REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1506 OF 2005

1. TRINITY INVESTMENT BANK LIMITED

2. ERIC ANANDA.....PLAINTIFFS

VERSUS

GUARDIAN BANK LIMITED.....DEFENDANT

RULING

1. This ruling determines two applications on record with the parties' advocates' agreement. The first is the Defendant's motion dated 23rd March, 2015 seeking dismissal of this suit for want of prosecution and the second is the motion dated 22nd June, 2015 by the Plaintiff seeking directions in relation to the hearing of this suit.
2. The motion dated 23rd March, 2015 is premised on the grounds set out on the face of the application and the supporting affidavit of Henry Kabiru who is the advocate in conduct of this matter on behalf of the Defendant. It was his contention that the Plaintiff has since the year 2012, the Plaintiff has taken no steps to prosecute this suit.
3. The 2nd Plaintiff has filed a replying affidavit on behalf of the Plaintiffs, grounds of objection and preliminary objection on 22nd June, 2015 in opposition to the application. The Plaintiffs contend that the Defendant's motion lacks merit and is defective for being grounded on an affidavit sworn by the Defendant's advocate. That this matter was listed for hearing on 23rd June, 2010 when the 2nd Plaintiff testified in chief. That thereafter the matter was listed for hearing on 5th October, 2010, 29th November, 2010 and 9th March, 2011 and on all those occasions the case was adjourned at the instance of the Defendant's advocate. That on 16th March, 2011, the Defendant's advocate filed an application seeking to admit additional documents which application was allowed and the matter was ordered to proceed in the civil division. That Judge Dulu who was presiding over the matter was transferred and there was need for the proceedings to be typed. That the matter was mentioned before Judge Waweru on 8th June, 2012 for directions to confirm whether the same had been typed but the court file could not be traced. That by a letter dated 17th June, 2012, the Plaintiffs' advocate wrote to the Deputy Registrar requesting to have the matter placed before a judge for directions. That the matter was then listed on 9th July, 2012 and 26th September, 2012 for the said purpose. On 26th September,2012, it was ordered that fresh dates be taken at the registry. That this matter later appeared in the list of matters to be dismissed in early February, 2015 but the same was not fixed since the court file was missing. That the file re-surfaced in March, 2015 when the Plaintiffs' advocate re-constructed the said file. That after the reconstruction, the Plaintiffs' advocates invited the Defendant for fixing of a hearing date on 5th May, 2015. It was contended that the motion seeking dismissal of the suit was filed a week after

compliance with pre-trial requirements and served upon the defendant's counsel on 22nd April, 2015 thereby it is an afterthought. It was contended that the Defendant has not complied with pre-trial steps by filing documents in order to prepare the suit for hearing. That upon the Plaintiffs' advocate's clerk Mr. Moki's perusal of the court file, it was revealed that on 13th December, 2012, the matter was listed for mention before Judge Odunga when the Defendant's advocate attended court ex- parte yet they did not serve upon the Plaintiffs a mention notice. That on the said date Judge Odunga gave directions that the proceedings had not been proof read or signed by the court, that counsel to peruse the proceedings and that the matter be stood over to 21st January, 2013 for further orders. It was further contended that the delay in prosecuting this matter was occasioned by the transfer of the Judge and negotiations between the parties' advocates.

