REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 614 OF 2010

LEONARD NJOGU…….....PLAINTIFF

-VERSUS-

BARCLAYS BANK OF KENYA.....…….1ST DEFENDANT

NGINA WANYOIKE.....…….2ND DEFENDANT

RULING

Dismissal of suit for want of prosecution

[1] The 1st Defendant has applied for this suit to be dismissed for want of prosecution with costs to the 1st Defendant. The application is dated 21st March 2014 and based on the Supporting Affidavit sworn by Castro Mutai, Officer on 21st March 2014 which has set out the course of events in this matter since its filing on 14th September, 2010. It is also founded on the grounds below.

[2] The Applicant argued that there has been fragrant inaction by the Plaintiff for over 1 year since the Plaintiff filed his List of Documents, List of Witnesses and his Witness Statement on 17th July, 2012 on this suit. The Plaintiff has not taken any step to prosecute or set down his application dated 14th September 2010 and/or this suit for hearing. He has failed to carry out his duty to expeditiously prosecute its case to assist the Court further the overriding objective under section 1A and 1B of the Civil Procedure Act. It is, therefore, unconscionable to allow the suit to hang over the 1st Defendant's head while there is no action by the Plaintiff for over 2 years; a delayed justice, hence, denied justice for the 1st Defendant. The delay in prosecuting the matter has given rise to a substantial risk and it is no longer possible to have a fair trial of the issues in the action and has caused serious prejudice to the 1st Defendant. Thus, the delay is inordinate, prolonged and inexcusable. This litigation must come to an end.

[3] This suit is seeking for general damages and costs for purported irregular sale of the Plaintiff's property by the Defendants. The 1st Defendant stated that on 24th January 2014 they were invited to fix the matter for hearing and it was fixed for hearing on 15th May 2013. On the said date the court was not sitting. But since then, the Plaintiff has not taken any steps to fix the matter for hearing. The conduct of the Plaintiff only shows he has lost interest in and/or neglected his claim. The subject matter of the suit is related to a loan facility in which the Plaintiff executed

a letter of guarantee and indemnity on 4th December 2000, over 13 years ago. It is only fair that the suit should be dismissed with costs to the Applicant.

[4] The 1st Defendant submitted that the delay herein if for over one year and since no explanation to the satisfaction off the court which has been given, Order 17 Rule 2 of the Civil Procedure Rules should be applied and the suit be dismissed. The 1st Defendant cited relevant cases, to wit; **Netplan East Africa Limited v Investment & Mortagages Bank Limited [2013] eKLR** where Kimondo J. stated that:

> ***"The discretion was never intended to be exercised to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice"***

The Applicant also quoted the case of **Ivita vs. Kyumbu [1984] KLR 441,** as quoted in **Sitarani Hiralal Shorifal Luthra v Loresho Gardens Limited & another [2013] eKLR.** Other cases cited are **AGIP (KENYA) LIMITED v HIGHLANDS TYRES LIMITED (2001) KLR, 630**, **JONATHAN K. MUTAI & ANOTHER v CHERUIYOT RANDICH [2013] eKLR** and **UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS v NIC BANK LIMITED & ANOTHER.** In the latter case Gikonyo J. expounded what amounts to inordinate delay thus;

> "…***Therefore, inordinate delay for purposes of dismissal for want of prosecution should be <u>one which is beyond acceptable limits</u> in the prosecution of cases".*** **(Underlined for emphasis)**

[5] The last time the matter was in court was on 15th May 2013. There is complete inertia by the Plaintiff. There is delay beyond the acceptable limit in prosecution of cases. There is inordinate delay which is inexcusable. The discretion of court should be to dismiss this case. The plaintiff cannot try to put blame for delay or a duty on the 1st Defendant to fix their suit. The duty to ensure suit is set down for hearing is the plaintiffs. See **CHARTERHOUSE BANK LIMITED & ANOTHER v NATION MEDIA GROUP & ANOTHER [2012] eKLR** where the court relied on **Ruth Wambui Gichuru vs. Crossways Car Hire Tours ltd & Another [2007] eKLR** and held that;

> ***"It is the duty of the plaintiff to take the necessary steps to ensure that the matter is fixed for hearing. The defendant's primary aim is to have the suit dismissed and therefore the defendant cannot be faulted for choosing the route of terminating the suit rather than sustaining it. In Pirbhai Lalji & sons Ltd vs. Hassanali Devji [1969] EA 439 Russel, J emphasised that although the defendant had the right to set down the suit for trial it was <u>not incumbent</u> on him to do so as it might only have involved him in further and unnecessary costs. <u>He was entitled to sit back and in due course make an application for dismissal of the suit for want of prosecution.</u> (*****Underlined for emphasis)**

