REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Civil Suit 117 of 2009

YOUNG UNITED DRY CLEANERS LIMITED.....PLAINTIFF

VERSUS

BUFFET PARK LIMITED.....1ST DEFENDANT

P N MBURU T/A VIRMIR AUCTIONEERS.....2ND DEFENDANT

RULING

This ruling is the subject of a Motion brought on Notice dated 17th February, 2011 expressed to be brought under the provisions of sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, Order 7 rule 11 and Rule 13, Order 10 Rule 4(2), Order 17 Rule 3, Order 40 Rule 6 and 10(1)(b) and Order 51 of the Civil Procedure Rules, Order 17 Rule 2, Order 51 rule of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The application is brought on behalf of the defendants who are seeking an order that the Plaintiff's suit against the defendants be dismissed for want of prosecution, the injunction granted on 13th May 2009 be held to have lapsed due to operation of the law as well as the costs of the application.

The grounds on which the application is based are that the plaintiff has since the grant of the said injunction lost interest in prosecuting the suit with the result that since 14th January 2010 when the matter was last in court no step has been taken by the plaintiff in prosecuting the suit yet the plaintiff continues wasting and damaging the suit property. Further it is contended that there is no reply to the defendant's counterclaim and therefore it is in the interest of justice that the prayers be granted since the plaintiff's suit is a blatant abuse of the process of the court and a waste of judicial time.

The application is supported by an affidavit sworn by Obadiah **Ndegwa Nderitu**, the 1st defendant's managing director. According to him the plaintiff filed this suit through a plaint dated 11th March 2009 to which the defendants entered appearance and filed their defence dated 30th March 2009. On 13th May 2009 the Court granted an injunction against the defendants. The defendants' application seeking to amend their defence was allowed by the Court on 14th January 2010 and the amended defence and counterclaim was filed and served on 21st January 2010. However, the plaintiff has not filed a reply to the said amended defence and counterclaim and has not taken any action in the matter since 14th January 2010 when the matter was last in Court hence warranting the dismissal of the suit for want of prosecution. As more than one year has lapsed since the grant of the injunction, based on their advocates advice, the

defendants contend that the same has lapsed due to operation of law.

In opposing the application the plaintiff on 13th June 2012 filed grounds of opposition dated the same day in which the following issues are raised:

1. That the plaintiff is desirous of having this matter heard and concluded but the 1st defendants' deception did mislead the plaintiff into the belief that they could attain an out of court settlement only to be ambushed with an application dated 17th February 2012 and filed on 14th March 2012.

2. That the said application is an abuse of the court process as it has been brought in the light of Section 1A but the intentions are to override the said Section 1A.

3. That the application is mischievous misconceived and an abuse of the court process.

4. That the application is calculated to deny the plaintiff its legal right to be heard as provided by the constitution of Kenya and Civil procedure Act Cap 21 Laws of Kenya.

5. That the applicant has not come to court with clean hands as he wants the suit dismissed while contemporaneously admitting that the right Act they should have followed was Cap 301 landlord and Tenants (Shops Hotels & Catering establishment) cap 301.

6. That the applicant lacks bonafide as the defendant as the applicant has brought under Section 1B which empowers the court to ensure the just determination of proceedings and the efficient disposal of the business of the court.

7. That the application contravenes Section 120 of the Evidence Act cap 80 Laws of Kenya.

Apart from the said grounds, on 27th June 2012, the plaintiff filed a replying affidavit sworn on 26th June 2012 by **Joshua Ochieng**, the plaintiff's General Manager. In the said affidavit, the deponent accuses the defendants of being malicious, vexatious and not acting in good faith as well as lacking candour by not disclosing the factual evidence pertaining to the relationship existing between the parties herein after the grant of the said injunctive orders. According to the deponent in 2009, negotiations were commenced between the parties with a view to reaching an out of court settlement. He deposes that the said injunctive orders were granted after the court considered the unlawful actions of the defendants in levying distress for rent during the pendency of a case before the Business Premises Rent Tribunal. According to the deponent vide a letter dated 29th May 2008 the plaintiff's advocates floated to the defendant's advocates certain proposals with a view to settling the dispute herein which terms were accepted by the plaintiff without any conditions which made the plaintiff relax in pursuing the matter with vigour. As a result of the foregoing the relationship between the parties became cordial despite the fact that the defendants are in arrears of rent for three months. According to the deponent, the defendants having led the plaintiff to believe that an out of court settlement could be attained, are stopped by section 120 of the Evidence Act Cap 80 Laws of Kenya. It is further deposed that the application, in so far as it seeks to deviate from the Civil Procedure Act and the intentions of Law Review Commission, contravenes sections 1A and 1B of the said Act and is thus an abuse of the process of the court as it also deviates from the sentiments of the Chief Justice. Finally it is deposed that the Court should find the defendants' actions mischievous, dismiss the application and allow the plaintiff to prosecute its suit which it is willing to do vigorously.