4. In the grounds of objection filed by the plaintiffs' counsel it was stated that the application is frivolous and vexatious and should be struck out *in limine*, that the affidavit in support of the application is defective and incompetent, that the application is brought in bad faith, with ill motive and is an attempt to steal a match on the Plaintiffs, that the Defendant has not taken any step to comply with pre-trial requirements and that the Defendant's application is filed as an afterthought, the Plaintiff having filed and served upon the Defendant the pre-trial documents and prepared the suit for hearing. The Preliminary objection is based on grounds that the application is incurably defective as the affidavit sworn by the Defendant's counsel depones to matters which descend to issues in dispute and that the affidavit of Henry Kabiru is defective.
5. Mr. Kabiru learned counsel for the Defendant urged that this suit was instituted in the year 2005 and was last in court on 22nd May, 2012 when Judge Musinga delivered a ruling and that since then, directions were given for typed proceedings to be made available. That the Defendant obtained proceedings. That three (3) years down the line, the Plaintiffs have not prosecuted this suit. He argued that the delay has been admitted. That this matter was scheduled for dismissal in February, 2015. He stated that the conduct of the Plaintiff is crucial in determining such an application. That the Constitution allows parties to be heard substantively when the Plaintiff is candid enough. He pointed out that the letter dated 17th June, 2012 requesting the Deputy Registrar to fix the matter for directions bears no stamp and secondly that the pre-trial questionnaire was filed in March, 2015 after the matter was listed for dismissal. Counsel cited **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) EA 696** and argued that a party should not wait until last minute in order to take steps to forestall an application for dismissal of suit otherwise the case will never end. That in that case, it was held that such forestalling amounted to an abuse of court process. He argued that had the Plaintiffs been active, they would have complied with Judge Odunga's orders of 13th December, 2012. Counsel further cited **Victory Construction v. A N Duggal [*1962*] 1 EALR 697** where it was held that where no steps are taken, the application should be allowed. On his affidavit, counsel argued that it does not contain controversies rather it merely gives a history of the case on what is public knowledge and on record and argued that his affidavit falls within the exceptions to the general rules.
6. In the Plaintiffs' notice of motion an account is given on all that has transpired in this matter just as has been explained in the replying affidavit. That the Plaintiffs' have since filed and served requisite documents in readiness for trial and that the suit ought to be therefore set down for hearing.
7. In response to the Plaintiffs' application, Mr. Kabiru argued that it seeks to superimpose directions on a court yet directions were already given by Judge Odunga, to forestall the steps already taken and which cannot cure the problem.
8. Mr. Lutta learned counsel for the Plaintiffs argued that an advocate ought not to swear an affidavit on matters relating to a client when that client is available to ensure that the client does not disown that affidavit when the matter is dismissed and is to pay costs. He pointed out that the supporting affidavit is not signed by Mr. Kabiru and further that there was no authority for him to swear the said affidavit. That the affidavit is not sworn on knowledge belief or information grounds upon which it is sworn. He contended that for the aforesaid reasons, the motion is not properly before court. Counsel argued that the matter came up for mention before Odunga J on 13th December, 2012 but he never received a mention notice and there is no evidence that the Plaintiffs' counsel was notified of the directions given by Odunga J. He argued that the rules changed since the year

2010 and no suit could proceed without compliance with Order 11. That the Plaintiffs complied with pre-trial directions on 20th March, 2015 and served the Defence counsel on 22nd March, 2015 by which date the application for dismissal for want of prosecution had not been filed. He claimed that the Defendant stalled the matter after it was part heard and the trial judge was also transferred occasioning the delay. He stated further that he had a discussion on settlement with the Defence counsel on a without prejudice basis. He stated that the authorities cited by the Defendant are very old and are overtaken by time. He further pointed out that the Defendant has not complied with the pre-trial requirements.

9. I have carefully considered the two motions. The Plaintiff raised an issue that the application by the defendant and the supporting affidavit are defective for the reason that the Defendant's advocate swore the affidavit in support of the motion. I feel that this is an issue that I should determine preliminarily considering that it may dispose of the motion in the event the Plaintiffs' argument carries the day. The law is that advocates should not swear affidavits in relation to contentious matters. They can however, swear to matters directly within their knowledge. **Mbogholi Msagha** in **Ngui v. Overseas Courier Services (K) Ltd (1998)eKLR** while dealing with a similar issue quoted the extract from Halsbury's Laws of England, 3rd Edition, paragraph 845 as quoted by Ringera J. in **HCCC No. 1625 of 1996 Kentainers Ltd v. Assani & Others** as follows:-

"Affidavits filed in the High Court must deal only with facts which the witness can prove of his own knowledge, except that, in interlocutory proceedings or with the leave, statements as to a deponent's information or belief are admitted, provided the sources and grounds thereof are stated...For the purposes of this rule, those applications only are considered interlocutory which do not decide on the rights of the parties but are made for the purpose of keeping things in status quo until the right can be decided, or for the purpose of obtaining some direction of the court as to the conduct of the cause."

