



GRAHAM VETCH.....PLAINTIFF

VERSUS

CALVIN BURGESS.....1ST DEFENDANT

DOMINION FARMS LTD.....2ND DEFENDANT

RULING

This ruling is the subject of a Motion brought on Notice dated 29th March, 2012 expressed to be brought under the provisions of sections Order 17 Rule 3, Order 40 Rule 6 and 10(1)(b) and Order 51 rule 1 of the Civil Procedure Rules, as well as sections 1A, 1B and 3A of the Civil Procedure Act. The application seeks an order that the Suit against the defendants be dismissed.

The grounds upon which the said application is brought are that although the pleadings closed on 6th November 2008, the plaintiff has not taken any steps to prosecute this suit for a period of 4 years. According to the defendants the prolonged lapse of time in prosecuting this matter has adversely affected the Defendants who ought not to be called to defend in an action which the plaintiff is not keen on prosecuting. In prosecuting the said application, **Mr Kimani**, learned counsel for the defendants submitted that there is no replying affidavit sworn by the plaintiff himself stating the steps taken by him to prosecute the suit. Instead the replying affidavit is sworn by the plaintiff's counsel. However the reason given in the replying affidavit that there were arbitration proceedings pending, is challenged on the ground that there is no indication that the said arbitration proceedings had a bearing on the instant suit. According to the applicants the said arbitration proceedings concerned the plaintiff's contract of employment with the second defendant while in the plaint herein the only issue for determination is the issue of damages for libel. Since the suit does not belong to counsel, it is contended that the concentration by counsel on the said proceedings does not excuse the obligation on the plaintiff to take steps towards the prosecution of the suit. In any case, it is contended there is not even a single correspondence showing the steps if any the plaintiff took in the matter. According to the defendants this is not one of cases in which it can be said that a mistake by counsel ought not to be visited on the client. On the issue of the pursuit of investment opportunities by the plaintiff it is contended that the Court cannot come to aid of a party who chooses to pursue such ventures at the expense of his case. On the issue of the plaintiff's recuperation, it is the defendants; case that there is no such evidence since the only documents exhibited is a newspaper report which in any case is dated 3 years prior to the accident. At the time of the alleged accident, the said arbitration process was on-going such that it cannot be contended that the injuries sustained therefrom were of such a serious nature that the plaintiff was disabled from pursuing this case. Therefore it is contended that what has woken up the plaintiff from his slumber is the present application. On the authorities of **James Kimani vs. A. R. Bakatasi & Another Civil Appeal No. 72 of 1988**; **Sheikh vs. Gupta & Others [1969] EA 140**; **Fitzpatrick vs. Batger [1967] All ER 657**; **Harbinder Singh Sethi vs. Standard Limited & Another HCCC No. 314 of 2002** it is contended that steps taken subsequent to the filing of an application seeking to dismiss the suit cannot be considered as constituting reasons for delay and hence not a ground for consideration in the exercise of discretion. The defendants contend that they have been seriously prejudiced by the delay in setting this suit for hearing.

On the part of the plaintiff it is contended through **Mr Amolo**, his learned counsel that there is another dispute pending before an arbitrator pitting the plaintiff against the 2nd defendant in which the issues similar to the issues herein are in contention. According to counsel, he concentrated his attention on the said arbitral proceedings inadvertently and that according to the information furnished to him his client was either in Tanzania pursuing investment opportunities of recuperating from injuries sustained in an aircraft accident. As a result of the foregoing the pre-trial procedures were not undertaken though they have now been completed. In his submissions **Mr Amolo** freely admitted that the mistake was his hence the justification for his swearing the replying affidavit. According to him the facts deposed in his affidavit disclose a “cause” to the satisfaction of the court as required under Order 17 rule 2(3) as read together with subrule (1) thereof. It is the intention of the plaintiff to adduce the award in the arbitral proceedings in these proceedings. The cases cited by the defendants are distinguishable since in those cases no cause was shown while here there is a cause shown. On the authority of **Ivita vs. Kyumbu [1984] KLR 441**, the court was urged not to dismiss the suit but to allow the plaintiff prosecute the same.

