



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 149 OF 2006**

**PRAVICHANDRA JAMNADAS KAKAD ..... PLAINTIFF**

**VERSUS**

**KENYA BUS SERVICES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**EDWINS MUKABANAH ..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

**BACKGROUND**

[1] I am confronted with the Defendants' Notice of Motion dated 16<sup>th</sup> June, 2011 which is asking this Court to dismiss this suit for want of prosecution; or alternatively, the suit against the 2<sup>nd</sup> Defendant to be struck out to strike out. The application is supported by the Affidavit of Edwins Mukabanah. The suit is a money claim for legal fees in the sum of and is seeking judgment against the Defendants severally and jointly. It however, specified that the Plaintiff's claims against the 1<sup>st</sup> Defendant is in respect of legal fees whereas the claim against the 2<sup>nd</sup> defendant is based on an undertaking that he was pursuing the claim for fees and would promptly remit same to the Plaintiff. The latter is particularized at paragraph 5 of the Plaintiff which states:

**“The plaintiff further claims the said amount as against the 2<sup>nd</sup> Defendant on the latter's undertaking that he is pursuing the said claim and would promptly remit it to the Plaintiff”.**

[2] The 2<sup>nd</sup> Defendant at paragraph 4 of the Amended Defence denies that he gave an undertaking and puts the Plaintiff to strict proof thereof. The 2<sup>nd</sup> Defendant has laid a lot of reliance on the Ruling by Kimaru J when setting aside a summary judgment in this matter stated as follows:

**“in their defence, the Defendants denied that the 2<sup>nd</sup> Defendant had given such an undertaking. It is evident that the Plaintiff enjoined the 2<sup>nd</sup> Defendant as a party to the suit on the basis that the 2<sup>nd</sup> Defendant was the managing director of the 1<sup>st</sup> defendant. It is trite law that the 2<sup>nd</sup> defendant cannot be held liable for the acts of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant can only be held liable for a debt incurred by the 1<sup>st</sup> defendant if there was an unequivocal undertaking by the 2<sup>nd</sup> defendant that he would settle the debt of 1<sup>st</sup> defendant.”**

[3] But even after the ex parte judgment was set aside on 18<sup>th</sup> June, 2008, the plaintiff did not bother to

prosecute the suit or take steps to list suit for hearing which prompted the 2<sup>nd</sup> defendant to apply to have the suit dismissed for want of prosecution, or in the alternative, the suit to be struck out. That inertia offends Order 17, Rule 2(1) AND (3) of the Civil Procedure Rules, 2010, as **“No application has been made, or step taken by either party for one year....”** The Plaintiff only filed a Notice of Appeal against the decision of Kimaru J., dated 15<sup>th</sup> June, 2008. The appeal has nothing to do with and is not a stay of the case in the High Court unless there is a specific order of stay of proceedings. The Plaintiff even after service with this application in June, 2011 did not file his List of Documents, Witness statements nor framed issues despite stating in paragraph 7 of his Replying Affidavit that he will ‘endeavor’ to do so. See the decision by Waweru J in **HCCC NO.314 OF 2009 GEORGE ROY AWUOR & 270 OTHERS v KENYA RAILWAYS CORPORATION AND RIFT VALLEY RAILWAYS(K)LIMITED (2013) eKLR** that:-

**“6. The record shows that pleadings in this case closed in August, 2009. The suit was filed on 10<sup>th</sup> June, 2009. Apart from the act of filing the plaint the Plaintiffs have done nothing at all towards advancing the suit towards trial. They have filed their list and bundle of documents. They have not even filed their witness statements.**

Furthermore, Kimondo J in **JARIBU CREDIT TRADERS LTD v MUMIAS SUGAR COMPANY LIMITED (2013) eKLR** also dismissed the Plaintiff’s suit for want of prosecution relying on the well laid out test in **Ivita Versus Kyumbu (1984) KLR 441**. **“It is whether the delay is prolonged and inexcusable, and if it is, whether justice can still be done.”** The judge in paragraph 14, 15, 16 and 17 stated:-

**14. In fitzpartick Vs Badger &C0 Ltd (1997) 2 ALL ER 657 Lord Denning citing his decision in Reggentine Vs Beecholme Bakeries Ltd (1967) 111 Sol. Jo. 216 said as follows:**

***“it is the duty of the plaintiff’s advisers to get on with the case. Public policy demands that business of the courts should be conducted with expedition.... The delay is far beyond anything we can excuse. This action has gone to sleep nearly two years. It should now be dismissed for want of prosecution.***

**15. the court has inherent power to strike out such a dormant suit. The power is well explained in Mukisa Biscuit Manufacturing Company Vs West End Distributors Ltd (1969) EA 696... the plaintiff has to take actual solid steps to set down the suit for hearing.**

