REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 429 OF 2011

CHANDARIA INDUSTRIES LIMITED ……..…… PLAINTIFF

VERSUS

SONAL HOLDINGS (K) LIMITED ……..…….. 1ST DEFENDANT

PAREH KUMAR DODHIA ……..……. 2ND DEFENDANT

RULING

1. The Defendants' Notice of Motion dated 21st March 2014, seeking for this suit to be dismissed for want of prosecution, is brought under the provisions of **Order 17 rule 2 (1) and (3)** of the *Civil Procedure Rules, 2010*. It was also based upon **sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Application was brought upon the following grounds:

   > **"a) The Plaintiff has without any explanation inexplicably failed to take any steps towards the prosecution of this suit for over two years and six months.**
   >
   > **b) The Plaintiff's delay in preparing this matter for hearing is inexcusable and contrary to the spirit of the Civil Procedure Act Chapter 21 Laws of Kenya and the Rules made there under which envisage an expeditious, just and affordable disposal of suits.**

2. The Supporting Affidavit was sworn by a director of the first Defendant on even date. He gave his name as **Paresh Kumar Dhodia** but did not say that he was also the second Defendant herein. He stated that he was aware that the Plaintiff appointed the firm of LJA Associates to take over the conduct of this matter on 7th June 2012. He noted that since that firm had come on record, the Plaintiff had inexplicably failed to take any proactive steps towards the prosecution of this matter. He maintained that the said firm had exhibited signs of reluctance and loss of interest towards the suit and had inexplicably failed to set it down for either a pre-trial conference or a hearing. He had been advised by his advocates on record that the delay exhibited by the Plaintiff was intentional, inordinate and, as such, inexcusable. There was no conscionable explanation by way of evidence or at all, to justify a delay of two and a half years. He believed that the Plaintiff had most likely lost interest in the suit because of there being little chance of success. It was unfair and unjust for the Plaintiff to endlessly subject Mr. Dodhia to the anxiety of defending a suit that was not being prosecuted.
3. Somewhat unusually, the advocate having the conduct of this suit on behalf on the Plaintiff, **James Gitau Singh** swore the Replying Affidavit to the Application on the 16th May 2014. He

noted that his firm, in addition to coming on record for the Plaintiff, took over the conduct of two other matters being **HCCC No. 430 of 2011** and **HCCC No. 431 of 2011**. Both of those suits had been brought against the Defendants herein and were closely related involving monies lent to the second Defendant or his associated companies. He annexed to the Replying Affidavit a copy of the Plaints in the two matters. He then went on to say that unfortunately, due to an oversight on his part, the file relating to this matter had been inadvertently placed in the folder in respect of **HCCC No. 431 of 2011**. He maintained that his firm operated a bring-up system whereby each file was reviewed at least once a month. Unfortunately, the file for the matter before this Court had not been captured. Mr. Singh went on to detail that once his firm had been served with the Application before Court, he had proceeded to frame issues and to complete the pre-trial questionnaire, copies of which he attached to the Replying Affidavit. He maintained that this suit involved a vast sum of money that had been duly lent to the Defendant and he believed that that the Plaintiff would be prejudiced should the same be dismissed for an oversight that was clearly on the part of the Plaintiff's advocates.

