



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 32 OF 2010

**UTALII TRANSPORT COMPANY
LIMITED.....1ST PLAINTIFF**

VERONICA NDINDI MUSYIMI AND

JUSTUS KIMAU MUSYIMI

AS ADMINISTRATORS OF THE ESTATE OF

STEPHEN MUSYIMI

**KIMOLO.....2ND
PLAINTIFF**

VERONICA NDINDI

**MUSYIMI.....3RD
PLAINTIFF**

JUSTUS KIMAU

**MUSYIMI.....4TH
PLAINTIFF**

Versus

NIC BANK

**LIMITED.....1ST
DEFENDANT**

KANINI HARAKA ENTERPRISES

LIMITED.....2ND DEFENDANT

RULING

The Application

[1] The 1st Defendant, **NIC BANK LIMITED (hereafter the Applicant)** applied to this court through a Notice of Motion dated 2nd July, 2013 for dismissal of this suit for want of prosecution. The Applicant based his motion on Section 1A, 1B & 3A of the Civil Procedure Act (hereafter the CPA), and Order 17 Rule 2(1) and Order 51 Rule 1 of the Civil Procedure Rules (hereafter the CPR). The application is supported by the Affidavit of **ALLEN WAITAKI GICHUHI**, a partner in the firm of **WALKER KONTOS ADVOCATES**.

[2] The major grounds of the application are that:

1) Over one year has lapsed without the Plaintiffs taking any step to progress their case.

2) The Plaintiffs' inertia runs contra to the overriding objective of the court stipulated in section 1A, 1B and 3A of the CPA.

*3) It is the primary duty of the Plaintiffs to take steps to progress their case since they are the one who dragged the Defendant to court. They cited **ECOBANK GHANA LTD V TRITON PETROLEUM COMPANY LTD (in receivership) & OTHERS CIVIL CASE NO 24 OF 2009**.*

[3] Mr Ogunde argued the application and essentially amplified the ground set out in the application. He, however, stated quite categorically that the Plaintiffs have not offered any or any reasonable reason on their failure to effectively move this case forward. According to him, the fact of incarceration of the 3rd and 4th Plaintiffs which is being put forward as an explanation for the delay herein is not an explanation at all for two reasons: 1) the Plaintiffs have not disclosed when they were released from incarceration; and 2) that non-disclosure is a deliberate design to avoid being asked what they have done to progress this suit since their release. The court should discard the so called reason. What should be of concern to the court is that there has been a long delay herein which has not been explained by the Plaintiffs.

[4] Mr Ogunde did not stop there. He submitted that the Plaintiffs had attempted to fix this case for hearing. But even that act was mere gimmick because they knew the case was not ready for hearing; issues had not been agreed upon and documents had not been filed as required in law. Moreover, up to now, there has been no meaningful step taken by the Plaintiffs to have the matter fixed for hearing. This case is just fit for dismissal and should be dismissed, so he urged the court.

[5] Mr Ogunde submitted that the case of **D.T. DOBIE** which has been quoted by the Plaintiffs' counsel is about striking out of pleadings and is, therefore, irrelevant to the instant application. He also distinguished the case of **COMMUNICATION CARRIER** on the basis that it was decided before the overriding objective of the court was enacted into our law. He insisted that the correct test is the one which was set out in the case of **ECOBANK** quoted in the application. He promised to deliver a hard copy of the said decision to the court, but he did not.

M/S Ibrahim opposed the application

[6] M/S Ibrahim opposed the application. She submitted that the 3rd and 4th Plaintiffs, who are the directors of the 1st plaintiff and administrators of the estate of the 2nd plaintiff were incarcerated on 31.8.2012. The two are the main individuals in this matter and their incarceration affected the case. Notably, the two Plaintiffs did not state when they were released from prison; a matter M/S Ibrahim termed as an oversight on their part.

[7] She continued. The 4th plaintiff suffered blindness as a result of the incarceration. Contrary to what the Applicant submitted, M/S Ibrahim told the court that the Plaintiffs are interested in the case. She relied on the following judicial authorities to support her arguments:

- 1) **D.T. DOBIE (K) LTD v JOSEPH MUCHINA [1980] eKLR**
- 2) **MARY A. OTIENO v KWEGA BUS SERVICE and**
- 3) **COMMUNICATIONS COURIER & ANOTHER v TELCOM (K) LTD [1999] eKLR**

[8] She emphasized that the test which the court should apply is the one enunciated in the case of **IVITA v KYUMBU [1984] KLR 441, Chesoni, J.** (as he then was) and was adopted in the case of **COMMUNICATIONS COURIER & ANOTHER v TELCOM (K) LTD [1999] eKLR** by **Lesiit J:** that

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

[9] In her submissions, M/S Ibrahim introduced a matter which, I think, may as well work against the Plaintiffs; that the Defendants filed their defences in breach of a court order. But, the less I say about it at this stage the better.

COURT’S REDITION

[10] When the Applicant states and correctly so, that:

“It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court”.