[6] The delay herein has worsened the position of the 1st Defendant, has occasioned prejudice to the 1st Defendant; has given rise to substantial risk to fair trial and has resulted into grave injustice to the 1st Defendant. The additional prejudice is in the fact that that the subject matter of the suit relates to a loan facility in which the Plaintiff executed a letter of guarantee and indemnity on the 4th December 2000, over 13 years ago. The officers present at the time of granting the loan facility have already left and/or ceased employment with the 1st Defendant and their whereabouts are unknown to the 1st Defendant/Applicant. The delay has given rise to substantial risk that it is no longer possible to have a fair trial of the issues in action. It is absolutely unconscionable to allow the suit to hang over the 1st Defendant's head indefinitely for close to 13 years while no action is being taken by the Plaintiff. The 1st defendant has met the test in **Utalii Transport Company Limited & 3 others v NIC Bank Limited & another (supra)**; as per Gikonyo J stated that;

> ***"There must be some additional prejudice on the Defendant which has been caused by***

the delay which justifies the dismissal of the suit without trial. The prejudice must be substantial and one which results to: 1) impeding fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant. And it is the Defendant who bears the onus of proving that the delay has worsened his position in the suit".

[7] The 1st Defendant introduced another argument which is important to discuss and make a decision on. It urged that after filing this suit, the Plaintiff did not take out or serve summons on the 1st Defendant. Order 5 Rule 1 of the Civil Procedure Rules requires a summons shall issue to the Defendant ordering him to appear within the time specified therein and that every summons shall be accompanied by a copy of the Plaint. The command in that rule is mandatory that the Plaint accompanies the summons, and service of the Plaint without summons to enter appearance renders the Plaint defective. The omission is fatal to the entire suit which should be struck out on that basis. They cited **FRENZE INVESTMENTS LIMITED v KENYA WAY LIMITED HCCC 524 OF 1999 MOMBASA** where the court stated that:

" A summons to enter appearance is not a piece of paper of little consequence. <u>It is necessary and vital document governing the timetable of pleadings and the rules governing issuance and service thereof must be complied with for the pleadings to acquire legitimacy.</u> Such seriousness was underscored by the Court of Appeal in CA 85/96 UDAY KUMAR CHANDULLAL RAJANI & RS T/A LIT PETROL STATION vs. CHARLES THAITHI (UR) where a defective summons was issued and served (beyond the validity of one year) but objection was raised to its validity although the defendant had already accepted it and entered unconditional appearance". (Underlined for emphasis).

[8] The Applicant relied also on the case of **ANTONY WECHULI ODWISA v ALFRED MUNYANGANYI [2006] eKLR** to demonstrate the preponderant weight on the requirement for issuance and service of summons together with a plaint; that the court can even move *suo moto* to strike out the suit. See also the case of **DAVID NJUGUNA KARANJA v HOUSING FINANCE CO. LIMITED HCCC 733 of 2008 AT NAIROBI** where summons to enter appearance were not taken out and the court ruled that it is a mandatory requirement that the Plaint must be accompanied by summons and where the Plaintiff has not taken summons the court cannot invoke its inherent jurisdiction to save the said suit. See also the case of **MOBILE KITALE SERVICE STATION v MOBIL OIL KENYA LIMITED & ANOTHER [2004] 1 KLR** where J. Warsame as he then was stated:

"***Order 4 of the Civil Procedure Rules contemplates that summons will be issued and served at the same time as the plaint and the duty according to Rule 3(5) of the Civil Procedure Rules is placed upon the plaintiff. It is the responsibility of the Plaintiff or his advocate to prepare the summons so that the court may sign the document to give it validity. According to Order 5 rule 1(7), the life span of summons is 24 months and after the expiry of 24 months, if no application has been made to extend, then the court without notice would dismiss the suit. <u>In the present matter, no summons was issued, leave alone seeking extension of time</u>. If there is no summons which was issued, in the first instance, there is nothing capable of being extended. The failure of the Plaintiff to issue and give summons is in clear contravention of the order of injunction granted to the plaintiff and it would be impossible for the defendant to respond to the suit. Parties ought to respect the rules of engagement for they are promulgated to achieve justice to the rival parties: summons is a judicial document calling a party to submit to the jurisdiction of the court and if the party is not given that opportunity how else would he submit to the jurisdiction of the Court. Order 4 and 5 of the Civil Procedure Rules are designed to enable the parties to follow certain procedures. <u>The word 'shall' which makes it mandatory to comply with the direction and if there is no explanation as to why the summons were not taken out, then the court has no discretion but a judicial duty to ensure the Rules of Procedure are followed and failure to observe would be fatal".</u> (underlined***

for emphasis).