10. Further, it is to be noted that the provisions of Rule 9 of the Advocates (Practice) Rules, are in the following terms:-

"No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears."

11. The said rule 9 therefore does not give rise to an automatic bar to affidavits being sworn by advocates who then also appear before the court for the hearing of matters in which the affidavits are adduced in evidence. The rule allows advocates to swear affidavits on "**formal or non-contentious matter of fact, in any matter". In Kenya Horticultural Exporters (1977) Ltd v. Transami Kenya Limited Nairobi H.C.C.C No. 1405 of 99** it was stated as follows:-

"In general the advocate can swear such affidavit where it is purely matters which will not raise opposition from the other side. Even where it is matters of law the client would better swear that he had been advised so by his advocate."

12. What is deponed to by Mr. Kabiru are matters that transpired in the suit he has been conducting on behalf of his client and are well within his knowledge which matters fall within Order 19 rule 3 (1) which provides that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove and if called upon, he could well defend the same in cross-examination. To that end, I do not find the said Affidavit offends the said provisions so as to be struck out. I say so because the advocate was able to peruse the file and find that no action had been taken by the

plaintiff to have the matter prosecuted hence, he filed the application on behalf of his client. i do not see any controversy which the client must be put to task to prove.

13. On the issue that there was no signature in the supporting affidavit, I have perused the "supporting affidavit" filed by Henry Kabiru Advocate on 26th March, 2015. Indeed, there is no signature thereto and the plaintiff's counsel too confirmed that the copy he was served with had no signature. The requirement of the law that an affidavit can only be signed and must be signed by a deponent is an elementary requirement. An affidavit by its very nature contains evidence and has attendant consequences. therefore, the deponent must own the same in order for it to qualify as an affidavit and in my humble view, anything less than a signed and sworn affidavit does not elevate it to the status of an affidavit but places it at best as a mere statement. it follows that there was indeed no affidavit on record upon which this court could cure by application of the provisions of Order 19 rule 7 which provides that the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality and also Article 159 (2) (d) of the Constitution which behove courts to ensure that justice shall be administered without undue regard to procedural technicalities. To my mind the failure to sign or the lack of signature goes to the root of the matter and not a mere technicality. Therefore, can the motion dated 23rd March, 2015 stand without a supporting affidavit? The answer lies in the provisions that permit the filing of such applications thus Order 17 Rule (2) and Order 51 rule 4 of the Civil Procedure Rules and to be considered in the succeeding paragraphs.

14. Order 17 Rule 2 of the Civil Procedure Rules provides that:

1. in any suit in which no application or step has been taken by either party for more than 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 of the court, it may dismiss the suit.

2. if cause is shown to the satisfaction of the court, it may make such orders as it thinks fit to obtain the expeditious hearing of the suit

3. any party to the suit may apply for its dismissal as per rule 1.

The above provision does not mention the requirement of affidavit evidence. The procedural aspect that governs applications is Order 51 rule 4 of the Civil Procedure Rules which provide that:

"every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served."

15. It is clear from the above provisions of the law that it is not all motions that should be supported by an affidavit. Indeed, no affidavit evidence is required where an application raises pure points of law. An affidavit is, however, necessary where the motion is to be supported by evidence. the defendant's application was also premised on the grounds on the face of the application namely:

1. That the plaintiff's have not taken any step to prosecute this suit since 13th of December 2012 when it was ordered that the parties to get typed proceedings from the Registry

2. That there has been inordinate delay in prosecuting the suit and the defendant will ultimately face tremendous difficulties in finding witnesses to testify in court

3. That the delay is prejudicial to the defendant

4. That it is clear that the plaintiffs are no longer interested in prosecuting the suit.

16. In my view, the grounds as set out above would sufficiently dispose of an application seeking to dismiss the suit for want of prosecution since the facts are to be found in the court record which would speak for itself and therefore there would be no need for affidavit evidence. Accordingly, I

find that the application by the defendant is sound and competent before this court for consideration on its merits.

