REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 774 OF 2005

FRANK CHOGE….....1ST PLAINTIFF

HEZRON SHIKANDA….....2ND PLAINTIFF

SHERRY ONYANGO…….....3RD PLAINTIFF

VERSUS

THE BOARD OF TRUSTEES TELPOSTA PENSION SCHEME. DEFENDANT

R U L I N G

This suit was filed on 22nd June 2005 by the plaintiff against the defendant claiming that the defendant as their landlord is in breach of its obligations as a landlord and should be compelled to meet its said obligations. The plaintiffs further seek to restrain the defendant from increasing the rents in respect of the said tenancies.

By an application dated 23rd September 2011 and filed in this Court on 27th October 2011, the defendant sought an order compelling the plaintiffs to deposit in Court a suitable security for costs in the sum of Kshs. 3,115,000.00. On 27th October 2011 the said application was fixed for hearing on 26th January 2012 when it is recorded that the parties had agreed to take out the matter indefinitely a phrase popularly known in this jurisdiction as “stood over generally” or simply put “SOG”. The application for adjournment was, according to the record, made by **Mr.Odhiambo**, learned counsel for the defendant. The matter seem to have gone silent until 3rd April 2012 when the application, the subject of the present ruling dated 30th March 2012, was filed by the same defendant primarily seeking orders for dismissal of the suit for want of prosecution.

The said application, brought by way of Notice of Motion and expressed to be brought under the provisions of Order 17 rule 2(3) and Order 51 rule 1 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act and all other enabling provisions of the law, is supported by an affidavit sworn on 30th March 2012 by **Daniel O. Odhiambo**, the defendant’s advocate. In the said affidavit, it is deposed

that since the suit was filed three years have lapsed without the plaintiffs taking steps to prosecute the suit. This, in the deponent's view is a manifestation that the plaintiff has lost interest in prosecuting the suit and is in any event guilty of inordinate delay and therefore it is in the interest of justice that the suit be dismissed. The continued subsistence of this suit, it is averred, amounts to a clog in the judicial system and prejudices the Defendant as the Plaintiff keeps dangling the suit over the head of the defendant without prosecuting the same. The efforts to fix the matter, it is deposed, have been at the initiative of the defendant.

When the matter came up for hearing before me **Ms.Mathangani**, for the plaintiffs applied for adjournment mainly on the ground that she needed time to file an affidavit to the effect that the application is premature as there is a pending application filed by the defendant which is yet to be disposed of. Since the matter that was sought to be stated in the affidavit was a matter of record I declined to grant the adjournment sought but permitted **Ms.Mathangani** to address the Court on the same.

In his submissions **Mr.Odhiambo** learned counsel for the defendant reiterated the contents of the supporting affidavit and stated that since the filing of this suit six years have lapsed without the suit being set down for hearing. Any initiative taken in setting the suit for hearing has been at the prompting of the defendant, counsel submitted, a clear indication of lack of interest in prosecuting the same.

On her part, **Ms.Mathangani** learned counsel for the plaintiffs, submitted that the application was premature. According to learned counsel, under Order 17 rule 2(1) of the Civil Procedure Rules, there was a step taken in the matter when the application dated 23rd September 2011 was filed. That application should have been dispensed with first before the action for dismissal of the suit commenced. According to learned counsel, the present application has the effect of causing confusion and should be dismissed.

In his short reply **Mr.Odhiambo** submitted that the adjournment of the application dated 23rd September 2011 was to enable the plaintiff's counsel cease acting yet todate no application along those lines has been made.

I have considered all the matters raised in this application and this is the view I form of the matter.

The decision whether or not to dismiss a suit is purely discretionary. However, like any other exercise of discretion, the same must be based on reason and should neither be based on sympathy nor exercised capriciously. Each case must ultimately be decided on its own facts and it must always be kept in mind the court should strive to sustain the suit where possible rather than prematurely terminate the same. In the case of Sheikh Vs. Gupta and Others Nairobi HCCC No. 916 of 1960 [1969] EA 140 Trevelyan, J stated as follows:

"The purpose of rule 6 of Order 16 is to provide the court with administrative machinery whereby to disencumber itself of case records in which parties appear to have lost interest…In this matter the claim is now eight years, less four months, old and the plaintiff, so far as the court is concerned, has done nothing for more than three years to say the least. There is a prima facie negligence on the part of the lawyers or inexcusable delay on the part of the plaintiff or both, on his own say so. In deciding whether or not to dismiss a suit under rule 6 a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship, and that there has been no flagrant and culpable inactivity on the part of the plaintiff…In the instant case there has been both culpable and flagrant inactivity on the part of the plaintiff in respect of his smallish claim and he cannot bring himself within the set of circumstances as stated...It is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition".