The application was prosecuted by way of written submissions. In their submissions the defendants contend that the negotiations alluded to by the plaintiff in the said replying affidavit are non-existent and the letters annexed thereto date before the suit was filed which were used in the said Tribunal proceedings and have no bearing to the delay in prosecuting this suit. However, should the Court be inclined to hold otherwise, the defendants urge the court to award them costs and direct that the suit be set down for hearing within 30 days while holding that the injunction granted herein has lapsed.

On its part the plaintiff submitted that since the injunctive orders were granted on 18th May 2009, the new

Order 40 rule 6 which came into force with the new amendments in 2010 cannot operate retrospectively and therefore one cannot be vexed by a law that was non-existent. On the authority of **Rev. John Mungaina vs. Kenya vs. Kenya Methodist University Board of Trustees & Another [2012] KLR HCCC No. 133 of 2003**, it is submitted that the defendant must satisfy the Court that he will be prejudiced by the delay in that justice will not be done in the case due to the prolonged delay on the part of the plaintiff. In this case, it is contended that the plaintiff was misled by the 1st defendant to believe that an out of court settlement could be achieved and this is confirmed by the annexures to the replying affidavit. Accordingly it is submitted that the defendants are estopped under section 120 of the Evidence Act from denying that parties were in pursuit of an out of court settlement and reliance is sought on the case of **Jetha Ismail Ltd vs. Somani Brothers Civil Appeal No. 82 of 1959**. According to the plaintiff dismissing the suit will negate the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act under which the court is duty bound to ensure that proportionate justice is accorded to both parties expeditiously. According to the plaintiff, since order 7 rule 11 is not couched in mandatory terms the issue of filing a defence to a counterclaim is not mandatory.

I have considered the application, the affidavits on record as well as the grounds of opposition and submissions.

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 terminating the same. In the case of**Sheikh vs. Gupta and Others Nairobi HCCC No. 916 of 1960 [1969] EA 140Trevelyan, 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 whetheror 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…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 is suit dismissed for want of prosecution".

In this case, it is clear that the last time a step was taken in this matter before the present application was filed was on 14th January 2010 when the Court granted leave to file amended defence counterclaim. That the said pleading was served is not disputed. The reason advanced for the delay is that there were negotiations. Whereas the Court are enjoined under the provisions of Article 159(2)(c) of the Constitution to promote alternative dispute resolution mechanisms which in my view include out of court negotiations, the negotiations must be genuinely conducted and must not be used as an excuse to unduly delay or derail the prosecution of the suit. In this case the negotiations relied upon took place before the suit was instituted. They cannot, in my view, form a basis for not prosecuting the suit when it is the failure by the parties to adhere to the proposals and alleged agreements in the said negotiations that led to the institution of this suit. In the premises I find the reasons advanced for not prosecuting this suit unconvincing.

Having said that the defendants have not claimed any serious prejudice which has occasioned to them apart from the existence of injunctive orders. It has not been alleged for example that due to the delay in setting down the suit for hearing the documents have been lost, or the witnesses have passed on or memory has faded. There is no allegation that the delay in setting down the suit for hearing, a delay of two years, has made it impossible for a fair trial to be conducted. In the case of **Agip (Kenya) Limited Vs. Highlands Tyres Ltd [2001] Klr 630 Visram, J** (as he then was) stated thus:

