REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 38 OF 2010

MOSES MWANGI KIMARI ……...…...………………………………..……...PLAINTIFF

Versus

SHAMMI KANJIRAPPARAMBIL THOMAS……….....….................1ST DEFENDANT

SPECTSA (K) LIMITED …………………………………………………2ND DEFENDANT

PRIME BANK LIMITED……………...…………………….………..….3RD DEFENDANT

RULING

INTRODUCTION

Two applications

[1] There are two Notices of Motion dated 9/5/2013 and 8/10/2013. The first application is seeking for Re-amendment of the Plaint while the second is for dismissal of the suit for want of prosecution.

PLAINTIFF'S SUBMISSIONS

On application for amendment

[2] The Plaintiff filed the application dated 9/5/2013 seeking leave to re-amend his plaint. The application is based on the grounds set out in the application and the supporting affidavit sworn by the Plaintiff sworn on 9/5/2013. The Plaintiff wishes to amend the Plaint so that he can plead the specific loss that was occasioned to him by the fraud, collusion and negligence on the part of the Defendants. The Plaint field on 9/2/2010, at paragraphs 10 and 12 thereof pleaded breach of duty by the 3rd defendants and set out the particulars of fraud on the parts of the 1st and 3rd defendants. The specific particulars of fraud which stand out in paragraph 12 thereof, is that the 3rd defendant proceeded to honour and pay cheques drawn by unauthorized signatories. The particular cheques subject of the claim of fraud were inadvertently omitted, hence the current application. Contrary to the claims by the 3rd Defendant that the Plaintiff is trying to introduce a new claim of breach of duty, the cause of action already been pleaded. Equally, by paying the unauthorized cheques, loss occurred to the Plaintiff hence the claim for specific damages. The amendment is, therefore, to specify the specific loss suffered.

[3] The Plaintiff submitted that he had concurrently filed an application for interlocutory orders of injunction against the 1st Defendant to be restrained from collecting any money/demanding payment from the 2nd defendants debtor or from alienating the 2nd defendants assets and stocks or from tempering with the 2nd defendant lease housing the company's offices. That application was dismissed and the 1st defendant has now gone ahead to close down the known offices of the 2nd defendant, which makes prayer 1 in the amended plaint un-realizable, hence the more reason to Re-amend the plaint.

[4]According to the Plaintiff, the allegation by the 3rd Defendant that the introduced amendments are time barred has no legal basis. Firstly, the claim for breach of duty/negligence has already been pleaded in the amended plaint before the court hence is not a new issue. Also, the relationship between the Plaintiff and the 3rd Defendant was a contractual relationship, and a breach of contractual duty is not yet time barred.

On Application to dismiss suit for want of prosecution

[5] The 1st and 2nd defendant filed their grounds of opposition and opposed the application for amendment based on the directives of the court issued on 8/11/2012 that the plaintiff does take steps towards setting down the suit for hearing within 30 days. It was contended that, the learned judge did not order that the suit stood dismissed if the same was not fixed for hearing within 30 days. In any event, this court has wide discretionary power to extend time where justice demands so. Secondly, the directive of the court was to the effect that the parties should take steps towards having the suit heard within 30 days. However, the record is very clear that pre-trial directions have not been taken in this matter. All the parties have not filed their list of documents and their list of witnesses. In the upshot this matter is not ripe for hearing. The Plaintiff, in his replying affidavit sworn on 3/3/2014 to the 1st and 2nd defendant's application dated 8/10/2013, has laid out the steps he took towards compliance and having matter ready for hearing. There was criminal case number 775/2010 in Kiambu related to this civil suit and the plaintiff needed the exhibits, proceedings and the judgment thereof. He did request for them from court since he needed the same as exhibits in this matter. A hearing date would not have been given to the Plaintiff before parties to the suit have compiled with requirements as to the filing of documents and statements; and the court certifying the matter to be ready for hearing. The Plaintiff was alive to that fact and perhaps the only mistake he committed was failure to mention the matter before the judge for directions on Order 11 of the CPR. The Plaintiff regrets the failure. The Plaintiff beseeches the Court to serve justice by refusing to dismiss the suit. The Defendants are yet to comply with Order 11 of the Civil Procedure Rules.

