REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 461 OF 2008

GOVERNORS BALLOON SAFARIS LTD……PLAINTIFF

VERSUS

SKYSHIP COMPANY LIMITED……...1ST DEFENDANT

COUNTY COUNCIL OF TRANSMARA…….…..2ND DEFENDANT

RULING

1. By a notice of motion dated 31st March, 2010, brought under Order XVI, rule 5 of our former Civil Procedure Rules the 1st Defendant sought for the dismissal of this suit for want of prosecution. The grounds in support of the application were that the Plaintiff had failed to take any further steps in the suit since 28th April, 2009. That the Plaintiff had further failed to timeously make discovery as required by the mandatory provisions of the then Order X Rule 11 of the Civil Procedure Rules. It was also contended that there had been inordinate delay that was inexcusable and that the Plaintiff's failure to take any steps to prosecute the suit was an abuse of the court process. The Application was supported by the Affidavit of Adi Vinner sworn on 31st March, 2010.
2. The 1st Defendant contended that the proceedings herein were commenced on 14th August, 2008 vide a Plaint of the same date. That the Plaintiff's cause of action against the 1st Defendant was for the alleged inducement and procurement of a breach of contract by the 2nd Defendant of a 66 year agreement between the Plaintiff and the 2nd Defendant, which conferred upon the Plaintiff exclusive rights to carry on hot air balloon services within a certain area in the Maasai Mara. Further, it was deponed that the pleadings to the suit closed on 9th December, 2008. That thereafter, the Plaintiff lodged an application dated 21st November, 2008 to have certain paragraphs of the 2nd Defendant's Amended Defence and Counter-claim struck out, the dismissal of the said Counter-claim and the entry of judgment in favour of the Plaintiff as against the 2nd Defendant. That the said application remains unheard to date owing to the adjournments sought by the Plaintiff and the 2nd Defendant on 23rd February and 28th April, 2009, respectively.
3. The Application was opposed by the Plaintiff through a Replying Affidavit sworn by Aris Grammatics on 17th June, 2010. It was contended that the instant application was brought in bad faith as its objective was to conceal the fraud and obstruction of justice by the 1st Defendant. It was averred that the Plaintiff commenced the suit to enforce its contractual rights under a contract

it had entered into with the 2nd Defendant. That the said contract conferred exclusive rights on the Plaintiff with regard to services to be carried out in certain areas of Maasai Mara. That subsequently, the 1st and 2nd Defendants entered into an agreement that was in breach of the exclusivity clause in the said contract between the Plaintiff and the 2nd Defendant. That both Defendants consistently denied the existence of any contract between themselves in all their pleadings and affidavits in the instant suit. That it was on the basis of this denial, that the court declined to grant the Plaintiff a temporary injunction that was meant to protect its rights under the said contract. That after the dismissal of the application for a temporary injunction, the 1st Defendant commenced a separate suit against the 2nd Defendant in **Kisii HCCC No. 182 of 2009 Skyship Company Limited –vs- City Council of Transmara** on 18th September, 2009 between the Defendants for breach and termination of the contract dated 1st August, 2000. That through the said legal action, the Plaintiff learnt that the 2nd Defendant terminated the contract in question on 1st March, 2007 on the ground that the said contract was never stamped, nor approved by the 2nd Defendant as required by statute, and was therefore void ab initio. The Plaintiff therefore contended that it was wrong for the Defendants to produce the unstamped contract document as evidence in any court proceedings.

4. That despite this, the Defendants relied on the said contract document to defeat the application of the Plaintiff for a temporary injunction, which the Plaintiff contended, was a fraud committed on the court and an act of contempt. That given that the proceedings in **Kisii HCC no. 182 of 2009 (supra)** raised issues that were similar to the instant suit, the 1st Defendant ought to have filed the aforementioned suit in this court and apply for consolidation of the cases as is customary, which they failed to do. The Plaintiff therefore argued that the 1st Defendant's action in filing the suit against the 2nd Defendant at the High Court in Kisii was meant to conceal from the court the fact that the contract which it was relying on had been terminated by the 2nd Defendant. The Plaintiff therefore raised a Preliminary Objection on the ground that the 1st Defendant was in contempt of court and should not be heard in any further proceedings in this suit unless and until it purges its contempt.
5. This application was argued before Njagi J and when it came before me, the parties agreed that this court could write a ruling based on the submissions already made. I have considered the affidavits of the respective parties and written submissions of the learned counsels. In deciding the application, I will begin with the Preliminary Objection raised by the Plaintiff. It was the Plaintiff's case that the 1st Defendant is in contempt of Court and ought not to be heard in this application or any other application until it purges its contempt.
6. The Plaintiff stated that the following facts were suppressed from this Court by the 1st Defendant or both Defendants:-