**16. With the overriding objective to do justice to the parties, it is also in the interests of a fair trial to determine a suit expeditiously. The defendant here is obviously prejudiced by the existence of a stagnant suit.**

**17. Lastly in Nilam Doshi Vs Credit Agricole Indosuez Limited and 3 others Nairobi HCCC NO. 802 of 2002 ( as consolidated with HCCC Nos. 803 & 804 of 2002 (unreported), I observed that the dictates of justice and the inherent power of the court require, in the circumstances such as these ones, to free the Defendant from the hold of the plaintiff’s inert grip.”**

[4] The Applicant stated that this suit was filed in the year 2006, and eight years have lapsed without any serious steps being taken to set down the matter. Based on the foregoing, the plaintiff has not explained the delay nor made solid effort to expedite or determine this suit. If anything, the suit should be dismissed for being frivolous, bad in law and an abuse of court process. The Plaintiff’s claim is based on a purported undertaking whose existence has been unequivocally denied by the 2<sup>nd</sup> Defendant at paragraph 4 of his Defence. It is on the Plaintiff under Section 107(1) of the Evidence Act to prove its existence. The Plaintiff has not annexed a copy of the purported undertaking to his Replying Affidavit which the suit fatally defective and offensive to Section 3(1) of the Law of contract Act which provides:-

**No suit shall be brought whereby to charge the Defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which the suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereto by him lawfully authorized.”**

Whilst it is trite law that the courts are reluctant to strike out suits, they will not hesitate to do so where the suit does not disclose any cause of action. See **DT DOBIE v MUCHINA & ANOR (1982) KLR 1**, Where the Court of Appeal stated:-

**“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously disclose no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shares a mere resemblance of a cause of action provided it can be injected with real life by an amendment, it ought to be allowed to go forward for a Court of Justice ought not to act in darkness without full facts of the case before it.”**

[5] Accordingly, the Applicant submitted, this case needs an injection with real life by the production of the 2<sup>nd</sup> Defendant’s written undertaking but that is not forthcoming. See also **HCC NO. 131 OF 2007, BANK OF INDIA v TUSKER MATTRESSES (2013) eKLR**, where Havelock J., dismissed the suit summarily on the basis that it fell short of Section 3 of the Law of Contract Act as there was no written undertaking given by the Defendant thereon. See his words below:

**“8. The principles set out in the DT Dobie case (supra) are clear that if the pleading does not disclose any reasonable cause of action or defence or that the pleading is scandalous, frivolous and vexatious, or that such pleading may prejudice, embarrass or delay the fair hearing of the suit or that it is an abuse of the process of the court, then it ought to be dismissed.....**

**9. To my mind, the Defendant has demonstrated that any debt owing and outstanding to the plaintiff cannot be claimed against it as a third party. There is no nexus over the debt owed by the company to the plaintiff and the repayments made by the Defendant into the account to justify that it was liquidating any money owing or that it had taken any undertaking to repay the same.”**

[6] The Applicant concluded that this matter falls on all fours with **Tusker Mattresses Case (supra)** and the Plaintiff’s suit against the 2<sup>nd</sup> Defendant is frivolous and inherently defective. It ought to be dismissed with costs.

### **The Plaintiff fought back**

[7] The application is opposed by the Plaintiff (hereafter the Respondent) who filed a Replying Affidavit sworn by him on 21<sup>st</sup> July, 2011. The Respondent was convinced that the Defendant’s application lacks merit and should be dismissed. The Respondent relied on the case of **Allen Vs Sir. Alfred McAlpine & Sons Ltd (1968) 1 ALL ER 543** as quoted in **National Bank of Kenya Limited V Juma Construction Limited & 4 others (2012)** which held that:

**“...in making a determination for dismissal of suit, therefore the Defendant has to show that there has been inordinate delay, that the delay is inexcusable and that they are prejudiced by the delay.”**

[8] To the Respondent, the delay is not inordinate because, contrary to the claims by the Applicant, the Plaintiff has filed his list of documents, and list of witnesses all dated 19<sup>th</sup> of July, 2011 filed in court on 20<sup>th</sup> July, 2011 and served on the 2<sup>nd</sup> Defendant on 22<sup>nd</sup> July, 2011. Therefore, the Defendants’ application has been overtaken by events. The Plaintiff is serious in having this matter heard and determined on merits. Further the plaintiff filed a Notice of Motion Application dated 21<sup>st</sup> July, 2011 seeking, among others, the production of the books of accounts by the second defendant in his capacity as the Director of the 1<sup>st</sup> defendant. And on 29<sup>th</sup> November, 2011 Mutava J placed the matter for hearing before the Deputy Registrar. On 20<sup>th</sup> of February 2012 Nyakundi (DR) ordered that the Respondents provide books of accounts and a further hearing on 8<sup>th</sup> March, 2012. On this day the matter was not listed for hearing and a fresh date was to be fixed. After this the file went missing unfortunately. To date, the 2<sup>nd</sup> Defendant has not complied with the order of production of the books of accounts. Therefore, the court should find that there was no inordinate delay and is not inexcusable. The Plaintiff has not been able to scrutinize the books of accounts and proceed with its suit against the 2<sup>nd</sup> defendant because of the 2<sup>nd</sup>

defendant's contempt of the court orders given on the 20<sup>th</sup> of February, 2012. See **Fanuel Amimo v Tamasha Corporation Limited (2008) eKLR** where the court stated as follows:-