17. Now on the merits of the application for dismissal of this suit for want of prosecution, there is no doubt and/or contention that there has been delay in the prosecution of this suit which was instituted in 2005 and ten years down the line it still lies in court undetermined, and that the last time the file was before a judge is on 13th December, 2012.

18. The test to be applied in an application for dismissal of a suit for want of prosecution has been vastly discussed by our courts. In **Agip (KENYA) Limited v. Highlands Tyres Limited (2001) KLR, 630** the court outlined three principles governing the dismissal of a suit for want of prosecution as being; delay must be inordinate; the inordinate delay is inexcusable and the Defendant is likely to be prejudiced by the law. In **ET Monks & Co. Limited v. Evans (1985) KLR 584** Kneller, J. as he then was held:-

"...1. Whether an application for dismissal of suit for want of prosecution should be allowed or not is a matter for the discretion of the Judge who must exercise it judicially. The Court shall among other things, consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was inexcusable. However, each case will turn on its own facts and circumstances.

2. If an action is dismissed for want of prosecution, a Plaintiff may sue his advocate for negligence unless such Plaintiff has caused or consented to the delay which led to the dismissal of the action.

3. The delay in this case was inordinate and inexcusable and a trial would be prejudicial to the Defendants, as important witnesses may no longer be traced."

19. The above principles were applied in case of **Ivita v. Kyumbu (1984) KLR, 441 by Chesoni, J. (as he then was).** He had this to say:-

"***The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."(emphasis added).***

20. In the recent case of **Moses Muriira Maingi & 2 Others v. Maingi Kamuru & Another - Nyeri Civil Appeal No. 151 OF 2010**. The Court of Appeal cited Chesoni, J. in **Ivita v. Kyumbu, (Supra)** and said:-

> ***"The power of the court to dismiss a suit for want of prosecution is a discretionary power, but which should be exercised judicially."***

21. In summary, the reasons given by the Plaintiffs for the delay in prosecuting the matter were the transfer of Judge Dulu, the three adjournments sought by the Defence counsel and disappearance of the court file. The question that arises is whether or not the said reasons are sufficient and acceptable.

22. As to the contention that the delay was partly occasioned by the Defence counsel, I have taken the liberty to peruse the court record. It is clear that on 5th October, 2010, the defence counsel was unavailable since he was attending to a part heard murder case No. 23 of 2008 in Meru Law Courts. On 29th October, 2010 which date the Plaintiffs have avoided to mention, both parties' counsel were absent, on 29th September, 2010, counsel for the Defendant was absent since he had lost his brother. On 9th March, 2011 the matter could not proceed after the defence counsel expressed that he needed to add another document and was ordered to make a formal application. The Defendant thereafter made the said application whose ruling was delivered on 22nd May,

2012 by Musinga J since Judge Dulu who was handling the case had proceeded on transfer.

23. The matter was thereafter mentioned on 8th June, 2012 for directions that proceedings be typed. It was subsequently mentioned on 9th July, 2012, 5th November, 2012 and 13th December, 2012 on all those occasions for purposes of confirming whether or not the proceedings had been typed. On 13th December, 2012, Judge Odunga ordered that counsels peruse the proceedings and the matter was stood over to 21st January, 2013.

24. It is the mention notice for 13th December, 2012 that the Plaintiffs contend that they were not served with. The origin of that lapse is revealed from the record. When the matter came up on 9th July, 2012, both parties' counsel was present and a mention date was set for 26th September, 2012. However, the matter was not listed on the said latter date and the Defence counsel proceeded to take a date at the registry ex parte on 11th October, 2012. A date was taken for 5th November, 2012. It is on the 5th November, 2012 when the court gave a mention date for 13th December, 2012 and on that date (5th November, 2012), the Plaintiffs' counsel was not present in court. I agree with the Plaintiffs that their advocates were never served with a mention notice for the mention date of 13th December, 2012; nonetheless, the record convicts them for the laxity in acting in their matter. Even after the matter was not listed on 26th September, 2012, it is the defence counsel that bothered to fix a date for mention and not the Plaintiffs. From the aforegoing, it is clear also that the file was active until 13th December, 2012.

