



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 1540 OF 1999**

**ASSOCIATED WAREHOUSING CO. LTD. .... 1<sup>ST</sup> PLAINTIFF**

**NITICHANDRA KRISHNALAL PANDYA ..... 2<sup>ND</sup> PLAINTIFF**

**BHAVNA PANDYA ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**TRUST BANK LIMITED ..... DEFENDANT**

**R U L I N G**

1. What is before this Court is an Application by way of Notice of Motion dated 31st March 2009 brought by the Defendant (in liquidation) seeking that the suit be dismissed for want of prosecution. The Application is brought under the provisions of the old **Order XVI rule 5 (d)** as well as **Order L rule 1**. The delay in the hearing and determination of the Application has unfortunately come about as a result of the transfer of Judiciary personnel and delay in the typing of the Court proceedings herein to date. The Grounds in support of the Application noted that more than three months had elapsed since the Plaintiff took any steps to prosecute the case and the same had not been set down for hearing for a period in excess of 3 years since it had last been fixed for hearing. The Defendant had been greatly prejudiced by the grossly inordinate delay. The Application was supported by the Affidavit of the duly appointed Liquidation Agent of the Defendant, one **Daniel N. Muguima** sworn on 29th December 2008. In his said Affidavit, the deponent gave details of the date when the matter last came before Court in June 2006 and he accused the Plaintiffs of not taking any steps in continuance of their case.
2. The Replying Affidavit sworn on behalf of the Plaintiffs was made by **Richard Mundia Kariuki** and dated 6th July 2009. The deponent detailed that he was a partner in the law firm of Harit Sheth, the advocates who have the conduct of this matter on behalf of the Plaintiffs. The deponent detailed that the last time that the matter had come before Court was on 10th December 2007 for the hearing of an application seeking to further amend the Plaint. However that application was taken out of the hearing list. Thereafter the deponent went into some detail as to how the Court file had been mislaid and the efforts made by the Plaintiffs' advocates to reconstruct the same. Mr. Kariuki noted that the suit sought substantive relief as regards a prime property situated in Mombasa. The only reason why the Plaintiffs had not set down the suit for hearing was because the Court file had not been available.
3. The said **Daniel N. Muguima** swore a Supplementary Affidavit on 3rd June 2010. The deponent traced the background of the suit commencing with the granting of a loan facility requested by the Plaintiffs in the sum of Shs. 20 million, the same to be secured by a legal Charge over Subdivision

No. 1532/1 MN situated in Mombasa (“the suit property”) as well as a Guarantee and Indemnity signed 15th September 1995 by the second and third Plaintiffs. The deponent further noted that the Defendant was placed under statutory management by the Central Bank of Kenya on 17th of September 1998. Upon the appointment of the Statutory Manager, the advance to the first Plaintiff of Shs. 20 million was recalled. However, the deponent noted that it had been contended by the Plaintiffs that they had made payment to the Defendant by way of 6 Bearer Certificates of Deposits (BCDS) in the amount of Shs. 18 million prior to the placement of the Defendant under statutory management. Despite this, the Defendant’s advocates issued a Statutory Notice of sale as regards the suit property in a bid to recover Shs. 23,059,569.75. The directors of the first Plaintiff had then moved to Court where they obtained an injunction barring the sale of the suit property by the Defendant. The Ruling of the lower Court was appealed but during the hearing of the same, the Court of Appeal noted that the Ruling of the lower Court had not been signed and hence, it was of no effect. Thereafter and as a consequence, the suit property had been sold by the Defendant 9th August 2007 to Messrs. Clarkson & Southern Ltd. The deponent annexed to the Supplementary Affidavit, copies of the Sale Agreement, Transfer all issued in the name of the purchaser. As a result of the above events, the Liquidation Agent maintained that the Plaintiffs’ suit herein had been overtaken by events hence their lack of interest in prosecuting this suit.