**“the dismissal of a suit is discretionary. A party seeking the court to do its discretion in its favour must themselves have acted equitably. There is a lack of bona fide and equity in this case as against the defendant. The delay which has occurred in this case has been occasioned by the Defendant. The defendant cannot manipulate the circumstances to its favour at the expense of the plaintiff's right to be heard.”**

Judgment against the 1<sup>st</sup> defendant still stands and it is only by the 2<sup>nd</sup> defendant producing the books of accounts and explaining why the 1<sup>st</sup> defendant is unable to liquidate the decretal sum that the plaintiff will be able to realize the fruits of his judgment. In view of the foregoing, if there is inordinate delay the same was excusable and further, it was partly caused by the 2<sup>nd</sup> Defendant.

[9] The Respondent also stated that the Defendants have not been prejudiced by the delay particularly due to the fact that the 2<sup>nd</sup> Defendant is partly to blame for the delay hence he cannot claim to be prejudiced by his own default. See **Ivita Vs Kyubmu (1984) KLR 441**, where **Chesoni, J** (as he then was) held as follows:

**“the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and 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, or witnesses may be missing and 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 event 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 his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for 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.”**

[10] On striking out a suit, the Respondent submitted that the 2<sup>nd</sup> defendant has sought the order of striking out of the suit for being frivolous, bad in law and an abuse of the court process. Also, the basis of his application is that the Plaintiff did not annex a copy of the 2<sup>nd</sup> Defendant's undertaking to the Plaintiff's Replying Affidavit which makes the suit fatally defective. The plaintiff did provide the said undertaking in their list of documents filed on 20<sup>th</sup> July, 2011 which is the Defendant's letter dated 6<sup>th</sup> December, 2004, document number 4 on the Plaintiff's list. Striking out of a pleading is a draconian order and before the Honourable court can exercise this draconian power, it must be satisfied that the suit is scandalous, frivolous and/or vexatious and is an abuse of the court process. From the pleadings as filed herein, it is clear that there exists a cause of action against the 2<sup>nd</sup> defendant. Upon a casual perusal of the pleadings herein, one will observe the existence of numerous triable issues which have to be determined by full trial as numerous precedents dictate. See **Dupoto Group Limited v Kenya Airports Authority & Another (2013) eKLR** where Nyamweya J held as follows:

**“...it is my view that the overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. This is because a pleading that raises triable issues confirms the existence of a reasonable cause of action, and it cannot consequently be said that the said pleading is scandalous, frivolous or vexatious.”**

[11] The wealth of judicial decisions have settled the law that the power of the court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated in **D.T Dobie & Company (Kenya) Ltd V Muchina (1982) KLR 1** at page 9 by Madan, J.A as follows:-

**“No suit ought to be summarily dismissed unless it appears so hopeless that is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by**

**amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice not to act in darkness without the full facts of a case before it.”**

The pleadings raise triable issues and real life has been injected to the Plaintiff by filing the Defendant’s undertaking in court. Further, based on refusal to submit the books of accounts as ordered by the Deputy Registrar, the 2<sup>nd</sup> defendant has a lot to explain as to where the moneys the subject of this suit went to. A company acts through its Directors and the 2<sup>nd</sup> Defendant is a director of the 1<sup>st</sup> defendant. The onus is on him to prove whether the actions taken by him in events leading to the suit were indeed authorized by the company/1<sup>st</sup> Defendant or were “Ultra Vires” the company’s directive. These things can only be unraveled in a trial on evidence. The present application is an attempt to frustrate the plaintiff not to lawfully execute his decree against the 1<sup>st</sup> defendant. The application has been filed by the same firm of advocates which has been holding the 1<sup>st</sup> defendant’s advocate brief in the matter before the Deputy Registrar and they cannot now say that they have not been aware of the said proceedings. The application should be dismissed.

### **COURT’S RENDITION**

[12] There are two things I must determine. One, whether this suit should be dismissed for want of prosecution; and two, whether, in the alternative, I should strike out the suit against the 2<sup>nd</sup> Defendant.