[6] The Plaintiff in his Replying Affidavit sworn on 3/3/2014 has given sufficient cause why this suit should not be dismissed for want of prosecution. By dismissing the Defendant's earlier application for dismissal of suit, the Court found out that the plaintiff was not guilty of inordinate delay in prosecuting his suit. The Plaintiff also took steps only that it took him longer than expected due to factors beyond his control.

1ST AND 2ND DEFENDANT'S SUBMISSIONS

On proposed amendment

[7] The 1st and 2nd Defendant argued that the Plaintiff was ordered to set the suit down for hearing within 30 days. The said 30 days elapsed without any action from the plaintiff and six month thereafter no action had been taken by the plaintiff to comply with the court order of 8th November, 2012. He is waking up from deep slumber, and in a bid to circumvent the said court order, he filed the application dated 9th May, 2013 purportedly seeking to re-amend his plaint. The plaintiff has not explained why the proposed amendments were not incorporated in the initial plaint or in the first amendment. Or why he has taken such a long time to realize that he needs to re-amend his plaint. In law a party must put his whole case before the court and not bring piece meal material as that would prejudice and confuse the defendants as to the kind of case they have to meet. The facts relevant to the case have been in the Plaintiff's possession from the beginning but he has chosen to litigate in instalments; conduct which is not

only unnecessarily increasing the costs of litigation but also delaying this case and thus denying justice to the 1st and 2nd defendants. The 1st and 2nd defendants have a legitimate expectation to have a fair trial and the plaintiff's total case should be disclosed to them and not in instalments. The 1st and 2nd Defendants referred the Court to the case of **NAIROBI HCCC NO. 159 OF 1981 PATEL v AMIN** where it was held that an application for amendment should be made at the earliest possible moment. And where there is a delay in applying for amendment, the plaintiff must give satisfactory reason for the delay, or else, the application will be said to have been brought with an undue delay. Further no satisfactory reasons have been put forward to justify why the plaintiff never incorporated the proposed amendments in the initial plaint.

[8] The plaintiff has also totally failed to explain why he did not obey the court order dated 8th November, 2012, and is not remorseful. The Court should not condone open disobedience of court orders as it will send wrong signals to the public. Disobedience to a court order should be met with swift and appropriate sanctions. The Defendants contended that the plaintiff's application dated 9th May, 2013 is an afterthought calculated to circumvent the court order of 8th November, 2012 and deliberately intended to harass and embarrass the 1st and 2nd defendants. It should be dismissed. However, should for whatever reasons, the court find that it should allow the said application, we urge the court to order the plaintiffs to pay costs of the application to the Defendants due to the prejudice caused to the 1st and 2nd defendants and give a time frame and schedule within which this case should be heard and disposed of.

On dismissal of suit

[9] The 1st and 2nd Defendants submitted that, by their previous application dated 9th may, 2012 and filed on 11th May, 2012 had sought to dismiss the suit herein for want of prosecution. The plaintiff had not set the suit down for hearing two years after pleadings had closed. The application was, however, dismissed by a ruling delivered on the 8th November, 2012, in which the court directed and ordered that the plaintiff does set the suit down for hearing within 30 days. The plaintiff did not comply. The period of 30 days lapsed and no action was taken by the plaintiff for a period of more than 6 months after the said order. It is against the policy for cases to remain unprosecuted for long. Litigation must come to an end in order to conclusively determine the party's interest, restore certainty and ingrain public confidence in the judicial system. The plaintiff is only dwelling on technicalities when he states that he could not fix the matter for hearing because it had not been certified as ready for hearing. It is the plaintiff's duty to take steps to have the mater certified as ready for hearing and cannot shift that responsibility anywhere else. The Court should be guided by Article 159(1) & 2 (b) that...***Justice shall not be delayed*.";** Section 1A of the Civil Procedure Act on the overriding objective of the Act to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes; and Section 1B of the said Act to achieve …the timely disposal of the proceedings at a cost affordable by the parties. The delay in prosecuting the case herein has not been explained. The existence of the criminal case in Kiambu is a mere excuse as t has not been pleaded to be part of the amendments being sought. The continued existence of the suit herein indefinitely without prosecution is becoming oppressive and a denial of justice to the defendant which impinges on fair hearing for; witnesses may suffer loss of memories; documents and witnesses may become unavailable; and costs will increase.

