



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 136 OF 2008

RAPHAEL MBUCHO MUHIA.....PLAINTIFF/RESPONDENT

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT /APPLICANT

RULING

Variation of orders

[1] The Applicant has applied for variation of the orders by **Hon. Mr. Justice L. Kimaru** of **11th June 2008** which stayed these proceedings. The purposes of the variation is to pave way for the Plaintiff to be struck out for being an abuse of the court of process and consequently, the suit to be dismissed. The application is expressed to be brought under section 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the laws of Kenya and Order 17 rule 2 (1) & (3), Order 51 rule 1 of the Civil Procedure Rules (CPR).

[2] The application is supported by an affidavit sworn by Gregory Omusolo, the Defendant's Legal Officer on 25th February, 2014. The Applicant contended that the Plaintiff filed a suit against the Defendant in the Chief Magistrate's court, i.e. **Thika CMCC No. 114 of 2008** seeking orders similar to those in the instant suit. Subsequently, the Plaintiff withdrew **Thika CMCC No. 114 of 2008** on 4th March, 2008 and the Defendant requested for judgment on costs, which is yet to be entered to facilitate assessment of costs. Then, this suit was stayed ending the payment of costs in **Thika CMCC No. 114 of 2008**. According to the Defendant, the Plaintiff has failed to settle the party and party costs in the withdrawn matter and has also failed to take out any summons to enter appearance within twelve (12) months of filing the Plaintiff or any further action to prosecute his claim herein. These things, according to the Defendant show the Plaintiff is not seriousness in the instant matter and so the Court should vary the orders issued by Kimaru J for purposes of striking out the suit in which no reasonable step to set it down for hearing has been taken for over 5 years.

[3] The Defendant canvassed the application by way of written submissions and cited various judicial decisions. He urged the court to exercise its discretion and vary the orders granted by Kimaru J staying the proceedings herein on 11th June, 2008; and dismiss the suit for want of prosecution. The Defendant submitted that it will suffer irreparably prejudice and unnecessary cost of litigation for being subjected to judicial proceedings for over five years.

COURT'S RENDITION

[4] The affidavit of service of Patrick Mutuma sworn on 25th April, 2014 proves service of the application. But despite service, the Plaintiff did not file any response to the application. The Application is, therefore, not contested. Nonetheless, as this court is ordinarily guided by the demands of justice, I will determine the application on merit. I have considered the application, affidavit in support of the application and the written submissions of the Defendant. From the outset, I am of the view that the application herein is a kind of an omnibus application. It is seeking for variation of the orders issued by Kimaru J on 11th June, 2008, and then, prays for striking out of the Plaint and dismissal of the suit altogether. The orders sought are governed by different rules and are adjudicated by different judicial principles. I insist that counsels should always employ tidier methods in applying for orders to prevent meticulous Courts from having to address unnecessary issues of procedural rectitude. Needless to say that it is unnecessary to ask for striking out of the Plaint and then request for dismissal of the suit; any of the action if successful will lead to total demise of the suit. Clarity in pleadings is absolutely necessary as no court of law will ever have jurisdiction to disentangle confusion contained in pleadings of parties. See the strong deprecation of the court of such practice as eloquently expressed in the case of **PYARALAL MHAND BHERU RAJPUT vs BARCLAYS BANK AND OTHERS Civil Case No. 38 of 2004** that;

“There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff’s application incurably defective, and a candidate for striking out.”

[5] Nevertheless, although the Application herein may not be of elegant drafting, the Court is minded to act upon the avowed demands of Article 159 of the Constitution and lean towards serving substantive justice by acting blind to technicalities especially those which do not affect the substance of the application. I will, therefore, determine the merits of the application. Should this suit be dismissed for want of prosecution? The applicable law in dismissing a case for want of prosecution is Order 17 Rule 2(1) of the Civil Procedure Rules which provides as follows:

“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.”