[9] The suit is fatally defective for summons was never served. It should be struck out.

The Plaintiff opposed

[10] The Plaintiff submitted that the Application has no merit and the court should dismiss it. He stated that on 24th January 2013 the Defendants' Advocates were invited to attend the Registry on 31st January 2013 to fix a date for hearing of the case. The suit was fixed for hearing by consent for 15th May 2013 but it was not listed for hearing. Therefore, the allegations that since July 2012 no step has been taken is not true at all. The plaintiff submitted that Order 17 Rule 2 of the Civil Procedure Rules 2010 has not become available in the circumstances of the case. In any case, for the court to determine whether or not to dismiss a suit for want of prosecution, there are two tests that need to be satisfied under Order 17 Rule 2 of the Civil Procedure Rules 2010. There threshold is one year delay. The last step taken before the filing of the Defendant's Notice of motion dated 21st March 2014 was a hearing date that was fixed by consent of both parties for 15th May 2013. But, on that day, the matter was taken out of the cause list. This means that the period between 15th May 2013 and 21st March 2014 is slightly around ten months and therefore the one year delay threshold set by Order 17 Rule 2 of the Civil Procedure Rules had therefore not lapsed. See the case of **RICHMOND MWANGI & 259 OTHERS v LEE MWATHI KIMANI [2013] eKLR**, where Justice Nyamweya held:

> ***I have perused the court file and note that the last step taken before the filing of the Defendant's Notice of Motion on 27th September 2012 was a hearing of a Notice of Motion dated 26th October 2009 filed by the Plaintiffs, which was held on 15th November 2011. There was a period of slightly over 10 months between 15th November 2011 and 27th September 2012, and the one-year delay threshold set by Order 17 rule 2 of the Civil Procedure Rules had therefore not lapsed. There was thus no culpable delay by the Plaintiffs and the Defendant's application is premature.***

[12] Mbito J in the case of **Sagoo v Bharij[1990] KLR,** stated that for dismissal of a suit for want of prosecution, the court has to first be satisfied:

> ***(2)(a) That there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers***
>
> ***(b) That such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or is such as is likely to cause or to have caused serious prejudice to the defendants whether as between themselves and the plaintiff or between each other or between them and a third party"***

[13] The Applicant urged that, the allegations by the 1st Defendant that the delay in the prosecution of the matter is detrimental to them because the officers present at the time of granting the loan have already left and/or ceased employment and their whereabouts are unknown to the 1st Defendant, is not convincing at all and cannot be a ground to dismiss the Plaintiff's case. The allegation is a mere excuse for the suit not to be heard on merit. The officers may have left, but the records are there especially because the 1st Defendant is a reputable bank which should be able to preserve such records. It is still possible to do justice in this matter. see the ruling by Justice Ngenye-Macharia in **SITARANI HIRALAL SHORILAL LUTHRA v LORESHO GARDENS LIMITED & ANOTHER [2013] eKLR,** which quoted the case of **Ivita vs Kyumbu (1984) KLR 441:**

The test applied by the courts in application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the delay. 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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.

[14] The delay has been explained in the Replying Affidavit by the Plaintiff; the delay has been as a result of the matter having been taken out on 15th May 2013. The Plaintiff found support in the ruling by Ngenye-Macharia J in **Emily Jerobon Bett v Rael Cherop Maritim & 2 others(supra)** that *"**court should be focused on substantive justice as opposed to concentrating on technicalities that may vitiate the course of justice."***

[14] The plaintiff took issue with the submissions by the Applicant on issuance of summons to enter appearance. He submitted that submission is introducing a new prayer that was not in the application. He called that act to be of ''sneaking in other prayers''. The application dated 21st March 2014 did not pray for the Plaintiff's Plaint to be struck out. The Application seeks only the dismissal of the suit for want of prosecution and costs of the application and the suit. In the interest of fair justice, Parties should be bound by their pleadings and what was not in contention in the Application by the Applicants dated 21st March 2014 should not be considered. A party should bring forth the entire evidence it intends to rely to enable the other party to prepare his defence. Gone are the days of practice by ambush. The plaintiff cited the following cases to support that approach: **Richmond Mwangi & 259 others v Lee Mwathi Kimani [2013] eKLR; Sagoo v Bharij[1990]KLR; Sitarani Hiralal Shorilal Luthra v Loresho Gardens Limited & Another [2013] eKLR;** and **Emily Jerobon Bett v Rael Cherop Maritim & 2 others [2014] eKLR. F**or the foregoing reasons, the plaintiff asked the court to dismiss the application with costs.