3RD DEFENDANT'S SUBMISSIONS

On amendment

[10] The 3rd Defendant opposed the application vide the replying affidavit sworn by Carrol Kabiru on 08/10/2013 on the grounds inter alia that the proposed amendments will deny the 3rd defendant the chance to introduce the defence of limitation of time. Limitation of time is a matter of great significance in an application for amendment. Order 3(2) of the Civil Procedure Rules is instructive on the issue and provides as follows:-

Where an application to the court for leave to make an amendment such as it mentioned in sub-rule

(3) (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit had expired, the court <u>may</u> nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it <u>thinks just so to do.</u> (Emphasis added)

[11] The 3rd Defendant posits that the onus rests squarely on the plaintiff to demonstrate firstly that the court should exercise discretion in his favour and secondly the exercise of such discretion in favour of the plaintiff would not occasion an injustice to any party herein. There have been previous amendments to the plaint and the current request for amendment is tainted with delay which has not been sufficiently explained. The amendments have been brought after a delay of a period of 3 years. The plaintiff has merely stated that 'after the closure of the 2nd Defendant Company by the 1st defendant some of the prayers sought in the plaint are not realizable.' A look at the draft re-amended plaint shows that the plaintiff intends to abandon prayer Number (a). However, the plaintiff has not given any explanation as to why the claim for Kshs. 2,033,786.00 was not included in either the plaint or the amended plaint. By the virtue of this failure to explain, this Honourable court should not exercise discretion in favour of the plaintiff. The 3rd Defendant cited the decision of **Justice Kimondo** in **UNGA LIMITED v MAGINA LIMITED (2014) eKLR** where the learned judge stated that ***'when delay is established, unless a plausible explanation is forthcoming, it is deemed to be inexcusable.'*** They further relied on the decision by **Justice Ogola** in **ANNE NJOKI MURANI v KENYA COMMERCIAL BANK LIMITED & 2 OTHERS (2013) eKLR** where the court stated as follows:-

However, in my view this application has not been brought timeously and no reasons whatsoever have been advanced by the applicant to explain the delay…. The applicant has failed, either in supporting affidavit or in its submission to even give a feeble explanation for this delay. No reasons are given whatsoever. Under the circumstances, I am prepared to hold, which I hereby do, that this application is an afterthought and has under the circumstances being brought after undue delay, more than one year after the relevant facts came to the knowledge of the Applicant.

[12] The 3rd Defendant soldiered on with submission; that an exercise of discretion in favour of the plaintiff would occasion serious and gave injustices to the 3rd defendant. By introducing a claim of fraud and negligence whose limitation is 3 years, the proposed amendments would deny the 3rd defendant the chance to rely on the defence of limitation of time. Besides the proposed re-amended plaint introduces further claims based on inter alia loss of stock and assets. Allowing the proposed amendments would widen the scope of the claim so much as to change the entire character of the suit and prevent the 3rd defendant from knowing what to meet at trial. See the decision in **Unga Limited Vs Magina Limited (supra)** where Kimondo J cited with approval several authorities as follows:-

'An amendment will be disallowed if it would cause a serious injustice to the other party. It will also be disallowed if it prejudices the rights of the opposite party accrued at the date of the proposed amendment. A good example is an amendment that would deprive the defendant of a defence of limitation that has crystallized since the issue of the writ.'

