



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 1128 OF 1999

DAIMA BANK LIMITED PLAINTIFF

VERSUS

NGOTHO WATHOME COMPANY LTD. DEFENDANT

RULING

1. Before this Court are 2 Applications, the first dated 1st March 2012 but only filed on 30th May 2012 by the Plaintiff, seeking leave to continue these proceedings while in liquidation. The second Application is that of the 2nd Third Party dated 25th April 2013 seeking Orders to strike out the suit herein against the 2nd Third Party. The Plaintiff's said Application is brought under the provisions of **section 228** of the *Companies Act*, **section 35 (1)** of the *Banking Act* and the discretionary jurisdiction of this Court under **sections 1A, 1B and 3A** of the *Civil Procedure Act*. The grounds upon which the Application is based are as follows:

- a) **The Plaintiff filed suit against the Defendant on or about 9th August 1999.**
- b) **At the time of filing the suit the Plaintiff was not in liquidation.**
- c) **The Plaintiff was consequently put in liquidation on 13th June 2005.**
- d) **As per the ruling of this Honourable court delivered on 16th day of February 2012 pursuant to Section 228 of the Companies Act and section 35 (1) of the Banking Act, the Plaintiff requires leave of this Honourable court in order to continue prosecuting the suit herein.**
- e) **In consequence the Plaintiff was ordered inter alia to file an application seeking leave of the court to continue prosecuting the suit herein.**
- f) **It would be in the interests justice and in line with the overriding objective of the Civil Procedure Act and duty of the court to attain a just determination of this suit, to grant such leave to the Plaintiff in order to enable it continue to prosecute its suit against the Defendant to its just conclusion.**

2. The Plaintiff's said Application is supported by the Affidavit of the liquidation agent of the

Plaintiff bank – one **Zack Kiplangat Rono** sworn on 1st March 2012. The Plaintiff's position vis-a-vis this litigation is summed up in paragraphs 9 and 10 of that Affidavit which read as follows:

“9. THAT the Plaintiff's suit relates to a piece of land which the Plaintiff claims it had instructed the Defendant to carry out a valuation for purposes of ascertaining whether the same could be used as a good security for an advance to a borrower, Travel concepts Ltd, and which valuation the Plaintiff's claims inter alia misrepresented the actual value of the property leading the Plaintiff to suffer a massive loss of over Kshs.3,000,000.00

10. THAT the Plaintiff has a good case against the Defendant and I verily believe it would be in the interests of justice for this Honourable Court to grant the Plaintiff leave to continue to prosecute its suit to its just conclusion as I am advised by my advocates on record which advice I verily believe to be true that if such leave is not granted the Plaintiff's suit would fail without the Plaintiff being afforded an opportunity to ventilate its claim.

3. The 2nd Third Party, **Timothy Nduvi Mutungi** filed Grounds of Opposition in relation to the Plaintiff's said Application, 13 June 2013. Those Grounds detailed that the Application was legally incompetent and a total abuse of the Court's process. The 2nd Third Party maintained that the Application had been filed in total violation of the Order of this Court given on 16th February 2012. He maintained that the Court was now *functus officio* and had no jurisdiction to entertain the Application. Similarly, the Grounds of Opposition filed by the 1st Third Party on 12th June 2013 also maintained that the Plaintiff's said Application was an abuse of the Court process but went on to say that there had been no plausible explanation why the Plaintiff had delayed in prosecuting the suit before Court. It also maintained that the Plaintiff could not proceed with the suit in view of its liquidation. Indeed in this regard, the Court noted its Order contained at page 8 of its Ruling which detailed as follows:

“In consequence, the Plaintiff is ordered to file an application in that regard within 14 days of the date hereof. In the event that such an application is not filed within that time period, the Third Parties (and the Defendant) are at liberty to file an application before court for dismissal of this suit.”

4. At the hearing of the two Applications before Court on the 13th June 2013, Mr. Muli for the Plaintiff noted that it had been unable to comply with the Court's Order as above as the Court file had gone missing. The Plaintiff had written to the Deputy Registrar complaining in regard to this turn of events and it was only able to access the Court file on 30th May 2012 and file its Application. Counsel asked the Court to allow the Plaintiff to present its Application dated 1st March 2012 in the interests of justice. Mr. Wasika, on behalf of the 1st Third Party, in reply, commenced his submissions by detailing that he supported the Application by the 2nd Third Party to dismiss the suit as against it. He continued by saying that, in his opinion, the Plaintiff, as the liquidator, should have first filed an application for leave to file the Application before Court, out of time. Mr. Nyamai, the advocate for the 2nd Third Party, in his submissions, noted that he had only been served with the Plaintiff's Application before Court two weeks previously, after his office had served the Plaintiff's advocates with his client's Application of 25th April 2013. He agreed with Mr. Wasika that the Plaintiff's Application was meant to scuttle his client's Application. He noted that the fact that the Court file had gone missing was not detailed in the Supporting Affidavit. He commented that the said Application dated 1st March 2012 was only filed on 30th May 2012, outside the grace period given by this Court in its said Ruling dated 16th February 2012. He further agreed with Mr. Wasika that the Plaintiff should have filed an Application for leave to file its said Application out of time. He noted that this case went back to 1999 and, in his opinion, it was in the interests of justice that this litigation to come to an end.
5. It seems that learned counsel for the 1st and 2nd Third Parties have slightly misinterpreted that portion of my Ruling dated 16th February 2012 in relation to the Plaintiff filing its Application for leave to proceed with this matter in accordance with **section 228** of the *Companies Act*. The

