REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 48 of 2010

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

JUMA CONSTRUCTION LIMITED.....1ST DEFENDANT

GRACE SERAPAYI WAKHUNGU.....2ND DEFENDANT

JACOB JUMA.....3RD DEFENDANT

JOHN WALUKHE.....4TH DEFENDANT

AGNETTA SIMULI.....5TH DEFENDANT

R U L I N G

1. By Notices of Motion filed by the 1st & 3rd, 4th and 5th Defendants on 27th July, 2012, 7th September, 2012 and 10th September, 2012 respectively and brought under the provisions of Order 17 Rule 2(3) of the Civil Procedure Rules, Sections 1,1A, 3A and 3B of the Civil Procedure Act sought for orders for the dismissal of the Plaintiff suit for want to prosecution. The Applicants contended that the Plaintiff had filed the suit on 2nd February, 2010, that the Plaintiff had lost interest in prosecuting its claim for over one year and that the Plaintiff had not taken any steps to prosecute the matter. The Applications were supported by the Affidavits of Jacob Juma, John Koyi Walukhe and Agnetta Simuli for the 1st & 3rd, 4th and 5th Defendants respectively.

2. Mr. Jacob Juma, the Director of the 1st Defendant in his supporting Affidavit contended that the Plaintiff had filed the suit on 2nd February, 2010, that it was over one year since the close of pleadings yet the Plaintiff had not taken any steps to prosecute the suit, that the failure to set down the matter for hearing was an abuse of the court process and that in any event it would be just and expedient for the suit to be dismissed. The 1st Applicant contended it entered Appearance on 25th May, 2010 and subsequently filed a Statement of Defence 11th June, 2010.

3. The 4th Defendant in his affidavit contended that it was over one year since pleadings closed, that the Plaintiff had not taken any steps in setting down the matter for hearing and that it was in the interest of justice for the suit to be dismissed and that appearance was entered 17th May, 2010 and Defence entered on 4th June, 2012.

4. The 5th Defendant in her affidavit contended that the Plaintiff had not taken any steps in prosecuting

the case and that it would be in the interest of justice for litigation to come to an end within a reasonable time and in the circumstance the suit be dismissed for want of prosecution. She had entered appearance on 6th September, 2010 while Defence was filed on 7th September, 2010.

5. The Plaintiff in objecting to the Applications filed Replying Affidavits dated 28th September, 2012 and 3rd October, 2012. In the Affidavit sworn by Damaris Wanjiku Gitonga on 28th September, 2012, the Defendant confirmed that the Plaint was filed on 2nd February, 2010, that after pleadings closed on 2nd February, 2011, the Plaintiff engaged in an out of court settlement negotiations with the 2nd Defendant and that as such was not advisable to fix the matter for hearing, that the negotiations terminated with a settlement and subsequent withdrawal of suit against the 2nd Defendant, that they had not fully complied with Order 11 in order to fix the matter for hearing, that there has been no deliberate delay and in any event no prejudice shall be occasioned to any party and that the Plaintiff has not lost interest in the suit. The second Affidavit in reply to the Application by the 4th Defendant was sworn on 2nd October, it reiterated the contents of the Affidavit sworn on 28th September, 2012.

6. I have carefully considered the Applications by the Defendants, the Replying Affidavits and oral submissions in support of the Applications. The main suit is for the recovery of debt from the Defendants. The 1st Defendant is alleged to owe the Plaintiff Kenya Shillings Eight Million, Two Hundred and Eighty Three, Six Hundred and Twelve and Forty Cents (Kshs. 8,283,612.40/-) with an accruing interest at 19% per annum, calculated from August 2007. The 3rd 4th and 5th Defendants owe jointly and severally, Kenya Shillings Three Million (Kshs. 3,000,000/-) with an accruing interest of 19% per annum calculated from August 2007. The liabilities against the 2nd Defendant have been discharged. This is a money suit in which certain monies were advanced to the Defendants sometime in 2006. After the realization of the charged property L.R No. 12610/26, there was still a shortfall. This is the outstanding amount the Plaintiff now seeks against the Defendants on their personal guarantees issued for Kenya Shillings Three Million (Kshs. 3,000,000/-).

7. The law with regard to dismissal of suits for want of prosecution is clear under Order 17 Rule 2(1) of the Civil Procedure Rules.

In the case of **Allen –vs- Sir Alfred McAlpine & Sons Ltd (1968) 1 ALL E.R 543**, Salmon, L.J addressed the issue of dismissal in his holding inter alia;

"A Defendant may apply to have a suit dismissed for want of prosecution either (a) because of the Plaintiff's failure to comply with the rules of the Superior court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the Defendant must show;

(i) That there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and a lesser period on the other. 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 inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

(iii). That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the Plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proven. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial."

In making a determination for dismissal of a suit, therefore, the Defendant has to show that there has been inordinate delay, that the delay is inexcusable and that they are prejudiced by the delay.

8. It is true that pleadings closed in June, 2011. The applications were filed after period of over one year from the close of pleadings. The delay was occasioned by the negotiations the Plaintiff had with the 2nd Defendant and that it could not have thus proceeded to set down the matter for hearing. Mr. Onyango, learned Counsel for the Plaintiff argued that Order 11 and the Practice Rules did not allow for litigants to proceed to hearing unless pre-trial procedures had been strictly complied with, that the delay had not been inordinate or deliberate and in any event, the Plaintiff was seeking an early date to have the matter heard. There was a delay of one (1) year and a few days as at the time the first application was filed on 27th July, 2011. That is inordinate delay.

9. Has the delay been explained? Mr. Onyango's explanation is the negotiations which resulted in the suit against the 2nd Defendant being withdrawn. Under Article 159 of the Constitution alternative settlement is encouraged. My view therefore is that the delay was excusable.

10. On the issue of prejudice, the 5th Defendant contended that the delay had prejudiced the Defendant as the witness's memories would fail and/or documents destroyed. Odunga, J in **High Court Civil Suit No. 223 of 2002 Trust Bank –vs- Kiprono Kittony & 2 Others** held:-

"……., in my view it cannot be disputed that legal disputes do cause anxiety to parties and if the anxiety is extended for a long period of time it would naturally be prejudicial to the other party if not justified."

11. The power to dismiss a suit is a discretion exercised by the court deriving its authority under Section 3A of the Civil Procedure Act. In exercising this discretion, the court has to act judicially and fairly and not in a manner likely to be prejudicial to any of the parties. In the case of **Inter –vs- Kyumba (1984) KLR 441**, it was held *inter alia*;

"The test applied by the courts in an application for 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 delay. 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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.' (Emphasis added).

12. In the circumstances of this case, I am inclined to save the suit for the reason that there were negotiations that bore some fruit. This is a 2010 suit. Delay of one year which has been explained in my view cannot be prejudicial to the Defendants. Accordingly, I will dismiss the applications with no order as to costs. The Plaintiff however has to take pre-trial steps within 30 days of the date of this ruling.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 22nd day of November, 2012

A. MABEYA
JUDGE