REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 287 OF 2003

NATIONAL BANK OF KENYA LIMITED ……. PLAINTIFF

VERSUS

DATASOLV LIMITED & 2 OTHERS ……DEFENDANT

RULING

Dismissal of suit

[1] The 3rd Defendant has applied for the dismissal of the Plaintiff's suit with costs. The Motion is dated 18th April, 2012.

Arguments by the Applicant

[2] The suit is for recovery of a debt of Kshs.63,909,957.60/- together with interest at the rate of 29% as from the 30th September, 2002. The Applicant is the 3rd Defendant and has been sued as a guarantor and director of the 1st Defendant. The 3rd Defendant entered appearance and filed a Defence. According to the Applicant, from 2003 the plaintiff was well aware that he did not have any claim against the 3rd defendant hence the inordinate delays in prosecuting the said suit. The plaintiff did not prosecute its suit for a period of 2 years which prompted the defendants to file an application for dismissal of the suit for want of prosecution on the 12th July 2011. The application was heard and the plaintiff was ordered by court to set the matter down for hearing within 30 days. When the 3rd defendant was preparing for the hearing of the matter was later informed that on the 26th January, 2012 without his involvement, the Plaintiffs together with the 1st and 2nd defendants recorded and filed consent to have the matter marked as settled. The order making the suit settled was made on the 9th march, 2021. The recording of consent without the 3rd defendant's knowledge or involvement is the basis of the application before me.

[3] According to the Applicant, the application is straight forward and it encompasses two issues only, namely:

a. ***Whether the suit between the plaintiff and the 3rd defendant can stand in light of the consent recorded between the plaintiff and the 1st defendant marking the matter settled? Is there a reasonable cause of action to support the suit?***
b. ***Whether the 3rd defendant is entitled to costs of the suit upon its dismissal?***

[4] The 3rd Defendant submitted that the court in arriving at a decision should be guided by order 2 Rule 15(1) a, b, c and d of the Civil procedure Rules, 2010. Of particular relevance is sub rule (a) which provides that a suit can be dismissed if it discloses no reasonable cause of action. The consent recorded removed the cause of action from the suit since the suit against the 3rd defendant/applicant was founded on the claim against the 1st Defendant. Therefore the suit against the 3rd Defendant is void of a cause of action and hence should be dismissed with costs on the plaintiff. There was really no substantive claim against the 3rd defendant and was only dragged to court without a just and bona fide claim. As a result of the consent, the 3rd Defendant lost his property known as L.R. No. Dagorreti/Mutuini/637; the plaintiff admitted in the plaint that it auctioned it. The fact that the suit is unending has caused the 3rd Defendant emotional turmoil, time and money.

[5] On costs, the 3rd Defendant submitted it is entitled to costs and cited Section 27 of the Civil Procedure Act which provides;

> ***"subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid. And to give all necessary directions for the purpose aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.***
>
> ***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order"***

[6] As costs follow the event, the 3rd Defendant is the winner and should get costs. He cited the case of **HIGH COURT MISCELLANEOUS APPLICATION 1052 OF 2000 RICHARD GICHOBI KAMUNDO v THE DISTRICT MAGISTRATES 1, GICHUGU AND OTHERS**, the case of **MUKUA TUTUMA v ALEX MUNENE TUTUMA AND RAPHAEL KIBIRU TUTUMA (2006) eKLR**. In the latter case Ochieng J stated in his ruling that:

> ***"…in the circumstances, I hold that the plaintiff really had no reason to sue the 1st defendant. That implies the 1st defendant succeeded in both the application and the suit, by default, as no remedies were sought or obtained against him. Accordingly, in accordance with the proviso to Section 27(1) I order that the costs of both the application and the suit should follow the event, as the plaintiff has not persuaded me that here was good reason for me to order otherwise."***

The Plaintiff resisted the Motion

[7] The Plaintiff opposed the application in its submissions and the Replying Affidavit sworn on 11th June, 2012 by Mrs. Damaris Wanjiku Gitonga. It reiterated the nature of its claim as is in the plaint but emphasized that money was advanced to the 1st Defendant was on condition that the 2nd Defendant executed a guarantee in favour of the plaintiff which was to be supported by a legal charge of Kshs.4,000,000/= over his property known as Land Reference Number 7660/123, Tigoni, Kiambu District. By separate Deeds of Guarantee each dated 31st January, 1995, the 2nd and 3rd Defendants separately guaranteed the repayment of all sums advanced and which or would become due to the plaintiff from the 1st Defendant to a maximum sum of Kshs.12,000,000/= each. The 2nd and 3rd Defendants also executed individual charges over the properties Land title Number Dagoretti/Mutuini/637 and Kajiado/Kitengela/3292 respectively.