#### **On dismissal of suit for want of prosecution**

[13] The relevant provision which gives the Court power to dismiss a suit for want of prosecution is Order 17, Rule 2(1) and (3) of the Civil Procedure Rules, 2010. It applies where no application has been made, or step taken by either party for one year to prosecute the case. I do not, however, re-invent the wheel on this subject. Much judicial innk has been spilt on the subject and the test applicable. I am content to cite a work of the Court in **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?**

**Is the delay inordinate and inexcusable?**

[14] The cornerstone of the power to dismiss a suit for want of prosecution is whether the delay is inordinate and inexcusable. There is, however, no precise measure of what amounts to inordinate delay as that would differ from case to case and would depend 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 McALPINE & 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?

[15] Let me say that there are vital pieces of information that the application has not addressed. The Respondent took some action after the application herein was filed and filed a list of document and witnesses. There is also another important matter. The 2<sup>nd</sup> Defendant was ordered to produce books of accounts by the Deputy Registrar on 20<sup>th</sup> February, 2012 after the Respondent applied formally. From the record, there is nothing which shows that the 2<sup>nd</sup> Defendant complied with the said order. It is not, therefore, correct for the Applicant to state that the Respondent filed only a Notice of Appeal on the Ruling by Kimaru J. The Respondent avers that the default by the 2<sup>nd</sup> Defendant on the said orders of 20<sup>th</sup> February, 2012 has contributed to the delay in this matter. It may be true there is default on the part of the Applicant on some orders of the Court. But, it is also true that the Plaintiff should have done more to have the default purged by seeking the coercive powers of the Court of contempt of Court. Since 2012, there have been no active steps taken by the Plaintiff.

**But even in the face of delay, is it possible to conduct a fair trial?**

[16] The next question the Court should answer before it concludes the delay is inexcusable is whether it is still possible despite the delay to serve substantive justice. The basis for this is what I stated earlier in this ruling that, every Court of law should pay homage to its core duty of serving substantive justice in judicial proceeding before it, which explains the reasoning by Madan JA in the famous **DT DOBIE case**

that **the Court should aim at sustaining rather than terminating suit**. The constitutional principle and policy here is that dismissal of suit summarily for want of prosecution completely divests a party of a hearing of his case on merit, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the "Sword of the Damocles". Therefore, where an explanation has been given of the delay, the Court should evaluate it to see if it is reasonable and thus, excuse the delay. The Court would at the same time consider prejudice to the Defendant as well as to the Plaintiff if the suit is sustained or dismissed, respectively. Substantial to fair trial or grave injustice to the Defendants 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 1<sup>st</sup> Defendant has not shown such substantial risk occurring due to the delay. And the 2<sup>nd</sup> Defendant is already accused of default of a court order. He cannot stand on a pedestal or be beyond reproach such that he can point a finger at the Plaintiff for a delay he has contributed to. Using the test formulated in **IVITA v KYUBMU (1984) KLR 441 (supra)**, by **Chesoni, J** (as he then was), the hearing of the case is still possible without causing injustice or extreme difficulties in the trial. At least, the suit against the 1<sup>st</sup> Defendant is sustained so that a just resolution of disputes through a fair and public hearing in accordance with Article 50(1) of the Constitution is achieved. See the opinion of **Russel L.J.** in **WILLIAM C. PARKER LTD v F.J. HAM & SONS at p 1586** which was quoted in **BIRKET v JAMES p 335**.

### **WHAT ABOUT THE SUIT AGAINST THE 2<sup>ND</sup> DEFENDANT?**

#### **A matter of striking out?**

[17] Striking out a suit is also a power that should be used sparingly and only on clearest of cases. It applies on suits which are plainly and obviously do not have any reasonable cause of action, and cannot be revived even by injection of life by way of amendment. The case of **D.T. DOBIE (supra)** is useful here. The Applicant also applauds the ratio of that case and suggested that the case against him lacked a foot on which to stand because it did not exhibit the purported undertaking by him. Needless to state that the said purported undertaking is part of the court record having been filed with the Plaintiff's list of documents on 20<sup>th</sup> July, 2011, that is, the Defendant's letter dated 6<sup>th</sup> December, 2004, document number 4 on the list. Although the filing was after this application, it has not been and no application to have it expunged from the record. In the circumstances, I will not go into the propriety or otherwise of the said document to see whether it satisfies Section 3(1) of the Law of contract Act which provides:-

**No suit shall be brought whereby to charge the Defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which the suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereto by him lawfully authorized."**

I reserve that for the trial. I, therefore, dismiss the alternative prayer and sustain the suit against the 2<sup>nd</sup> Defendant as well.

[18] In sum, I sustain the entire suit. And instead, I dismiss the application herein. But I attach the following condition: That the Plaintiff will within 45 days set down the suit for hearing which failing it will stand dismissed. It is so ordered.

**Dated, signed and delivered in open court at Nairobi this 27<sup>th</sup> day of October, 2014**

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**F. GIKONYO**

**JUDGE**