The plaintiff opposed the application and filed an affidavit sworn by Alex Ngatia Thangei on 1st April 2015 averring that the matter was last in court on 20th September but that they did on 1st December 2011, 13th June 2012 and 16th November 2012 invite the defence counsels to fix mutually convenient dates for the hearing of the suit. Further, that the last date taken was 10th May 2012 but the matter was not listed. It is also deposed that court diary was full in 2012 causing delay and that the plaintiff has complied with all pre-trial requirements and has written to the Deputy Registrar on 27th February 2015 seeking a mention date for pre-trial conference when they were served with this application yet the defendants had not complied with pre-trial requirements and has instead, since 2008 sought vide various applications to dismiss the plaintiff's suit. It is further deposed that the plaintiff had not lost interest in his case and no prejudice will be suffered if the matter proceeds to full hearing.

The parties urged their respective positions orally on 16th June 2015 with Mr Rimui advocate representing the defendant/applicant and Mr Thangei advocate representing the plaintiff/respondent.

Mr Rimui submitted that the suit had been instituted in 1999 and it now 16 years yet no steps had been taken to have it prosecuted. Further, that since 2008 the defendant had been taking steps to have the suit dismissed but their applications were either compromised or withdrawn and that on 20th September 2011 parties agreed to have their suit disposed of expeditiously but to date the plaintiff had made no efforts to have the suit disposed of. Counsel further submitted that no action was taken in 2013 and 2014 to set down the suit for hearing. He urged the court to find that the plaintiff's conduct of inaction did not entitle them discretion of the court and urged the court to dismiss the suit for want of prosecution.

Mr Thangei submitted in opposition to the application, relying on his replying affidavit that the age of the suit did not matter. Instead, that what was material was the last attempts made by the plaintiff. In his view, there is no inordinate or inexcusable delay caused by the plaintiff that cannot be compensated by an award of costs. He maintained that they made attempts to have the suit heard in 2012 but were unsuccessful and that prior to this application being filed, they had filed witness statements and pre-trial questionnaire on 27th February 2015 and by letter filed with the Deputy Registrar on 27th February 2015 asked the Deputy Registrar to fix a mention date for pre-trial conference which in his view, were sufficient steps to have the case heard and determined.

On the test for delay, he relied on **HCC 114/2006 Communications Carier Ltd and Communication Carrier Satellite Services Ltd vs Telcom (K) and Ivita V Kumbu (1984) KLR 441.** He urged the court to consider Constitutional principles that substantive justice should be done to both parties proportionately, invoking the overriding objectives of the Civil Procedure Act. He also submitted that the defendants had not demonstrated that they had been ready to be heard but stopped by the indolence of the plaintiffs.

Mr Thangei also relied on **HCC 1744/2000 Samuel M. Njuguna and Others V Theta Tea Factory** where the court held that courts should be slow to dismiss suits for want of prosecution without giving the plaintiff an opportunity to be heard unless the court is satisfied that the default has been intentional and contumelious and that there has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his lawyers and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

Mr Thangei also urged the court not to be poisoned by the previous application by the defendants to have this suit dismissed for want of prosecution as they were compromised or withdrawn on a without prejudice basis and that presently the plaintiff was ready to set down the matter for hearing.

In a brief rejoinder, Mr Rimui submitted that the delay was not only inordinate but inexcusable as no reasonable grounds had been given for failure to set down the suit for trial. He also submitted that they were never served with witness statements and that the authorities relied on by the plaintiff were persuasive not binding on this court hence this court must consider the reasons for the delay as was the case in the cited cases unlike in the instant case where no excuse or explanation for not fixing the case for hearing since 2012 was given.

Counsel for the defendant argued that there was no duty placed on the defendant to take any steps to set the suit down for hearing as it was the plaintiff's suit and that the application to dismiss the suit for inaction by its initiation was the appropriate way of moving the court.

I have carefully considered the application herein, the responses and submissions together with decided cases. The brief history of this suit must be given to lay a basis for the decision that I am just about to render.

The suit was instituted on 16th March 1999 by the plaintiff Galsheet (K) Ltd against Kayam Chatur and

Sultan Hardwares Ltd praying for judgment for USD 107,285.33 or its equivalent in Kenyan currency, interest and costs being alleged balance of the agreed price of goods sold and delivered to the defendants at their order and request in Nairobi between 1996 and 1997.

The defendants entered appearance on 30th April 1999 and filed defence on 13th May 1999.

On 11th June 1999, the plaintiff filed an application seeking judgment on admission but were unsuccessful and on 16th January 2002 they filed an application seeking that the defendants furnish security or costs.

On 2nd April 2002 the defendants filed an application for dismissal of the plaintiff's suit for want of prosecution. On 28th October 2004 the plaintiff sought to amend the plaint. In the meantime, there were change of advocates.

On 9th January 2008 the defendants again sought dismissal of the suit herein for want of prosecution. On 17th September 2009 the plaintiff filed list of documents and on 19th April 2011 the defendants again filed an application to dismiss this suit for want of prosecution.

The application for judgment was withdrawn by consent and pre-trial ordered to be complied with in 30 days from 30th July 2002. The application for amendment to the plaint was granted with corresponding leave to the defence to amend their defence within 14 days on 1st February 2005.

The application for security for costs was dismissed on 7th February 2002 by Kuloba J. The 1st application for dismissal of suit for want of prosecution was withdrawn by consent on 17th April 2008. The second one was also withdrawn by consent on 13th July 2011.

The present application was filed on 12th March 2015 predicated on Order 17 Rule 2(3) Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A,1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.

Under Order 17 Rule 2 of the Civil Procedure Rules.