default aspect of the Court's Order was to allow the Third Parties to file applications to strike out. It was not that the suit would automatically be struck out as against the Third Parties. That said, what of the legal position as regards the Plaintiff's said Application of 1st March 2012? There is no doubt that the Plaintiff filed its Application on 30th May 2012 well outside the 14 day grace period allowed by this Court in its said Ruling dated 16th February 2012. What is surprising is that in the said Supporting Affidavit of Mr. Rono, there is no mention of why the delay in filing the Application. I assume that the reason for this is that as at the date as at the date of the swearing of the Affidavit, 1st March 2012, the 14 day grace period had not, as yet, expired. It appears that the only explanation for the delay is contained in the submissions of Mr. Muli made before Court on 13th June 2013. I believe that what the Plaintiff should have done, taking into account the alleged disappearance of the Court file, is to have had Mr. Rono swear and file a further Affidavit explaining the delay beyond the 14 day grace period.

6. At this juncture, it would be as well for me to refer to the Notice of Motion dated 25th April 2013 and filed herein on 29th April 2013. As detailed, that Application prayed of this Court to strike out the suit herein as against the 2nd Third Party. It was brought under the provisions of **sections 1A, 1B, 3 and 3A** of the *Civil Procedure Act*. I was supported by the Affidavit of the 2nd Third Party. That Affidavit simply referred the Court to the fact that the Plaintiff had failed to comply with this Court's Order of 16th February 2012 in putting in an Application to prosecute this suit, as required by **section 228** of the *Companies Act*. All that the 2nd Third Party's Application has done is to focus this Court's mind on the fact that, as it stands today, the Plaintiff herein does not have leave to further prosecute this suit, as per the provisions of **section 228** of the *Companies Act*. The question to be determined is whether the Plaintiff does so deserve?
7. I have carefully perused the record of this Court ever since the Plaintiff was filed herein on 18th August 1999. From that date until 25th October 2006, this case had progressed through the Court much in the way that could be expected of a case of this nature. There were interlocutory applications to and fro as well as the suit being set down for hearing on 6th February 2003, 25th February 2003, 3rd July 2003, 9th June 2004, 27th July 2004 and 25th July 2005. At the hearing of an application filed by the firm of Kipkenda, Lilan & Co to cease acting for the 2nd Third Party on 25th October 2006, my learned brother **Ochieng J.** allowed the said application but there the Court's record is silent until the Notice of Motion dated 11th April 2011 was filed on 13th April 2011. That application was dealt with and determined by this Court in its said Ruling of 16th February 2012. In the Affidavit in support of the Plaintiff's Application dated 1st March 2012, there is absolutely no explanation for the inactivity of the Plaintiff for the period of four and a half years. The Court notes that, according to exhibit "ZLN 1" of the Supporting Affidavit of the Plaintiff's said Application, the Deposit Protection Fund Board was appointed the liquidator of the Plaintiff bank on 13th June 2005. There was some attempt to explain the Plaintiff's position as regards its delay in prosecuting this matter as per the Replying Affidavit of the (then?) Liquidation Agent of the Plaintiff bank, **Mr. Daniel Leparan Ng'atuny** sworn on 14th June 2011 in response to the 1st Third Party's Notice of Motion dated 11th April 2011. The deponent swore to the fact that on 12th November 2009, the Plaintiff's representative had attended the Court registry in order to fix a hearing date but again the Court file could not be traced. The deponent then detailed the history of the Plaintiff's attempts to locate the Court file attaching correspondence that it had written to the Deputy Registrar of this Court in that connection. That Affidavit was not referred to or taken into account in this Court's said Ruling of 16th February 2012, which had concentrated upon the point as regards leave to prosecute under **section 228** of the *Companies Act*. Of course, the problem with **Mr. Ng'atuny's** said Affidavit as well as the Supporting Affidavit of **Mr. Rono**, is that there is no explanation for what transpired between the 26th October 2006 and 12th November 2009, a period of over three years.
8. Both counsel for the Plaintiff and for the 2nd Third Party have emphasised in their submissions as to what is in the best interests of justice in this suit. It has taken the Plaintiff just under 7 years to file this Application before Court for leave to prosecute the suit. I consider that period to be one of inordinate delay. The Plaintiff may have been hindered by the disappearance of the Court file for which it had drafted an application for reconstruction but that was not until 2011 and it was never pursued by the Plaintiff, presumably because the Court file reappeared. In my opinion, the Plaintiff has been dilatory and as a consequence, I am not prepared to grant leave that it continues these proceedings. As learned counsel for the 2nd Third Party observed in his submissions before

Court:

“It is in the interests of justice that this litigation should come to an end.”

9. I am supported in this view by the Ruling of **Ochieng J** in **Venture Capital and Credit Ltd. v Consolidated Bank of Kenya Ltd** (2006) eKLR when the learned Judge quoted from the case of **Allen v Sir Alfred McAlpine** (1968) 1 All ER 543 at page 546 as follows:

“Lord Denning MR captured, in the following words, the fundamental reason why courts do dismiss suits for want of prosecution:

“The delay of justice is a denial of justice

To no one will we deny or delay right or justice. Over the years men have protested at the law’s delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3. Sc. 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, C.1). To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it. It is the only effective sanction that they contain”.

10. Accordingly, I dismiss the Plaintiff’s Notice of Motion dated 1st March 2012 with costs to the 1st and 2nd Third Parties. As a consequence (and automatically), the Application of the 2nd Third Party dated 25th April 2013 is allowed with costs.

DATED and delivered at Nairobi this 30th day of October, 2013.

J. B. HAVELOCK

JUDGE