25. Although the Plaintiffs claim that the file disappeared only to re-surface in March, 2015. There is nothing placed before court to so prove. They ought to have been at least keen to annex to their letter to the Deputy Registrar requesting that the file be traced if indeed they made an attempt to trace it or rather a letter indicating that they expressed their concern about the disappearance of the file. Secondly, the Plaintiffs have not established that they applied for reconstruction of the file after they allegedly discovered its disappearance. Basically, the inaction or silence between the period 13th December, 2012 and March, 2015 when they filed witness statements is unexplained.

26. It is after the matter had stalled for that long that the court on its own motion pursuant to the provisions of Order 17 Rule 2(1) issued a notice of dismissal for want of prosecution. From the aforegoing disposition, it is clear that after the bid by the court to *suo motu* set the suit for dismissal failed, the plaintiffs did take action when on 20th March, 2015 they filed their witness statements in compliance with Order 11 of the Civil Procedure Rules.

27. That action was taken before the defendant filed its notice of motion dated 23rd March, 2015 seeking to have the suit dismissed for want of prosecution on 26th March, 2015. It therefore follows that the defendant's application was prematurely filed. I say premature because the letter and spirit of Order 17 Rule 2 of the Civil Procedure Rules is clear and a reproduction of that provision is essential. The said provision enacts that:

17 (2) (1) in any suit in which no application or step has been taken by either party for more than 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 of the court, it may dismiss the suit.(emphasis added).

28. The operative words are ***no application or step has been taken by either party for more than one year***. The delay was inordinate and insufficiently explained by the plaintiff. However, after the attempt to dismiss the suit by the court failed the plaintiff took steps to have the suit ready for hearing by filing witness statement which is legal requirement under Order 11. That step is mandatory and therefore it could not be expected that the plaintiffs should have fixed the suit for hearing before complying with the pre-trial requirements.

29. Finally, the Defendant pointed out that it shall have difficulty in tracing its witnesses. The difficulty in tracing witnesses is a fact that is likely to prejudice the defence case and is very likely to occur considering the period that has lapsed since the matter was last in court. However, as I have stated, the fact of the matter is that the plaintiff after a long lapse of time which is unexplained finally took steps before the defendant filed the application for dismissal of the suit for want of prosecution, and which step was and remains essential for the hearing of the suit herein. Thus, in this case, I find that despite the delay before the step of filing of witness

statement, that period was interrupted by the essential step of filing of witness statement and therefore it would be unfair and unjust to ignore that step and act in retrospect which would in essence unjustifiably oust the plaintiffs from the judgment seat, yet they have knocked on the doors of justice before they were caught up by the delay that they had been unable to satisfactorily explain to the court. The Plaintiffs attempted to comply with pre-trial directions on 20th March, 2015 and served the Defence counsel on 22nd March, 2015 by which date the application for dismissal of this suit for want of prosecution had indeed not been filed.

30. In view of the aforegoing, I find that the Plaintiffs' motion seeking for directions has not been brought with a view of forestalling the application by the defendant for dismissal of this suit for want of prosecution. This court takes note of the very fact that indeed sometimes it takes a visitor to show one the cobwebs that are considered part of household furniture but in this case the cobwebs were cleared before the visitor arrived and I would accordingly dismiss the defendant's notice of motion dated 23rd March 2015 but comment them for being vigilant, and allow the plaintiff's notice of motion dated 20th March, 2015 and provide the following direction:

a. That both the plaintiffs and defendant parties to this suit shall comply with all the pre-trial requirements as stipulated in Order 11 of the Civil Procedure Rules within the next 60 days from the date hereof taking into account the impending Christmas vacation.
b. That this matter being very old spanning 10 years part heard and undetermined shall be mentioned on 17th March, 2016 for pre-trial conference/directions.
c. Each party shall bear the costs of their respective notices of motion as determined herein.

Dated, signed and delivered in open court at Nairobi this 7th day of December 2015.

R.E ABURILI

JUDGE