THE DETERMINATION

[15] Courts have said time and again, and we shall continue to state, for as long as applications for dismissal of suit for want of prosecution are made, that, under Order 17 rule 2 of the Civil Procedure Rules, the court has discretion to excuse a delay as long as it has been explained to the satisfaction of the Court. Therefore, the fact of delay *per se* does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay 1) is inordinate and inexcusable; and 2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. For the Plaintiff, the Court will be interested in the nature and importance of the case, the right of the Plaintiff to be heard and the fact that summary dismissal of a suit drives away the Plaintiff from the seat of judgment; an arbitrary and draconian act comparable only to the proverbial ''sword of the Damocles''. And, for the Defendant, in order to complete the balancing, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice and Articles 48, 50 and 159 of the Constitution are relevant guide. Ultimately, as Chesoni J (as he then was) stated in the case of **Ivita Vs Kyumbu,** the Court should ask itself, whether, despite the delay, it is still possible to do justice for all the parties. That is the test I will apply here.

[16] Applying the said test, there has been some delay on the part of the plaintiff arising from the fact that, since this suit was removed from the hearing list on 14th May, 2013, the plaintiff has not taken any step to set it down for hearing. This being an adversarial system of justice, it is expected that the plaintiff will take every step required of him under the law to set down his suit for hearing. Except I should add that, a distinction should been drawn of the specific obligation of the

plaintiff to set down the suit for hearing especially where the suit is ready for hearing, from the general statutory obligations on all the parties in the suit under the overriding objective in sections 1A and 1B of the Civil Procedure Act which explains why Order 11 of the Civil Procedure Rules places the duty to comply with all pre-trial processes on the parties to the suit. But, in principle, the suit is the plaintiff's and he should be the most eager one to take all steps required of him to progress the case unless he is saying he had done his part only that the Defendant has not done his, but still, the plaintiff will be required to move the court to take action against the defendant under Order 11 rule 7(3) of the Civil Procedure Rules. The rendition resolves the elaborate submissions of the parties on that aspect of the law.

[17] I will want to look at the alleged inertia between the times when the last step was taken by the plaintiff up to the filing of this application. The period under consideration will then be from 15th May, 2013 to 21st March 2014 when this application was filed. Definitely, as the said period is less than one year, the one-year period for delay provided in Order 17 rule 2 of the Civil Procedure Rules has not lapsed. Order 17 rule 2 of the Civil Procedure Rules is not, therefore, available in this case. But I should state that a vigilant Plaintiff who is a staunch observer of the tenets of justice and the overriding objective will always act with speed to have his suit set down for hearing without delay. I say this because; it is not uncommon in our jurisdiction for a plaintiff enjoying an order of stay or injunction to take every advantage in law to temporize a case for as long as possible. In a case such as this where an application for dismissal of the suit for want of prosecution has been made prematurely, and the Plaintiff takes out as a defence the fact that the application is premature; the conduct of the plaintiff to progress the case while the application is pending should be considered. Unscrupulous litigant who stands to gain out of further and prolonged delay of the case will take advantage of the time which will pass by before the ''premature'' application is heard and finalized. This approach may seem out of the mainstream jurisprudence, but with time, I hope the approach will find favour with those who are intent to seeing the ultimate goal of the overriding objective principle being realized. And the following words of Kimondo J. in the case of **NETPLAN EAST AFRICA LIMITED v INVESTMENT & MORTAGAGES BANK LIMITED [2013] eKLR** supports the foregoing postulation that:

> ***"The discretion was never intended to be exercised to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice"***

Of course, that will depend on the entire circumstances of each case.