a. ***That the 2nd Defendant has after the close of pleadings herein, admitted or conceded that the contract of 1st March, 2007 entered into between the Defendants (and which contract triggered the present case) is void and unlawful.***
b. ***That the 2nd Defendant has terminated the said contract on the said ground that it is void and unlawful.***
c. ***That in consequence of the said admission of the illegality or unlawfulness of the contract dated 1st March, 2007 and the termination thereof by the 2nd Defendant, there is no longer a dispute between the Plaintiff and the Defendants on the validity of the said contract.***
d. ***That if there is any dispute at all concerning the validity of the said contract dated 1st March, 2007, such a dispute exists only between the 1st Defendant and the 2nd Defendant.***

7. It was the Plaintiff's contention that both Defendants were under a legal obligation to notify the Plaintiff and the court of the above developments in order to assist the court in the just determination of the present suit or proceedings and for the efficient disposal of the business of the court in these proceedings. That by oppressing the above facts from the court and commencing parallel proceedings **Kisii HCC No. 182 of 2008 (supra)** to determine the same issue that was at the core of the present proceedings, the 1st Defendant had obstructed justice in these proceedings.

That this was a misuse or abuse of the process of the Court and the Defendants should therefore be cited for contempt of Court.

8. On its part, the 1st Defendant submitted that where a party had been found guilty of contempt for breaching an order of the court, the Court can decide not to hear such a party until it purges such contempt by complying with the order. In the instant case, it was contended that there was no court order that had been disobeyed. It was further submitted that the application for injunction by the Plaintiff had been denied on a number of grounds none of which touched on the contract between the Defendants. On the issue of the proceedings in **Kisii HCC No. 182 of 2008** (supra) it was argued that the matter was indeed in existence but that the same was between the Defendants. That the Plaintiff had no standing to participate in the dispute between the Defendants without leave of court to be enjoined in the same. That the filing of **Kisii HCC No. 182 of 2008 (supra)** was not wrought with mischief as purported by the Plaintiff, as matters emanating from the Transmara region were required to be filed at the Kisii High Court according to the practice directions of the Chief Justice Gazette Number 300 of 2007 and not in Nairobi.
9. On the other hand, according to the 2nd Defendant, the Plaintiff's Preliminary Objection was an outright attempt to scuttle the hearing and determination of the 1st Defendant's application. That there was no order issued against the Defendants and as such, the issue of contempt cannot arise. The 2nd Defendant argued that the Plaintiff ought to have instituted contempt of court proceedings to coerce its compliance instead of raising the same through a Preliminary Objection.
10. I have considered the various arguments by the parties. It is clear that there is no allegation of any wilful disobedience of any judgment, decree, direction, order, or other process of this court on the part of the Defendants. Further, due to their serious nature contempt proceedings, ought to be made through a formal application as provided by law procedures. The same should not be by way of a Preliminary Objection.
11. Be that as it may since what its merit? On the issue of suppression of material facts by the Defendants concerning the contract dated 1st August, 2000, I have read the ruling dated 24th October, 2008 by Lesiit J who decided on the application by the Plaintiff for a temporary injunction. It is clear from the said ruling that in dismissing the said application the Court considered other grounds to the application apart from the issue of the contract between the two Defendants. Although, the Plaintiff was free to appeal against the said ruling it did not do so. On the issue of the filing of the proceedings in **HCC No. 182 of 2008 (supra)** in Kisii, it is clear that the dispute between the Defendants arose from a transaction with regard to Maasai Mara which is in the Transmara region. The High Court at Kisii is the court with jurisdiction over the matter and there has been no material presented to this court to show that the filing of those proceedings at Kisii was otherwise then on the basis of geographical jurisdiction. In view thereof, I am not satisfied that the Plaintiff's Preliminary Objection on the ground of contempt of court has any merit and the same is hereby dismissed.
12. I now turn to the merits of the 1st Defendant's application. It is clear that this application was brought under the provisions of the repealed Civil Procedure Rules as the application was filed before the Civil Procedure Rules, 2010 came into effect. Order 16 rule 5 of the repealed Civil Procedure Rules, provided: -

"If within three months after-

a. ***the close of pleadings; or***
b. ***the removal of the suit from hearing list; or***
c. ***adjournment of the suit generally the Plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the Defendant(s) may either set the suit down for hearing or apply for its dismissal."***

13. The 1st Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution. In the case of **Naftali Opondo Onyango Vs National Bank of Kenya [2005] eKLR** the Court while quoting **Salmon, L.J.** in **Allan-v-Sir Alfred McAlphine and Sons Ltd (1968) 1 ALL E.R. 543,** noted;