4. The Second Defendant, with the leave of this Court, filed a Supplementary Affidavit sworn on 20th May 2014. He maintained that, having read Mr. Singh's Replying Affidavit, it was clear to him that he did not proffer any explanation and/or justification to explain the inordinate delay in prosecuting this suit. He maintained that the Affidavit was unbelievable, inexcusable and unmaintainable. He though that it was highly unlikely and doubtful that the Plaintiff had prepared **HCCC No. 431 of 2011** for trial but had failed to notice that the file for this suit was placed inside. The deponent went on to say that he had been advised by his advocates on record, that once a suit is filed, it is for the litigant to check its progress and indeed that of his advocate. Mr. Singh had put nothing before the Court to demonstrate why the Plaintiff itself had not checked upon the progress of the case. He had further been advised by his advocates on record that this particular suit was fundamentally distinctive from the others detailed in the Replying Affidavit. He maintained that the three suits were entirely unrelated and that any such attempt to intertwine the same was baseless and a clever ploy employed by the Plaintiff to mislead this Court.
5. The Defendants' Submissions were filed herein on 10th June 2014. After having set out the subject matter and prayers of the Motion before Court, the Defendants submitted that once a litigant invoked **Order 17 rule 2** of the *Civil Procedure Rules, 2010* it behoved the party in default to show cause why the suit should not be dismissed. It was incumbent upon the Plaintiff herein to put forward a plausible and satisfactory explanation for the delay. It was required to put sufficient material before Court to unlock the Court's discretionary power. In their view, counsel for the Plaintiff had failed to advance any cogent reason why his firm had failed to prepare and set this matter down for hearing after a delay of 2½ years. No evidence had been placed before this Court to demonstrate that the file had been inadvertently omitted under the bring-up system utilised by the firm having the conduct of this matter for the Plaintiff. The Defendants referred the Court to the case of **Alice Mumbi Nganga v Danson Chege Nganga & Anor. (2006) eKLR** to this end. It also referred this Court to the cases of **Gerphas A. Odhiambo v Felix Adiego (2006) eKLR** and **Meridian Properties Ltd v Variava & 2 Ors (2006) eKLR**.
6. The Plaintiff's submissions as regards the Defendants' Application before Court were filed herein on 25th June 2014. The Plaintiff submitted that the nature of this suit could be gleaned from the Plaint filed on 29th September 2011. The Plaintiff sought to recover a cumulative sum of Shs. 362,608,125.00 advanced to the Defendants on various dates in the years 2009 to 2011 together with interest at 16%. It maintained that an application brought to dismiss a suit for want of prosecution under **Order 17 rule 2 (3)** was entirely at the discretion of the Court as to whether to strike out the suit or allow the Plaintiff to proceed with the same to hearing. The Plaintiff urged the Court to consider the provisions of *Article 159 (a) (d)* of the *Constitution* and two cases namely **Allen v Sir Alfred McAlpine & Sons Ltd (1968) All ER 543** and **National Hospital Insurance Fund v Equity Building Society HCCC No. 29 of 2003 (unreported)**.
7. In the Plaintiff's view there were two issues for determination in an application of this nature. Firstly, whether the Plaintiff's delay had been explained and secondly, whether justice can be done despite the delay. The Plaintiff submitted that the delay in fixing this matter for hearing had been explained in paragraphs 3 to 10 of the Replying Affidavit. It repeated the matters as raised in the said Replying Affidavit as regards the Plaintiff's claim being for a substantial amount of money and if the matter was dismissed, due to an oversight of the advocates, the Plaintiff would be

severely prejudiced. As regards the mistake of the advocate and whether justice could be done despite the delay, the Plaintiff pointed to the cases of **Paul Asin v Peter Mukembi HCCA No. 99 of 2011 (Mombasa)** which had been cited with approval in the case of **Philip Chemwolo & Anor. v Augustine Kubende (1982-88) KAR 103** in which **Apaloo JA** had detailed:

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that the party should suffer the penalty of not having his case heard on merits….. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

With the above in mind, the Plaintiff submitted that this was a suitable case for the Court to exercise its discretion in its favour by granting it an opportunity to set the suit down for hearing. In its view, the delay in fixing the suit for hearing was unintentional and was therefore, excusable.

8. **Order 17 rule 2 (1), (2) and (3)** reads as follows:

> **"(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 may make such orders as it thinks fit to obtain expeditious hearing of the suit.**
>
> **(3) Any party to the suit may apply for its dismissal as provided in subrule rule 1."**

As correctly pointed out to Court by the learned counsel for the Plaintiff, whether it strikes out a suit for want of prosecution under **Order 17 rule 2** as above is purely a matter of its discretion. As to how it exercises that discretion, I have gained some considerable guidance from one of the authorities cited to me by the Plaintiff being **Allen v Sir Alfred McAlpine** case (supra). **Diplock LJ** in his admirable judgement detailed:

"What then are the principles which the court should apply in exercising its discretion to dismiss an action for want of prosecution on the defendant's application? The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled. Disobedience of a peremptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend on the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend on the recollection of witnesses of events which happened long ago.

Since the power to dismiss an action for want of prosecution is only exercisable on the application of the defendant his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely on it. Moreover, if after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay, he cannot obtain dismissal of the

action unless the plaintiff has thereafter been guilty of further unreasonable delay. For the reasons already mentioned, however, mere non-activity on the part of the defendant where no procedural step on his part is called for by the rules of court, is not to be regarded as conduct capable of inducing the plaintiff reasonably to believe that the defendant intends to exercise his right to proceed to trial. It must be remembered, however, that the evils of delay are cumulative, and even where there is active conduct by the defendant which would bar him from obtaining dismissal of the action for excessive delay by the plaintiff anterior to that conduct, the anterior delay will not be irrelevant if the plaintiff is subsequently guilty of further unreasonable delay. The question will then be whether as a result of the whole of the unnecessary delay on the part of the plaintiff since the issue of the writ, there is a substantial risk that a fair trial of the issues in the litigation will not be possible.