Then exhorts that

“Over one year has lapsed without the Plaintiffs taking any step to progress their case”.

And makes a strong conclusion that

“The Plaintiffs’ inertia runs contra to the overriding objective of the court stipulated in section 1A, 1B and 3A of the CPA”.

The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgment-seat. It is, therefore, a matter of discretion by the court. See the opinions of **Danckwerts, LJ** in **NAGLE v FIELDEN [1966] 2 QBD 633 at p 648**, and **Lord Diplock** in **BIRKET v JAMES [1978] A.C. 297**. A great number of cases in the Court of Appeal have adopted that approach but I do not wish to multiply them. Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:

- 1) *Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
- 2) *Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- 3) *Whether the delay is an abuse of the court process;*
- 4) *Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
- 5) *What prejudice will the dismissal occasion to the plaintiff?*
- 6) *Whether the plaintiff has offered a reasonable explanation for the delay;*
- 7) *Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?*

[11] The principles above are somewhat inextricable and may not be dealt with distinctively from one another without making prominent reference to or connecting one with the other. But what matters is the overall impression the court makes out of the analysis of the above principles within the circumstances of the case in question, and the general demands of justice. That is why; it is worth repeating, it is all a matter of discretion of the court. Let me weigh each of these principles against the facts of the case as I make my conclusions.

Was there inordinate delay?

[12] Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases. See the case of **ALLEN v ALFRED McALPHINE & SONS [1968] 1 All ER 543**: where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases of **AGIP (KENYA) LIMITED v HIGHLANDS TYRES LIMITED [2001] KLR 630** and **SAGOO v BHARI [1990] KLR 459**, where delay of eight (8) months and five (5) months, respectively was considered not to be inordinate. And also **NBI HC ELC CASE NO 2058 OF 2007** where delay of about 1 ½ years was considered not to be inordinate. At this point, I think I should examine the circumstances of this case and the amount of delay involved to determine whether it is inordinate and inexcusable?

[13] The court issued direction on 21.5.2012 that the Defendants should enter appearances within 10 days and file their defences within 14 days of entering appearance; and that pre-trial to be undertaken thereafter. I stated earlier that I will say very little about the submission by M/S Ibrahim that the Defendants filed their defences in breach of the directions of the court for the simple reason that; ordinarily the Plaintiffs should have moved the court to have the offensive pleadings struck out and judgment entered, or undertaken pre-trial processes leading to the setting down the suit for hearing- something they did not do. Except, I should also state that, the wording of Order 11 rule 2 of the CPR does not seem to confine the obligation under that rule to the plaintiff alone. However, and I have said this already, ordinarily, in an adversarial system such as ours, the plaintiff should take such steps as are required by the preparatory or pre-trial procedures in order to advance the case towards full trial. The Plaintiffs attempted to fix the matter for

hearing before Order 11 of the CPR had been complied with, which I think was a pre-mature act. Also, notwithstanding the argument of incompetence of the defence filed herein, at least after that filing or expiration of the time allowed for filing of defence, the Plaintiffs should have taken an effective step to initiate the pre-trial processes under Order 11 of the CPR or apply for appropriate orders to remove the offending pleadings. Undoubtedly, there has been a delay of about 18 months. But is the delay inordinate and inexcusable? I shall answer that question by considering the other factors as above.

IS THE DELAY INEXCUSABLE?

[14] This question entails the following issues;

- 1) Whether the delay is intentional and contumelious;
- 2) Whether the delay is an abuse of the court process;
- 3) Whether the delay gives rise to substantial risk to fair trial or cause serious prejudice to the Defendant;
- 4) What prejudice will the dismissal occasion to the plaintiff?
- 5) Whether the plaintiff has offered a reasonable explanation for the delay; and
- 6) What the interest of justice dictates: lenient exercise of discretion?

Was the delay intentional and contumelious?

[15] A delay is inexcusable, if it is shown to be intentional and contumelious, for instance, where there has been disobedience of a peremptory order of the court. See the case of **ALLEN v ALFRED McALPHINE (supra)**. Absent of such disobedience, the court should consider whether there has been a reasonable explanation for the delay. This approach is borne out of the practice of courts and inclination to sustain a suit rather than dismiss it, and may order the plaintiff to take the necessary action, including filing pre-trial processes or setting the suit down for hearing within a particular period of time. Although the court ordered pre-trial procedures to be undertaken after the Defendant had filed their papers, it cannot be said that the Plaintiffs disobeyed a peremptory order of the court by not filing the relevant pre-trial processes in time. At least the Plaintiffs have filed their documents albeit it was after this application had been filed; an act which saves them from being accused of a complete dilatory behaviour. But before total absolution is declared, let me examine the other guiding principles to see if the delay is an abuse of the court.

Was the delay an abuse of court process?

[16] Nothing was placed before the court which suggests that the delay herein amounts to abuse of the process of court. The Defendant did not show that the delay is being used or is contrived to afford the plaintiff collateral advantage over the Defendant. It is not uncommon for unscrupulous litigants to file frivolous cases in court only to have those cases pending in court for as long as possible as a way of buying time. The court should never allow such temporizing by parties; instead it should dismiss such suit without hesitation. But, that is not the case here. On the contrary the latest filings by the Plaintiffs are an indication that they are willing to advance their case further.