"The Defendant must show:

i. ***That <u>there has been inordinate delay</u>… What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.***
ii. ***That this <u>inordinate delay is inexcusable</u>. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.***
iii. ***That <u>the Defendants are likely to be seriously prejudiced by the delay</u>. This may be prejudice at the trial of issues between themselves and the Plaintiff or between each other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at trial." (emphasis mine)***

14. In a nutshell the principles governing application for want of prosecution is that, the Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. Further to this, it is clear that the decision of whether or not to dismiss a suit is discretionary. Such discretion should however not be exercised by the court capriciously. Each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same. The purpose of Order 16 rule 5 of the former Civil Procedure Rules, as is Order 17 Rule 2 of the current Civil Procedure Rules provides the Court with an administrative mechanism to disencumber itself of case records in which parties appear to have lost interest. See the Case of **<u>Sheikh vs. Gupta and Others Nairobi HCCC No. 916 of 1960 [1969] EA 140.</u>** Bearing this in mind, has the 1st Defendant met the threshold required in dismissing the Plaintiff's suit for want of prosecution?
15. On inordinate delay, both Counsels for the 1st and 2nd Defendants submitted that as at the time of the filing of the application on 16th April, 2010, the matter had not been prosecuted since 28th April, 2009. It was further submitted that the delay complained of was for more than a year. Both the 1st and 2nd Defendant sought to persuade the Court that under the circumstances the Plaintiff had not offered any plausible explanation as to the said delay and had instead chosen to engage in side issues that had no bearing on the instant application. Learned Counsel for the 1st Defendant submitted that Order 16 Rule 5 provided for the dismissal of a suit if no steps are taken to prosecute it within three months. Counsel relied on a number of cases to buttress his contention including **Dipak Premchand Shah & Others –vs- Akiba Bank Limited (UR) Nairobi HCCC no. 34 of 2003** and **Render Holdings Limited –vs- Victoria Commercial Bank Ltd Nairobi HCCC No. 565 of 2006**. The 2nd Defendant's learned counsel further submitted that the decision rendered in **Kisii HCC No. 182 of 2008 (supra)** had no bearing on the Plaintiff's suit.
16. In rebuttal, learned counsel for the Plaintiff submitted that the application lacked merit and should be dismissed. That the reason for the delay was due to the fact that it opted not to prosecute its suit, pending the determination of Kisii **HCC No. 182 of 2008 (supra)** which also touched on the same issues as its cause of action, that is, the validity of the contract between the Defendants.
17. I have considered the parties rival arguments. In the case of **Nilani –vs- Patel (1969) EA page 341**, **Dickson J** held;

> ***"it is only too trite to say that as in every civil suit, it is the Plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, <u>it is my view that a Defendant ought to invoke the process of the court towards that end as soon as is convenient by either applying for its dismissal or setting down the suit for hearing</u>……Delay in these cases is much to be deplored. It is the duty of the Plaintiff's advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died…documents may have been mislaid, slost, destroyed and the memory tends to fade" (emphasis supplied)***

Further, in the case of **Agip (Kenya) Limited-v-Highlands Tyres Limited [2001] KLR 630**, **Visram J** considered the issue of inordinate delay and stated;

> ***"Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay."***

18. Bearing the above in mind, I note that the matter was adjourned on 28th April, 2009, to enable the Plaintiff file a Further Affidavit. Until 30th April, 2010 when this application was filed, the Plaintiff did not take any step in this matter. This included even matters of discovery. It is therefore clear that there was delay of over a year. Considering that the law then provided for three months only the delay was in ordinate. Even under the current rules the delay would be inordinate as it was over a year.
19. Was the delay excusable? The Plaintiff contends that the delay was occasioned by the fact that it opted not to prosecute suit as it awaited the hearing and determination of **Kisii HCC No. 182 of 2008 (supra).** That owing to the similarity of the issues in that case and the instant suit, its decision was guided by the need to "avoid misuse of judicial resources" that would be occasioned by having two parallel proceedings on the same issues. I have perused the Ruling dated 16th July, 2010 by Muchelule J with regard to **Kisii HCC No. 182 of 2008 (supra).** It is clear from it that the dispute therein was between the 1st and 2nd Defendant concerning an agreement dated 1st March, 2007. That dispute did not touch on or affect the Plaintiff. By the Plaintiff having the desire of challenging the validity of that agreement, did not make it party to that suit. The Plaintiff might have been interested in the outcome of **Kisii HCC No. 182 of 2008 (supra)**, but there were other ways to deal with such a situation without having to delay the prosecution of the instant suit. For example, the Plaintiff may have sought to be enjoined in that suit and then apply to have these proceedings stayed awaiting the final outcome of that suit. This suit did not do. In my view, I find the Plaintiff's explanation for not taking in this suit to be wanting.
20. The Plaintiff by all means had a duty to prosecute the suit that it had filed in court. The issue of whether there was a contract between the Defendants dated 1st March 2000 is an issue to be determined in the arbitral proceedings instituted by the said parties. The Plaintiff should not have pegged its case on the outcome of proceedings that it was not a party and had not even applied to be enjoined in. In every case filed in court, the burden of prosecuting a suit lay with a Plaintiff. The court is not satisfied with the reasons advanced by the Plaintiff for the delay. The delay in my view, therefore, is inordinate and inexcusable.
21. Having so stated, can justice still be done between the parties despite the inexcusable and inordinate delay? I note that the Plaintiff has raised pertinent issues in its Plaint with regard to the course of action between the Defendants. In the case of **Ivita Vs Kyumbu (1984) KLR 441,** the court held that it is only when a credible excuse is given with regard to delay that the Court can embark on doing justice between the Parties. In this regard **Chesoni J** stated thus:-