4. The second Plaintiff herein **Nitichndra Krishnalal Pandya** swore a Supplementary Replying Affidavit on 22<sup>nd</sup> June 2010 in response to the aforementioned Supplementary Affidavit. The deponent maintained that the Defendant had sold the suit property but the same was tainted with a great deal of fraud, was illegal, null and void. As a result, the first Plaintiff had filed a civil action in the High Court in Mombasa being HCCC No. 218 of 2007. That suit sought an injunction seeking to direct that the said Clarkson & Southern Ltd., as first defendant therein, do vacate and cease trespassing upon the suit property and that the Transfer in its favour as well as the new Title should be set aside. The deponent maintained that by a Ruling dated 23rd July 2009 delivered by **Sergon J.** the first Plaintiff herein obtained interlocutory orders preventing any further disposal of the suit property pending the hearing and determination of the Mombasa suit. The second Plaintiff maintained that he had given instructions to the Plaintiffs’ advocates to seek the transfer of this file to Mombasa and the consolidation of the 2 separate suits for determination there.
5. On 28th June 2010 before **Njagi J.**, the parties herein agreed that the Defendant’s said Application should be dealt with by way of written submissions. The Defendant’s submissions in relation to its Application were filed herein on 9th July 2010. Having set out the background in relation to this suit, the Defendant submitted that the prosecution of a suit comes with an obligation to see to it that it is conducted expeditiously and without unnecessary delay. As regards the subject of dismissal of suits, the Courts had on several occasions discussed the principles governing applications for want of prosecution being firstly, that the delay was inordinate, secondly that the inordinate delay was inexcusable and thirdly, that the Defendant was likely to be prejudiced by the delay. The Defendant noted that the present suit was last before Court on 14th June 2006. The application referred to in the Replying Affidavit dated 3rd October 2007 had not come before Court on 10th December 2007 as it had been taken out of the cause list. Although the advocates on record for the Plaintiffs had detailed that they had made enquiries of the Registry, there had been no application made for the reconstruction of the Court file as between 14th February 2008 and 30th June 2008. In support of its submissions the Defendant relied upon the cases of **Diamond Mapara v Abdul G. Kana HCCC No. 939 of 1996**, **Joseph Magembe v Innocent O. Momanyi HCCC No. 1692 of 1998**, **Kimani v Bakatasi Civil Appeal No. 72 of 1988**, **Nyoike Mathu & 2 Ors. v Attorney General HCCC No. 834 of 2004** and **Century Oil Trading Company Ltd. v Gerald M. Mbogo & Anor. HCCC No. 367 of 2001**. The Defendant did refer the Court to other authorities but failed to attach copies of the same to its submissions.
6. The Plaintiffs’ submissions filed herein on 28th July 2010 noted that the substantive prayer in the suit was to restrain the Defendant from advertising for sale, selling or otherwise disposing of the suit property in Mombasa. The Plaintiffs noted that the suit in Mombasa being **HCCC No. 218 of 2007** was still before Court and that the 1st Plaintiff had obtained interlocutory Orders in that regard. That suit was still pending in the Mombasa Law Courts. The Plaintiffs noted that their advocates had exhibited the letters written to the Deputy Registrar of this Court enquiring as to the availability of the Court file. It had only resurfaced when the present Application before Court for dismissal for want of prosecution was filed by the Defendant. More importantly, the Plaintiffs

noted that in the Amended Defence, the Defendant had put forward a Counterclaim in the amount of Shs. 25,578,119.80. The Plaintiffs asked the question as to whether the Defendant intended to proceed with its Counterclaim and, if so, it should have fixed it for hearing. The Plaintiffs noted that the Defendant had neither filed its Statement of Issues nor its List and Bundle of Documents in breach of **Order 11** of the *Civil Procedure Rules, 2010*. They maintained that the Defendant was not blameless as its Counterclaim remained unprosecuted. Finally, the Plaintiffs referred this Court to the cases of **Stephen Mburu Njoroge v Nancy Wambui Mbau HCCC No. 21 of 1989**, **Empress Dawger Company Ltd v Kenya Cultural Centre HCCC No. 670 of 2001** and **Agip (Kenya) Ltd v Highlands Tyres Ltd (2001) KLR 630**.