[8] The 1st Defendant defaulted in repaying the sums due from it to the Plaintiff which resulted

in the sale of properties comprised in the 1st, 2nd and 3rd charge leaving an outstanding balance of Kshs.63,909,957.60 as at 30th September, 2012. The court will, then have to determine the following issues arise for determination:-

a. **Whether the plaintiff has disclosed a reasonable cause of action against the 3rd defendant?**
b. **If answer to paragraph (a) above is in the affirmative, whether the 3rd defendant is liable to repay the money claimed from the 1st Defendant or any portion of it under guarantee?**
c. **Who between the Plaintiff and the 3rd Defendant is liable to pay costs of this suit?**

[9] The Plaintiff cited reasons why the Motion should be refused. Firstly, the 3rd Defendant's application is an attempt to be absolved of responsibility of repayment whilst relying on Consent between the 1st and 2nd Defendant which indeed does not favour him. The allegation that the consent crippled this suit is vexatious, frivolous and an abuse of the court process. In or about 9th March, 2012 the Plaintiff recorded a consent to mark the matter as settled with no order as to costs with the 1st and 2nd Defendants upon discovery that the Defendant company had since collapsed and the 2nd Defendant had no source of income or assets to repay the plaintiff. The plaintiff did not wish to end up with a Decree that it could not execute. The 3rd Defendant was a guarantor to the 1st Defendant and therefore liable to pay the debt of the 1st Defendant in the event that he defaults. The 3rd defendant was sued on his personal guarantee and the claim can be sustained on its own. The consent between the Plaintiff and the 2nd Defendant did not affect the suit against the 3rd Defendant. See the case of **AUGUSTINE WAMBUGU v NATIONAL BANK OF KENYA LIMITED & ANOTHER (2006) eKLR** wherein the Applicant was sued by the 1st Respondent as a Guarantor to the 2nd Respondent for a loan facility advanced to him.

[10] Secondly, the Plaintiff is ready to set down the matter for hearing against the 3rd Defendant and it has complied with pre-trial discoveries as ordered by the court. The 3rd Defendant has not complied with those orders. The suit should, therefore, not be dismissed. In that case, the 3rd Defendant is not entitled to costs. See literally work; **Sweet & Maxwell, 2000, *Snell's Equity,*** that he who comes into equity must come with clean hands. The 3rd Defendant has not honoured its guarantee which is to pay the entire debt. The 3rd Defendant cannot rely on his own breach and ask for dismissal of suit. The application is just a ploy by the 3rd Defendant to have the suit dismissed with costs to him on unjustifiable and unclean reasons.

[11] Thirdly, the 3rd defendant is not entitled to costs. Fourthly, it would be unjust and unfair to burden the plaintiff with costs yet it has established a prima facie case against the 3rd Defendant and any delay of prosecution (if any) has been occasioned by investigations being conducted and received by the Plaintiff regarding the present financial status of the 3rd Defendant and the probability of recovering the outstanding balance of debt of Kshs. 63,909,957.60 from the 3rd Defendant only. The plaintiff has suffered great prejudice and tremendous loss in its pursuit of justice and is hereby being constrained to mark. The 3rd Defendant cannot purport to have costs stating that he is a successful party as judgment in this suit has not been obtained in his favour. This application is a means by the 3rd defendant to take advantage of a consent made between other parties. Reliance is placed on **Harrison Kariuki Vs Blue Shield Insurance Company Limited (unreported).** Fifthly, the 3rd defendant has not explained any injustice likely to be suffered by him if this application is disallowed. In view of the foregoing, the Plaintiff accused the 3rd defendant to be subordinating the process of the court for his own selfish ulterior motives. The 3rd Defendant is merely using this application to unjustly frustrate the plaintiff. And the application should be dismissed with costs.