> ***"……even if delay is prolonged, if the Court is satisfied with the Plaintiff's excuse for the delay and justice can still be done to the parties notwithstanding the delay, the action will not be dismissed, but will be ordered that it be set down for hearing at the earliest available time. When the Defendant satisfies the court that there has been prolonged delay and the Plaintiff does not give sufficient reason for the delay, the court will presume that the delay was not only prolonged but it was inexcusable and in such case the suit maybe dismissed" (emphasis added)***

22. I associate myself with that holding. As already held, this court is not satisfied with the Plaintiff's excuse for the delay. The delay is inordinate and inexcusable. The Plaintiff submitted that the amount in question is colossal and involves a foreign investment. That may be so, but my view is that, that is more the reason why the Plaintiff should have been keener to prosecute its case. That excuse does not justify the failure to prosecute the suit although in appropriate circumstances it may be taken into consideration. The Plaintiff submitted that it was ready to proceed with the

hearing if so ordered I have perused the court file and have observed that no steps as to discovery or even pre-trial including the exchange of documents and drawing up of the issues has been undertaken. The suit is still at its infancy.

23. Additionally, I have considered the fact that the Defendants did not state whether they had been prejudiced by the delay in the prosecution of this case. Whilst it was vital for the 1st Defendant to show how it has been prejudiced by the delay, I find that the court cannot allow a situation where a suit continues to "hang" over a party due to the inaction of a Plaintiff even where the Defendant has failed to demonstrate that it is prejudiced by such delay. Even though I find that it is prudent to save a suit if justice will be done to the parties, it must be noted that justice delayed is justice denied. Article 159 2(c) of our constitution requires that there be no delay in dispensing justice. In the case of ***Ecobank Ghana Limited –v- Triton Petroleum Company Limited (in receivership) & Others Civil Case No. 24 of 2009*** **(UR)** the Court held that:-

"Ultimately, it may as well be customary that courts should in the interest of justice lean towards according parties to litigation the opportunity to ventilate their cases before eventual determination as opposed to what has been termed as "draconian" the move to dismiss suits precipitously. However, in the face of a Constitution that expressly advocates for justice to all and which must be dispensed without delay, and in the face of overriding principles alluded to above, the time for change of the customary mind set is here. Litigants should therefore stand guided that they must embrace themselves to up the gear, for speed and vigilance will now be the trend. The wheels of justice will no longer be turning on the thrust of a team engine."

24. This court adopts the said reasoning and affirms that justice must be done to all parties and it cannot be disputed that the legal disputes do cause anxieties to parties, more so if the same are extended for a long period of time. A suit hanging over the head of a litigant like a sword of democles causes enough anxiety. Such anxiety in my view, if not justified, is prejudicial to such a party. See the case of **Trust Bank (in Liquidation) –vs- Kiprono Kittony & 2 Others Nairobi HCCC no. 223 of 2002 (UR). As I have already stated,** this court is enjoined by Article 159 2(c) of the Constitution of Kenya to determine disputes and render justice without undue delay. Failure to do so will infringe upon the legitimate expectation of a Defendant that the dispute against it will be determined timeously.

25. Accordingly, I find the 1st Defendants application to be meritorious. I will allow the Application dated 31st March, 2010 and order that the suit be and is hereby dismissed with costs to the Defendants.

DATED and **DELIVERED** at Nairobi this 22nd day of November, 2013

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A. **MABEYA**

JUDGE