Next as to the personal position of the plaintiff. He may, of course, have been personally to blame for the delay; but generally the ordinary litigant, once he has consulted his solicitor, is helpless before the mysterious arcana of the law. Delay, when it occurs from this stage onwards, is usually not his own fault but that of his solicitor. If, as a result of his solicitor's default, he has a remedy in an action for negligence against his solicitor; and, as already pointed out, if the solicitor is financially able to meet the damages, this remedy is an adequate one. If, however, the solicitor would be unable to meet the damages, the hardship to the plaintiff, whose action against the defendant is dismissed for want of prosecution, is grave indeed. In strict logic, the impecuniosity of the plaintiff's solicitor would not affect the defendant's right to have the action dismissed; but in exercising a discretion, even a judicial one, the courts can temper logic with humanity and the prospect that an innocent plaintiff will be left without any effective remedy for the loss of his cause of action against the defendant is a factor to be taken into consideration in weighing, on the one hand, the hardship to the plaintiff if the action is dismissed, and, on the other hand, the hardship to the defendant and the prejudice to the due administration of justice if it is allowed to proceed."

9. I have considered the other authorities referred to me by both counsel. The **Alice Nganga** case (supra) involved delay in relation to a suit concerned with land and **Kimaru J.** found therein that the fact that a dispute involves land does not excuse a party from been diligent in the prosecution of his case. The **Gerphas Odhiambo** case (supra) involved an application for extension of time to file a notice of appeal out of time. The relevance to the Application before this Court in that case was the quote by **Waki J.** of the finding in the case of **First American Bank of Kenya Ltd & Anor v Grandways Venture Ltd Civil Appeal No. 173 of 1999 (unreported)** as follows:

"In the instant case there is no affidavit in support by the advocate who allegedly committed the mistake. Nor is there any material by way of any explanation. As a matter of common sense, though not making it a condition precedent, the Court will want to take into account the explanation as to how it came about that the applicants found themselves with an appeal that was incompetent. If the omission was deliberate and not due to accident the Court would, in our view, be unlikely to grant an extension. But, again, with respect, there was no material before the learned single Judge. Nor was there any material before her to show that the omission was a result of any inadvertence or accident to enable her to exercise her discretion.

We always understood the rule to be that once a party was in default (as the applicants here admittedly were) it was for them to place the necessary and relevant material before the Court to satisfy the Court that despite their default, the discretion should nevertheless be exercised in their favour. This burden unfortunately the applicants had not discharged."

10. My learned brother, **Emukule J.** spent considerable time in considering the **Allen v Sir Alfred McAlpine** case as above and after citing **Lord Denning's** principle went on to quote therefrom:

"So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay? Justice is justice to both the Plaintiff and the 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 all, witnesses may be missing and the 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 its favour and dismiss the action for want of prosecution. 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 notwithstanding 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. Where the Defendant satisfies the court that there has been prolonged delay and the Plaintiff does not give sufficient reason for the delay the Court will presume that the delay is not any prolonged but it is also inexcusable and in such case the suit will be dismissed".

11. The question of whether the mistake of an advocate should be visited upon the client has recently been reviewed by my learned brothers **Makau J.** in the case of **Ugas Sheikh Mohammed v Abdullah Said Salat & Ors (2014) eKLR** and **Ogola J.** in **Water Partners International v Benjamin K'Oyoo (2014) eKLR**. In the former matter, the learned Judge quoted from the **Juliana Chepngeno** case as above but then went on to consider the finding of **O'Kubasu J** (as he then was) in **Muhuru Bay Fishermen Co-Op Union Society Ltd v Cooperative Bank of Kenya Ltd & Anor Civil Appln. No. NAI 205 of 2012** in which the Judge referred to **Murai v Murai No. 4 (1982) KLR** as per **Madan JA** (as he then was) when he said:

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it was committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

In the latter case, **Ogola J.** referred to the decision of **Waki J.** (as he then was) in **Bi-Mach Engineers Ltd v James K. Mwangi (2011) eKLR** when the learned Judge stated:

"I have examined the affidavit in support of the application and it is my view that it falls short of candidness and betrays lack of expedition. There is no explanation at all about what the Applicant was doing between 2nd December and 30th December 2010 when an undisclosed informer gave out the information about the decision of the court. The Applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the Applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocates". (Emphasis added).