1. *In any suit, in which no application has been made or step taken by either party for one year, 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;*
2. *If cause is shown to the satisfaction of the court, it may make such orders as it thinks to obtain expeditious hearing of the suit.*
3. *Any party to the suit may apply for it dismissal as provided in Sub Rule 1.*

The defendant's application is therefore brought under Order 17 Rule 2 Sub rule 3 as read with Sub rule (1) and (2) of Rule 2 above.

It is therefore expected that the defendant satisfies this court that no steps or other party (defendants) for one year to the date of filing of this application to dismiss the suit for want of prosecution and that no cause is shown to the satisfaction of the court why the suit cannot be dismissed for want of prosecution to warrant granting of the orders sought herein.

From the record exposed above, the defendant has been very active in pushing for dismissal of this suit for want of prosecution. This application is the third attempt to do so.

The issue for determination from the above exposition is, whether the applicant has satisfied the conditions for dismissal of this suit for want of prosecution.

The record shows that this suit came up for hearing on 20th September 2011 before Mwera J (as he

then was) and was stood over generally as there was a settlement and pre-trial requirements as per the 2010 Civil Procedure Rule had not been fulfilled.

Thereafter, the plaintiff's counsel fixed the suit for hearing on 10th May 2012 but as deposed by the plaintiff's counsel, Mr
Thangei, the matter was not listed. The record then shows that on 16th November 2012 the plaintiff invited the defence counsel to attend the registry for purposes of fixing a mutually convenient date on 23rd January 2013. The whole of 2013 and 2014 went without action and on 27th February 2015, the plaintiff's counsel filed witness statements together with a pre-trial questionnaire in compliance with the requirements of Order 11 of the Civil Procedure Rules. On the same date, the plaintiff's counsel wrote to the Deputy Registrar of the High Court asking for a mention date to fix pre-trial conferencing. Thirteen days later, the defendant filed this application dated 26th January 2015 on 12th March 2015 seeking to have the suit herein dismissed for want of prosecution .

Indeed, this is a case of the hunter being hunted by the hunted with all the arsenals at the latter's disposal.

In my view, this application is premature and does not meet the threshold of the provisions of Order 17 Rule 2 of the Civil Procedure Rules. The defendant had to show that no application had been made or step taken for one year before seeking to hunt down the plaintiff. In this case, the plaintiff had taken active and necessary steps on 27th February 2015 to comply with pre-trial requirements under Order 11 of the Civil Procedure Rule and had even sought a date for pre-trial directions which was a step in the right direction to ready the suit for hearing.

Albeit the defendant denies receiving the pre-trial questionnaire filed by the plaintiff and the witness statement, that is a matter that would have been considered by the court on a mention date when considering whether all the parties had complied with the pre-trial requirements of Order 11 of the Civil Procedure Rules since there could have been no trial by ambush.

In addition, as the plaintiff had filed those documents and letter which were on record, the defendants are expected to have seen them on the file when they lodged their present application and thereby withhold the filing of their application herein.

The above being the factual position of this matter, I would not belabour discussing issues of delay since it is apparent that the suit was filed in 1999 and there are reasons on the face of the record for the delay including the various interlocutory applications and no-compliance with pre-trial requirements before attempting to set down the suit for hearing.

For the above reasons, I am unable to exercise my powers under Order 17 Rule 2 of the Civil Procedure Rules to dismiss this suit for a want of prosecution as it has not been shown to the satisfaction of this court that there has been default which has been intentional and contumelious or that there has been prolonged or inordinate and inexcusable delay on that part of the plaintiff for his lawyers in setting down this matter for trial. (see **Halbury's Laws of England VOL 37 paragraph 448).**

In my view, to dismiss this suit as urged would be exercising jurisdiction which has not crystallized and in the process dispossess the plaintiff the right to a fair hearing and hence bar it from accessing justice therefore, ousting them from the seat of justice. The right to a fair hearing cannot be limited.(see Art 25 of the Constitution).

It is guaranteed under Article 50(1) of the Constitution. On the other hand, the right to access justice cannot be impeded unnecessarily, being a protected and guaranteed right under Article 48 of the Constitution.

This court is conscious of the new constitutional imperatives under Article 159(2)(b) of the Constitution that justice shall not be delayed but is quick to point out that in this particular instance, it

has not been shown to the satisfaction of the court that there has been such deliberate delay with the intention of causing serious prejudice to the defendants. The defendants have not demonstrated what prejudice if any would be occasioned to them if the suit herein is not dismissed. If anything I find that it is the plaintiff who stands to suffer loss if this suit , which claim is substantial-nearly ten million is dismissed without according the plaintiff an opportunity to be heard on merits.

For the foregoing reasons, I decline to dismiss this suit and dismiss the application dated 26th January 2015.

To ensure that this matter is not archived in any way since it has been before this court long enough and forms part of the infamous backlogs, I direct that the parties thereto comply with all the pre-trial requirements within 45 days from the date of this ruling.

I further direct that pre-trial directions shall be given on 23rd November 2015 upon compliance with the pre-trial requirements under Order 11 of the Civil Procedure Rules. Any defaulting party shall be liable to a charge of kshs 15,000 to be paid into court.

I order each party to bear their own costs of the application herein.

Dated, signed and delivered in open court at Nairobi this 22nd day of September 2015.

R.E. ABURILI

JUDGE

22.9.205

Coram R.E. Aburili J

C.A. Adline

Mr Mayende holding brief for Rimui for defendant/applicant

No appearance for respondent

(date was given in court on 16th June 2015)

Court- Ruling read and delivered in open court as scheduled.

R.E. ABURILI

JUDGE

Court- Pre-trial direction on 23rd November 2015. The defendant's counsel to issue notice to the plaintiff's Counsel.

R.E. ABURILI

JUDGE

22.9.2015