In the case of **Et Monks & Company Ltd vs. Evans [1985] KLR 584** Kneller, J stated as follows:

"The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable? Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances…If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has

resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates. Should the trial proceed despite a prolonged delay the plaintiffs may not succeed because it cannot after such a long time establish liability and then it has no remedy against anyone else. If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself…The court may consider the matter of limitation and whether or not the plaintiff might probably succeed in the action for negligence against its lawyers and might prefer to be slow in deciding to dismiss for want of prosecution, but looking at the matter as a whole may order the application be dismissed and award the defendants the costs of the suit and of the application…It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position. A plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy…If the court is satisfied that there will be prejudice to the defendant as a result of a delay of ten years if the case proceeds and it would be impossible to have a fair trial the suit dismissed for want of prosecution since the principle witness for the defence was dead and 3 others had left Kenya and their whereabouts were unknown".

The defendant claims that it is prejudiced by the delay without elaborating on the nature of the prejudice save for stating that the suit continues to dangle over its head. As indicated above, the supporting affidavit was sworn by the advocate rather than the client. It has not been alleged that the witnesses are dead, or that the documents are lost or that the memory has faded. Clearly the supporting affidavit does not mention the impracticability of holding a fair trial as the prejudice to be suffered. It has been said time and again that counsel should not swear affidavit on disputed matters or matters that are likely to be disputed when the client is available and can depose to the said facts. The rationale for the said principle is not far-fetched. It is meant to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate exposes himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided by counsel at all costs. In my view, however innocent an averment may be, counsel should desist from the temptation to be the mouthpiece through which such an averment is transmitted. In this case, in my view, it would have been more prudent the defendant's authorised officer to have been the one to swear the affidavit in support of the application. Prejudice is a factual matter and not a matter of law although courts do take judicial notice of the fact that nobody enjoys the fact of litigation is hanging over their heads like a sword of Democles and that a prolonged delay in prosecuting cases invariably causes unnecessary anxiety on the part of the persons who are to defend the suits hence the need to expeditiously get on with the suit.

The advent of the Civil Procedure Rules introduced some amendments to Order 17 of the Civil Procedure Rules. Rule 2 thereof now provides as follows:

(1) In any suit in which no application has been made or steptaken by either party for one year, the court may give notice in writingto the parties to show cause why the suit should not be dismissed, andif cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may makesuch orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as providedin sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.

As opposed to the former Order XVI Rule 6 in which it was expressly stated that the step to be considered was a step with a view to proceeding with the suit, under the present state of the law any step seems to be sufficient. As already indicated above the last step in this matter was taken when the application dated 23rd September 2011 was filed and the parties appeared to prosecute the same on 2nd March 2012. Whether one starts counting from the date of the filing of the application or the date of the last appearance, it is clear that a year has since not lapsed. Accordingly, I can't help but agree with counsel

for the plaintiff that the application is premature not on the ground of the pendency of the said application but on the ground that the time provided under the rules has not lapsed. The mere fact that there is an application pending in the Court file, does not in my considered view, disentitle a party from seeking to have the suit dismissed for want of prosecution in appropriate circumstances. I, however, disabused the defendant from the notion that the Court should consider the time lapse before the said application was filed since that will amount to reading into the provision what is not provided therein.

Having said that, I am however of the view that there is no real justification for the delay in bringing this matter to conclusion. In the circumstances of this case I adopt the wise words of **Chesoni, J** (as he then was) in the case of **Ivita vs. Kyumbu[1984] 441**, that the test to be applied by the courts in an application for the 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 and that 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 available time since it is a matter in the discretion of the Court.

Accordingly, I decline to dismiss the suit at this stage but direct the plaintiff to, within the next 30 days, complete all the pre-trial procedures and list the matter for hearing in default of which this suit shall stand dismissed with costs to the defendant. The costs of this application will be in cause.

Ruling read, signed and delivered in court this 25th day of June 2012

G.V. ODUNGA

JUDGE

In the presence of:

Mr. Odhiambo for the Defendant

No appearance for the plaintiff