Having heard counsel for the respective parties 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 that 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 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...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 agreed that no step has been taken in the matter for four years. Clearly four years is an inordinately long period for a matter to remain idle and without any explanation forthcoming from the plaintiff the Court would have no difficulty in dismissing the suit. Again I agree with **Mr Kimani** learned counsel for the defendants that the mere fact that the plaintiff has subsequent to the filing of an application for dismissal of the suit taken steps with a view to setting the suit down for hearing does not bar the Court from dismissing the suit if no cause is shown to the satisfaction of the court.

In this case, the explanation for the delay is that counsel’s attention was concentrated on the arbitration proceedings between the plaintiff and the 2nd defendant herein which proceedings are similar to the instant proceedings and in fact the plaintiff intends to adduce the arbitral award in these proceedings. The other reason is that the plaintiff was either venturing into business in Tanzania or was recuperating from an accident. The last two excuses I will reject immediately for reasons that a party who decides to abandon his suit in favour of lucrative business ventures elsewhere to the detriment of the defendant does not deserve a favourable exercise of discretion. With respect to the accident, no evidence has been adduced to my satisfaction to show that the plaintiff was as a result thereof disabled from prosecuting this case for the said period of four years.

With respect to counsel’s mistake, the defendants’ position is that the plaintiff should have shown keenness in the prosecution of his suit since the suit does not belong to counsel. That submission is not entirely without merits. In **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002** Kimaru, J expressed himself as follows:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.

However, in **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22**, Oder, JSC stated:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered”.

In this case, counsel for the plaintiff has accepted that the mistake was his since he concentrated on the arbitral process to the detriment of this case. He has stated that he intends to adduce the said arbitral award in these proceedings. In **Nairobi HCCC No. 219 of 2009 – Duncan Muriuki & Another vs. Standard Group Limited and Others** I held:

“In this case, the cause of action is some publication of alleged defamatory matter by the defendants. The defendants have indicated that they intend to rely on the proceedings in Chief Magistrate Court, Anti-Corruption Case No.17 of 2009. It is this case that is alleged is pending the delivery of judgement in a months’ time. In my view where there are criminal proceedings pending

which may have a bearing on the civil case, whereas it is not mandatory to await the outcome of the criminal proceedings before getting on with the civil case, it is not imprudent for a party to do so either. In most cases depending on the determination of the criminal case, the result thereof may form part of the evidence in the civil matter. See Khoshi Mohamed & Another vs. Suleman Haji & Another (1946) LRK 54".

Whereas I cannot state with certainty the relevance or impact of the said award on these proceedings, I cannot say that no explanation has been offered for the delay as was the case in James Kimani vs. A. R. Bakatasi & Another Civil Appeal No. 72 of 1988.

Although **Mr Kimani** submitted that the delay in prosecuting this case is prejudicial to the defence and whereas the Court do take judicial notice of the fact that legal proceedings do cause anxiety on the parties thereto which anxiety ought not to be unnecessarily prolonged especially in defamation cases where the evidence may depend on the memory of the witness which memory do fade with time, the exact nature of the prejudice the defendants herein stand to suffer is not disclosed. The defendants have not 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 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 an inordinate delay in setting down this suit for hearing and that the plaintiff himself has not been diligent in following his suit, I am satisfied that the explanation given by **Mr Amolo**, which is not an uncommon mistake in advocates' chambers is excusable. I am also satisfied that in the circumstances of this case the affidavit sworn by **Mr Amolo** was substantially competent since it is only him who could depose to his own shortcomings. Under section 1A(2) of the Civil Procedure Act, the Court is enjoined to give effect to the overriding objective of the Act in the exercise of its powers under this Act or the interpretation of any of its provisions. In the case of **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, the Court of Appeal held *inter alia* that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.

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** (supra) 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, mention the matter for fixing a hearing in default of which this suit shall stand dismissed with costs to the defendants.

The defendants will, however, have the costs of this application.

Dated at Nairobi this 19th day of October 2012

G V ODUNGA
JUDGE

Delivered in the presence of

Mr. Amolo for Plaintiff

Miss Ndisho for the Defendant