THE DETERMINATION

[12] I have considered the submissions of parties and the affidavits filed. This is a case based on a contract of guarantee. The 3rd Defendant guaranteed payment by the 1st Defendant of all sums owing to the Plaintiff. A contract of Guarantee is separate from the Charge. See the decision of Ringera J (as he then was) in the case of **Dr. WAIHORO CHEGE v PARAMOUNT BANK LIMITED.** Therefore, for as long as the debt is not repaid in full, the Guarantee can institute or proceed with any existing suit against the guarantor for recovery of the balance. What I think is complicating this matter is the kind of order the Plaintiff recorded with the 1st and 2nd Defendants; that the suit against the two defendants was marked as settled. There is a problem there. It could mean that the debt is settled which begs the question whether it would be tenable to sustain a cause of action against the remaining defendant. That lacuna is what apparently the 3rd Defendant is trying to utilize to his favour. But the materials before the Court tell a different story. The 3rd Defendant was a Director of the 1st Defendant when the loan was advanced. The 3rd Defendant is aware of the impecunious status and the collapse of the 1st Defendant. He then parted ways with the co-director, i.e. the 2nd Defendant and left the 1st Defendant Company to crumble. The 3rd Defendant knows that the 1st Defendant has not repaid the entire sum advanced. The balance is what the Plaintiff seeks to recover from him as a guarantor. The consent did not, therefore, mean the debt has been settled. Thus, the suit against the 3rd Defendant as the Guarantor will subsist independently. Accordingly, I find the application by the 3rd Defendant to be self-seeking rather being out of love for expeditious disposal of cases under the overriding objective principle. And when a party comes to court with unclean hands, it should not expect a five-star hotel treatment. The door will be slammed at them and equity would deny relief sought.

[13] Apart from the foregoing, I have held that a guarantee is a separate contract from the charge. And the suit against the 3rd Defendant can be continued with or without the principal debtor. As such suit, I should be guided by the principles for dismissal of suit for want of prosecution. Dismissal of suit, I have said time and again, is a draconian act which drives away the plaintiff from the seat of judgment in a summary manner. The power should therefore be utilized where the delay is inordinate and therefore inexcusable. What amounts to inordinate and inexcusable delay depends on the circumstances of each case. But it should be delay which when it has occurred is easily discernible, is excessive compared to normality. The court will also consider a number of factors, including: 1) Whether the delay is intentional and contumelious; 2) 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; and 7) Even if there has been delay, is still possible to do justice?

[14] Therefore, where an explanation on the delay has been given, the Court should evaluate it to see if it is reasonable and thus, excuse the delay. The Plaintiff has given an explanation in the Replying Affidavit by Mrs. Damaris Wanjiku Gitonga dated 11th June, 2012. The Plaintiff has even complied with the pre-trial requirements but the 3rd Defendant has not-he is in breach. In such circumstances, the 3rd Defendant should not reap from his own default. I have also held that his application is not founded on bona fide intentions. In totality, the explanations gives are reasonable. Before I make the decision whether I should excuse the delay, I am aware the court should balance the prejudice the Defendant will suffer with the one the Plaintiff will suffer if the suit is sustained or dismissed, respectively. Substantial prejudice to fair trial or grave injustice to the 3rd Defendant is the test here, but it must be shown the Defendant will suffer some additional prejudice which results into 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant which has worsened the Defendant's position in the suit. The 3rd Defendant has not shown such substantial risk occurring due to the delay especially given my decision above. In all these, see the ultimate test formulated in **IVITA v KYUBMU (1984) KLR 441,** by **Chesoni,** J (as he then was), that despite the delay is it still possible without causing injustice or extreme difficulties in the trial to try the case? All the above analysis leads to one conclusion; it is possible to conduct a hearing of this suit without causing injustice or extreme difficulties to any party. But there is a section of the Plaintiff's submissions which I did not quite understand, for, it kind of

suggested that despite the extreme prejudice and huge costs it has faced it was still keen on compromising the suit without any order on costs. I did not know whether that submission related to the 3rd Defendant as well. But whichever way, there is nothing which would prevent parties to enter into any form of compromise. Meanwhile, the upshot is that the application dated 18th April, 2012 is dismissed. The Plaintiff shall within 45 days set down the suit for hearing. No order as to costs.

Dated, signed and delivered in open court this 30th day of September, 2014

F. GIKONYO

JUDGE