7. There is no doubt that there has been considerable delay on the part of the Plaintiffs in prosecuting this suit before Court. From the Court record, prior to filing the Application by the Defendant dated 31st March 2009, there had been no movement on the Court file since 7th December 2007. Since the filing of the Defendant's said Application all movement on the Court file has been in relation to the same including the filing of Affidavits and the parties' submissions. Both sides seem to be intent upon playing the blame game. The matter has been further complicated by the fact that there is the suit in Mombasa being **HCCC No. 218 of 2007** which is still pending in the High Court there. As I understand it from the Supplementary Replying Affidavit sworn by Mr. Pandya, the second Plaintiff, dated 22nd June 2010, that suit also involves the suit premises herein. In conformity with the position taken by the Plaintiffs, this Court notes that the Amended Defence dated 25th January 2000 included a Counterclaim in which the Defendant claims from the Plaintiffs the sum of Shs. 25,578,119.40 due as at 30th June 1999, being the balance of monies lent and advanced by the Defendant to the first Plaintiff during the years 1995 to 1999, together with interest thereon at prevailing rates. As the Plaintiffs have noted in their submissions, no attempt has been made by the Defendant to pursue such Counterclaim. The Court presumes that by the Defendant's Application before Court that it intends to abandon that Counterclaim? In the Court's view, the Defendant in bringing its said Application under consideration, has not been entirely above board in relation to the same.
8. In the **Empress Dawdger** case (supra), the Court quoted from **Halsbury's Laws of England 4th Edition Volume 37 at paragraph 448** as follows:

**"The power to dismiss an action for want of prosecution, without giving the Plaintiff the opportunity to remedy his default, will not be exercised unless the Court is satisfied:**

**(i) and contumelious (sic), or (ii) 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 always 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 third parties."**

That opinion that was endorsed by **Visram J.** in the case of **Agip (Kenya) Ltd** (again supra) when the learned judge detailed:

**"Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should allow the Plaintiff an opportunity to have his case determined on merit. Finally the Court must consider whether the Defendant has been prejudiced by the delay. To achieve justice the Court must also consider the possible loss likely to be sustained by the Plaintiff if this case is terminated summarily for a procedural default."**

9. The position as to dismissal of suite for want of prosecution was closely examined in the case of **Et Monks & Co. Limited -Vs- Evans** (1985) KLR 584 where Kneller, J. (as he then was) held, *inter alia*:

**"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.”**

In my view, the Plaintiffs have put forward the reason for the delay namely, that the Court file herein was mislaid. However, I cannot see that the Defendant has been in any way prejudiced by the delay always bearing in mind that it has had equal opportunity to pursue its said Counterclaim.

10. I am concerned that there would seem to be two different actions before the High Court as regards the suit property even though the Mombasa case involves other parties rather than just the Plaintiffs and Defendant herein. I have noted that the suit property is based in Mombasa. I also note that there are interlocutory Orders in effect pertaining to the suit property issued out of the High Court in Mombasa. Further, the Plaintiffs herein are situate/resident in Mombasa. As a result, in dismissing the Defendant's Application dated 31<sup>st</sup> March 2009 with costs, I direct, in accordance with the powers vested in this Court by **Order 47 rule 6** of the *Civil Procedure Rules, 2010*, that this suit shall be tried before the High Court in Mombasa. This file will be transferred to the Mombasa District Registry as soon as possible for hearing and determination, in association with **HCCC No. 218 of 2007** (Mombasa).

**DATED and delivered at Nairobi this 26<sup>th</sup> day of June, 2014.**

**J. B. HAVELOCK**

**JUDGE**