[18] Before I close, and although it is clear the direction the court is taking, let me determine another important issue which has arisen in this case; issuance and service of summons to enter appearance. The relevant provision is Order 5 rue 1 of the Civil Procedure Rules which provides as follows:

> ***1(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.***
>
> ***(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.***
>
> ***(3) Every summons shall be accompanied by a copy of the plaint.***
>
> ***(4) ...***
>
> ***(5) ...***
>
> ***(6) ...***

[19] This subject, and there is ample decisions, is of fundamental significance. See all the

judicial authorities cited by the Applicant on the subject. A summons serves an important role of commanding the defendant to appear in the suit and failure to obey the command has far reaching consequences; judgment will be entered against the defendant. A summons issued under the rules is a court summons, and that is why it is issued, signed and sealed by the Court under rule 1(1) and (2) of the Civil Procedure Rules. It is not the plaintiffs' summons and should carry the appropriate legal weight in the civil process concerned. It should, however, be understood that the responsibility on the plaintiff under rule 1(5) to prepare the summons does not make it the plaintiff's. Secondly, in any suit commenced under the Civil Procedure Act and Rules which requires issuance of summons, where a summons is not issued the suit is fundamentally undermined. If summons did not matter, the provisions on its expiry with the possibility of renewal in Order 5 rule 2 of the Civil Procedure Rules are therefore mere adornments or embellishments to the procedural law; the obvious absurd question would be, why have summons when you can do away with it altogether? I doubt a view that a summons to enter appearance counts for nothing will hold much water even in the new constitutional dispensation, and I do not think issuance and service of summons to enter appearance is a matter which the elegant provisions of Article 159 of the Constitution will dare to be treated as a technicality or diminished as such. My own view is; where a summons to enter appearance has expired and its validity has not been extended under the rules, there is not really a suit to talk about. The term ''validity of a summons'' is used in the rules and it is not without any specific meaning and effect.

[20] On service of summons to enter appearance the court has occasion to say the following long but necessary rendition in the case of **AFRICAN BANKING CORPORATION LIMITED v GENERATIONS FARMERS CO LTD [2014] eKLR**:

> ***[9] Order 5 of the Civil Procedure Rules is the supreme code that governs service of court processes in all civil proceedings under the Civil Procedure Act. Here we are concerned with service of summons and plaint. Order 5 of the Civil Procedure Rules is not a code of technicalities; rather, it is the enabler of fair trial, because, service of summons and plaint brings to the attention of the Defendant the kind of case he is faced with and for which he should defend: which is a step or procedure which cannot be supplanted merely because the Defendant had some knowledge or was aware of the existence of the case. It is not impossible that a party learning of proceedings against him may rush to put in an appearance or instruct counsel or even attend Court. An appearance was filed by MUTITO, THIONG'O & CO ADVOCATES. But such filing of appearance alone, unless it is in reply to the summons and plaint served in accordance with Order 5 of the Civil Procedure Rules, does not remove the necessity, and is not proof of service of summons. That is why Rule 15 of Order 5 of the Civil Procedure Rules requires that:***
>
> > ***15(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.***
> >
> > > ***(2) Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month's imprisonment or both.***
>
> ***[10] Return of summons served in all cases together with evidence of service is mandatory and should be seen a tool of accountability of court processes. Except, there is a disturbing practice that has gained root in litigation in defiance of rule 15: no return of summons is made. It is only when occasion such as the one in this case arises, that parties start to appreciate the importance of rule 15 of Order 5 of the Civil***

Procedure Rules. I insist due deference should been shown to accountability procedures especially on service of court process because it is an important facet of fair trial and source of protection to a party who claims was not served with court process. These things I have said become important when looked at in the context of this case, and the requirement that every summons shall be accompanied by a copy of the plaint. See rule 1(3) of Order 5 of the Civil Procedure Rules. The latter statement throws me back to the necessity of a return of service within the broader sphere of fair trial. The Respondent did not file a return or affidavit of service to show summons and plaint was served in accordance with the law. The basis of default judgment is that a party failed to file appearance or defence within the prescribed period after summons and a copy of the plaint was served. And in the absence of an affidavit of service, the foundation of default judgment either for failure to file appearance or defence is scorched. Towards that end, and I will state it again, entry of appearance, does not remove the necessity of and is not proof of service of summons. I have perused the file, and found no affidavit of service of summons and plaint as required in law. Nothing shows service of summons was done and I have no choice than to agree with the Applicant that summons was not served.

[20] I will not, however, determine whether or not summons was issued and served because of the manner in which the issue was lodged in court.

The upshot

[21] The upshot of the above analysis is that I dismiss the application dated 14th March, 2014. Costs will be in the cause. But I hereby direct that the Plaintiff shall, within 30 days from today, set this suit down for hearing. In default thereof, the suit will stand dismissed without the necessity of a formal application to that effect. It is so ordered.

Dated, signed and delivered in court this 28th day of October, 2014

F. GIKONYO

JUDGE