Further, **Ogola J.** quoted from the Court of Appeal case of **Three Ways Shipping Services (Group) Ltd v Mitchell Cotts Freighters (K) Ltd (2005) eKLR** as to the laying to rest the question of advocates' mistake being visited on the client as follows:

"The question of advocate's mistake being visited on the client has been raised from time to time. Rt. Hon. Lord Denning M.R. in "the Due process of Law" London Buterworths at page 93 said:

'wherever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him; as for instances when a solicitor does not issue a writ in time or serve it in time or does not renew it properly. We have seen, I regret to say, several such cases lately. Not a few are legally aided. In all of them, the solicitors have, I believe, been quick to compensate the suffering client; or at least their insurers have. So the wrong done by the delay has been remedied as much as can be. I hope this will always be done'.

The learned Judges of Appeal went ahead to hold as follows:

The above passage is relevant to the present application in which the applicant is blaming its previous counsel for the misfortune that it finds itself in. It must be emphasized that justice must look both ways. Here the Respondent obtained a Judgement which has now been registered in the High Court of Uganda. Notice to execution was issued and as of now execution is at an advanced state. In our view, it is too late to reverse the process".

12. As annexed to the Replying Affidavit as above, the Advocate on record for the Plaintiff detailed the Plaints filed herein as regards **HCCC No. 430 of 2011** and **HCCC No. 431 of 2011**. The same are brought by different plaintiffs but as against the same Defendants as in this suit. They cover the same subject matter namely friendly loans made to the Defendants in order to enable them to meet their financial obligations and to offset their debts. The first Plaint claims the amount of Shs. 30,000,000/- million and the second Plaint looks for amount of Shs. 81,269,274/-. There is nothing to indicate in the Replying Affidavit how far those suits have progressed other than a Statement of Issues filed in **HCCC No 431 of 2011** dated 26th September 2013. It is quite apparent to this Court that the progress by the advocates on record in those two suits in bringing the same for hearing is as slow as it is in this case. Of course, the amount claimed in the Plaint in this suit is very much more substantial than the amount claimed altogether in both the others. It is so substantial in fact that if this suit was to be struck out and the Plaintiff was to seek a remedy in negligence against the said advocates, I consider it highly likely that the said advocates would not be able to cover the damages that may be awarded and the Plaintiff herein would be left without any adequate remedy for the loss of its cause of action against the Defendants. **Diplock LJ** in the **Allen v Sir Alfred McAlpine** case (supra) advocated that in exercising judicial discretion the courts can temper logic with humanity. I have to take into consideration the hardship to the Plaintiff herein if the suit is dismissed and, on the other hand, the hardship to the Defendant if the suit is allowed to proceed to hearing. In making such determination, I must also consider the indolence of the Plaintiff itself. It is now over 2 years since the Plaintiff changed its representation before this Court. There is no evidence put before the Court in the Replying Affidavit why it has not chased its said advocates. This is particularly so when one bears in mind that the other two suits as above, although nominally having different plaintiffs, are based on similar causes of action and were all filed together, one after another with consecutive suit numbers on 29th September 2011.
13. In weighing up the respective positions as taken by the Plaintiff and the Defendants, I have had cause to consider the Annual Report and Financial Statements for the year ended 31st December 2009 for the first Defendant company herein as contained at pages 91 to 108 of the Plaintiff's List and Bundle of Documents dated 29th September 2011. I observe from the Notes to the Financial Statements at page 105 that under note No. 12 – Borrowings, there are two amounts of Shs. 12 million and Shs. 23 million respectively listed in the Current and Non-current borrowings of the company. At note No. 12 d) it details:

"Other borrowings from Chandaria Industries Ltd are unsecured."

It seems therefore that the first Defendant did borrow monies from the Plaintiff Company herein in the year 2009 and such detail, as above, would amount, in my opinion, to an admission. Exercising my discretion as best as I can and bearing in mind the amounts involved in this suit, I would thus be loth to strike out the same as against the Defendants.

14. As a result, I would dismiss the Defendants' Notice of Motion dated 21st March 2014 but with costs to them. Further, I direct the advocates on record for the Plaintiff to ensure that a copy of this Ruling is delivered to the Plaintiff company within 14 days of the date hereof.

DATED and delivered at Nairobi this 31st day of July, 2014.

J. B. HAVELOCK

JUDGE