And Order 17 Rule 2(3) also provides as follows:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”

[6] The Defendant has come to Court under the authority conferred by Order 17 Rule 2(3) of the CPR. The test to be applied by courts in applications for dismissal of suit for want of prosecution was set in the case of **IVITA v KYUMBU [1984] KLR 441** that, even where there is a prolonged delay, is it possible for the Court to do justice despite the delay? In other words; is it possible to attain fair trial of the case despite the delay? Here the Court looks at the likelihood of substantial risk of prejudice to fair trial, or serious prejudice to the Defendant for sustaining a suit over his head for such a long period of time. Other than claiming that considerable time has passed, the Defendant must show some additional prejudice based on the fact that the delay will result to; 1) impediment to fair trial; 2) aggravated costs; or 3) specific hardships to him. This onus of proving that the position of the Defendant has been worsened by the delay lies on the Defendant. An almost complete symmetrical balance is needed here which, the, requires the Court to also consider the prejudice the Plaintiff will suffer on the dismissal of his case as well as the

explanation given or reason for the delay. But in the whole it is the circumstances of the case which will determine whether the case will be sustained or dismissed. Applying these principles, did the Defendant sufficiently persuade this court to dismiss the suit herein?

[7] The record shows these proceedings were stayed on 11th June 2008 due to the existence of Thika CMCC No. 114 of 2008, which was withdrawn at the instance of the Plaintiff. However, the Defendant submitted that the Thika matter is still pending awaiting the determination on costs. Even if one is tempted to say that the Plaintiff appears to have lost interest in this matter, the fact that the Order of Kimaru J which stayed these proceedings is still in place, becomes an essential consideration in this application. In the circumstances, any or further legal process in the suit was halted and time technically stopped running with regard to the suit. In my view therefore, the Defendant's application for dismissal for want of prosecution is not tenable in law. It could as well be premature. I should state also that the fact of stay of proceedings coupled with the fact that the issue of costs in the THIKA case is yet to be concluded would still qualify as a reasonable reason why no steps or proceedings were taken out in this suit, and the Court would excuse delay arising out of such circumstances. I, therefore, dismiss the request for dismissal for want of prosecution. Following that finding, the request for striking out the plaint meets the same fate. In any event, no serious arguments were made towards the request of striking out the Plaint, and on the usual test that the jurisdiction to strike out pleadings should be exercised sparingly and only in exceptional cases, the prayer will still have failed for being devoid of merit. See the case of **D.T. DOBIE AND COMPANY (KENYA) LTD v MUCHINA (1982) KLR 1**. Perhaps the only argument which I can consider for now is the variation of the stay order in order to open the case for further progress by the Plaintiff; a course that will allow the Plaintiff an opportunity to be heard on merit and invariably, take away any excuse if the Plaintiff does not progress his case.

[8] The Defendant has offered reasonable grounds to this court to vacate the orders issued by Kimaru J on 11th June, 2008. Since June 2008, a considerable period of time has passed; to be precise, over 6 years. Longevity in litigation is a great prejudice to the fair trial of the suit, for, it negates the principle of finality of litigation, causes unnecessary anxiety to the Defendant and may also mean aggravated costs. The Defendant has demonstrated that the prolonged litigation is prejudicial to its interests. And as such, I am persuaded to vacate the orders issued on 11th June, 2008 which I hereby do. That course of action will allow the Plaintiff to take steps and finalize the case. By applying to dismiss this suit, the Defendant acted as an ideal example of a vigilant litigant in accordance with the overriding objective of the Court in Article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Rules. The plaintiff and the Defendant should comply with the pre-trial procedures under the Practice Directions for this Division in order to have the matter set down for hearing. But more specifically, the Plaintiff should file and serve all the documents required to be filed under Order 11 of the Civil Procedure Rules within the next thirty (30) days from the date of this ruling. Should the Plaintiff not heed to these orders, the Defendant shall be at liberty to apply for the dismissal of the suit. Costs of the application shall be borne by the Plaintiff.

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

F. GIKONYO

JUDGE