Is there any substantial risk to fair trial or serious prejudice to the Defendant?

[17] The Defendant has also not established that the delay in prosecuting the suit has given rise to substantial risk to fair trial or has resulted into grave injustice to the Defendant. See the case of

NJUKI GACHUGU v GITHI [1977] KLR 108. This approach is not oblivious of the desirability that litigants should prosecute their cases expeditiously and in accordance with the rules of procedure, except failure to take out pre-trial processes within the time specified in the rules alone should not constitute a sole ground for dismissing a suit. There must be some additional prejudice on the Defendant which has been caused by the delay which justifies the dismissal of the suit without trial. The prejudice must be substantial and one which results to 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant. And it is the Defendant who bears the onus of proving that the delay has worsened his position in the suit. This thought derives legitimacy as a principle of law from the Constitution which is aimed at promoting access to justice; enforcing the principles of justice especially on substantive justice in Article 159 of the Constitution; and achieving just resolution of disputes filed in court through a fair and public hearing in accordance with Article 50(1) of the Constitution. See the opinion of **Russel L.J.** in **WILLIAM C. PARKER LTD v F.J. HAM & SONS** at p 1586 which was quoted in **BIRKET v JAMES** p 335.

What prejudice will the plaintiff suffer by the dismissal?

[18] It is also established principle of law that; in assessing the prejudice caused to the Defendant by the delay, the court should also assess the likely prejudice the dismissal of the suit will occasion upon the plaintiff. See **ALLEN v ALFRED McALPHINE, BIRKET v JAMES** and **AGIP (KENYA) LTD.** The prejudice to the plaintiff will be ascertained by looking at a number of varying factors which, among the major ones are: the nature of the case-e.g. public litigation, representative suit etc., importance of the claim or subject matter, legal capacity of parties in the suit and so on. The cause of action in this case is quite substantial and raises serious issues of alleged fraud. The suit also involves an estate of a deceased person. These matters would need to be considered by the court on merit in order to avoid a miscarriage of justice.

Was the delay explained?

[19] Last but not least, once an explanation for the delay has been offered, the court has to consider it to determine whether it is reasonable or not. I admit it was necessary for the Plaintiffs to have disclosed when they were released from jail, but incarceration of a party in a suit is undoubtedly likely to cause delay in prosecuting the suit. There are unseen hindrances which may be occasioned by incarceration of a party. I am persuaded to give the Plaintiffs the benefit of the doubt and accept the explanation they have provided as being reasonable explanation for the delay.

The court will exercise discretion leniently

[20] Consequently, upon the analysis of all legal considerations, it is clear the direction the court is taking on this matter. But before I close, I will re-state; the acceptable test is that;

1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the

Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.

[21] I cannot agree more that the formulation in the case of **IVITA v KYUMBU (supra)** is most apt. But before I close on this point, one little observation; I am unable to accede to the submission by Ogunde that the case is inapplicable because it was decided prior to the promulgation of the Constitution of Kenya, 2010, and the entry of overriding objective of the court into our law. If that be a strict approach in law, it would be indefensible explication of the law and oblivious of the fact that the principle of overriding objective of the court and the principles of justice enshrined in Article 159 of the Constitution are all about serving substantive justice to all the parties- the defendant and the plaintiff- and the formulation in **IVITA v KYUMBU** which was applied by Lesiit J is a perfect embodiment of the principle of justice to all. Judicial decisions which pre-date the Constitution of Kenya, 2010 are good law and applicable in so far as they are not inconsistent with the constitutional philosophy and principles of justice promulgated by the Constitution. I am guided by a high sense of promoting the principles of substantive justice enshrined in the Constitution, and, therefore convinced that the circumstances of this case deserve a lenient exercise of discretion by the court in favour of sustaining rather than dismissing the suit. And applying the test, I find the delay of about 18 months; was not inordinate or inexcusable; it is not such that it makes the suit incapable of being heard without causing prejudice to fair trial or to the Defendants; and the delay has been explained. Accordingly, I make the following orders.

ORDERS

[22] The suit is sustained; I refuse to grant the application herein. But the Plaintiffs will pay cost of the application dated 2.7.2013 to the applicant. I then direct the parties to comply with Order 11 of the CPR within 60 days from today. They should also file a statement of agreed issues within 30 days from today which failing, each part to file own issues within 7 day immediately after the expiration of the 30 days assigned for filing of agreed issues. Thereafter, the registry shall assign an appropriate mention date immediately after expiration of 60 days from today before any judge in the division to confirm compliance of these directions.

[23] I thank the Defendant for their proactive action in filing the application to dismiss this suit. Indolent litigants should watch out; the law will catch up with them and, in appropriate cases, a dismissal will issue.

Dated, signed and delivered at Nairobi this 21st day of January, 2014.

F. GIKONYO

JUDGE