"It is not correct that Order 16 rule 5(d) of the Civil Procedure Rules gives the Court no discretion but to dismiss the suit otherwise it would mean that every application by a defendant under the said provision would succeed automatically. The law and the practice of the Courts does not lend any support to such an argument. It is the function of the Courts to determine whether the interests of justice would be achieved in allowing or refusing an application. In another aspect, it is clear that the process of our judicial system requires that all parties before the Court should be given an opportunity to present their cases before a decision is given. It is not possible that the Rules Committee intended to leave the plaintiff without remedy and take away the authority to the Court when it made Order 16 rule 5. Otherwise such a rule would by itself be void if its effect were to deny the Court an opportunity to hear and determine a case on merit as that would amount to interfering with the Court's inherent powers to do justice…A consideration of the principles to be applied in deciding whether or not a suit ought to be dismissed for want of prosecution, shows that an application by a defendant under Order 16 rule 5 of the Rules is not automatic and certain factors have to be considered such as (i) the delay whether inordinate (ii) whether the inordinate delay is excusable and (iii) whether the defendant is likely to be prejudiced by the delay…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. Finally. The Court must consider whether the defendant has been prejudiced by the delay. To achieve justice, the Court must also consider the possible loss likely to be sustained by the plaintiff if his case is terminated summarily for a procedural default. Where a plaintiff has *prima facie* case, to determine his rights by the summary procedure under Order 16 rule 5 would result in great hardship to a plaintiff who has a reasonable excuse for his delay…The test in an application for dismissal of a suit for want of prosecution 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 the defendant; so both parties to the suit must be considered and the position of the judge too. The defendant must however satisfy the Court that he will be prejudiced by the delay or even 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 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 notwithstanding he delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where 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 is not only prolonged but it is also inexcusable and in such case the suit may be dismissed…This Court could not be up to its duty if it were to drive the plaintiff out of the seat of justice because of an eight month delay. The Court has been reminded time and again to participate in sustaining suits rather than throwing them out on minor procedural defaults…In effect there is no evidence to show that prejudice will be sustained by the defendant if its application is denied. Even if the said advocate's affidavit were to be considered, the prejudice in this case is not such that it cannot be compensated by an award of costs".

Although I have found that there is no proper reason for not setting down the suit for hearing, it is my view that the delay here is not so inordinate that would justify a dismissal of the case if no explanation is offered. This is not to say that in all cases where the delay is not inordinate the court must necessarily disallow the application to dismiss the suit. It is purely an exercise of discretion and where there is a clear prejudice occasioned, the failure to set down the suit for hearing within the stipulated one year would justify the dismissal of the suit.

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, whereas I am not inclined to allow the application, the order that commends itself to me is to 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 defendants.

With respect to the applicability of the Civil Procedure Rules 2010, under **Order 54** it is expressly stated that the said rules were to apply to pending proceedings. Accordingly the rules were expressed to apply retrospectively unless the court ordered otherwise. If there was any doubt as to the retrospective operation of the said rules the same must be dispelled by the fact that it is a rule of statutory interpretation that amendments to procedural rules operate retrospectively unless indicated otherwise. In the case of **Said Hemed Said Vs. Emmanuel Karisa Maitha & Another Mombasa HCEP No. 1 of 1998** stated as follows:

"The general rule is that when the law is altered during the pendency of an action or proceeding, the rights of the parties are to be decided according to the law as it existed when the action or proceeding was begun unless the new statute shows a clear intention to vary or affect such rights and such and such intention may be even by implication. But in the case of an enactment, which alters or affects only procedure or practice of the Court, the general principle is that it has a retrospective effect unless it has some very good reason against it".

Again in the case of **Mistry Jadva Parbat & Company Ltd vs. Ameeri Kassim Lakha & 2 Others Civil Appeal (Application) No. 296 of 2001** the Court of Appeal stated inter alia as follows:

"It is also a rule of construction of statutes that prima facie, if a provision of legislation affects procedure only, it operates retrospectively. Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction and one of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective effect unless a clear intention to that effect is manifested. Whereas, if it affects procedure only, prima facie, it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation, which has to be ascertained, and the rule of construction is only one of the factors to which regard must be had in order to

ascertain that intention".

Accordingly I disabuse the plaintiff from the notion that the Civil Procedure Rules, 2010 do not apply to the orders of injunction made herein.

With respect to the overriding objective, it must be remembered that the objective applies to both parties. Whereas it may be invoked to do justice by excusing procedural slips, it may equally be invoked to bring to an end, proceedings in which the parties have shown lack of interest to bring to finalisation. As was held by the Court of Appeal in **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010**:

"the applicant cannot be allowed to invoke the "O2 principle" and at the same time abuse it at will...All provisions and rules in the relevant Acts must be "O2" compliant because they exists for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the "O2 principle" could easily become an unruly horse and therefore while the enactment of the "double O" principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained".

In the light of the orders I have made hereinabove, it would defeat the overriding objective if I were to discharge the injunction granted herein. Consequently the same will remain in force for the next 6 months subject to further orders of the Court. The defendants will, however, have the costs of this application.

G.V. ODUNGA
JUDGE

Ruling read and delivered in court this 20th day of September, 2012

G.K. KIMONDO
JUDGE
In the presence of:

Mr. Kerongo for Kimeria for the Plaintiff

Mr. Mahugu for the Defendants