[13] It was argued by the 3rd Defendant that the Court should find the plaintiff has given no plausible explanation for the delay in bringing forth the proposed amendments; and declines to grant the request for amendment. The 3rd defendant also claimed it has also demonstrated the injustice likely to occasion upon it which further justifies the dismissal of the instant application.

<u>COURT'S RENDITION</u>

Dismissal of suit

[14] I propose to begin with the application for dismissal of suit for obvious reasons; it will determine whether I should even bother with the application for amendment of plaint.

[15] The two major issues I should determine are:

a) Whether the delay herein has been explained; and

b) Whether the Plaintiff is guilty of disobedience of court order issued on 8th November, 2012.

[16] The law governing dismissal of suit for want of prosecution cannot be called upon to justify itself; it is well settled. I am content to cite a work of this court in the case of **NBI HCCC NO UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS v NIC BANK & ANOTHER [2014] eKLR** that**.**

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?

[17] There is no precise measure of what amounts to inordinate delay as that would differ from case to case depending on the circumstances and facts of each case; for instance, 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. Caution is, however, advised for courts not to take the word ''inordinate'' in its dictionary

meaning, but to apply it 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?

[18] The court allowed the Plaintiff time to set down this case for hearing, i.e. thirty days from 8th November, 2012. The direction was given on an application by the Defendants to dismiss the suit for want of prosecution. And it is worth of note that the said defendants' application had been precipitated by delay on the part of the Plaintiff to prosecute his suit. As I said, what is inordinate and inexcusable depends on the circumstances and facts of the case. The said circumstances in this case are, therefore, real issues which the court must consider in its decision. Apart from that, the Plaintiff did not take steps as ordered by the Court in order to set down the case for hearing until after six months when he applied for further amendments of his plaint. The only explanation the Plaintiff has offered on the delay is that it could not have been expected to fix the matter for hearing because both parties had not complied with order 11 of the CPR, and the Court had not certified the matter to be ready for hearing. I find the argument to be quite arrogant especially given that the Plaintiff had been directed to take steps towards setting down the suit for hearing. The steps the court meant and which could only have been taken by the Plaintiff, are those prescribed in the CPR and specifically Order 11 of the CPR. The steps to be taken by the Plaintiff as the suitor ought to have led to pre-trial conference being undertaken by the court after which the suit would be certified as ready for hearing. Therefore, failure to take such important steps towards preparation of the case for hearing, and more so when the Court had fixed a time frame of so acting is a violation of the order of the court, which should not be taken lightly by this court. It is a serious breach of law and all procedural rectitude required of the Plaintiff by the law in a civil process. In the face of such breach without a reasonable explanation, the delay herein can only be said to be un-explained and therefore, inordinate and inexcusable. We should not only look at the delay of six months since the direction of 8th November, 2012, we should look also at the entire conduct of the Plaintiff; it is negligent and tinctured a don't-care attitude towards court orders. This is not unfair indictment of the Plaintiff; it is simply an atonement of serious disobedience of court orders which no serious court of law should countenance. I am saying these things because many are under misconception or delusion that Article 159 of the Constitution is a panacea of all ills including those of a nature that is negligent, arrogant or dilatory conduct of suitors. Far from it; and any case which is attended to by inordinate delay which has not been explained should be dismissed straight away unless the interest of justice would demand otherwise. Justice would demand that the process of court be vindicated from blatant breach by parties. It will not, therefore, be just to sustain this suit. The upshot is that this suit is dismissed. Consequently, I grant the Defendants application dated 9/5/2013 and decline the one by the Plaintiff for amendment of the Plaint dated 8/10/2013.

Dated, signed and delivered in open court at Nairobi this 31st day of July 2012

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F. GIKONYO

JUDGE