REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 330 of 2005

TWIGA CAR HIRE & TOURS LIMITED…….....…..……....PLAINTIFF

VERSUS

BARCLAYS BANK OF (K) LTD……..……...……..1ST DEFENDANT

BARCLAYS BANK PLC……..……2ND DEFENDANT

RULING

The application before the court basically prays for an order that the Plaintiff's suit against the Defendants be dismissed for want of prosecution. It is made by way of way of a Notice of Motion dated 15th April, 2010 and taken out under Section 3A of the Civil Procedure Act order XVI 5(a) and (d) and Order L Rule 1 of the Civil Procedure Rules. It is supported by the annexed affidavit sworn on 15th April, 2010 by Paul Ogunde, an Advocate in the firm of Walker Kontos, Advocates who have the conduct of this matter on behalf of the Defendants. It is based on the grounds that-

(a) Over three months have passed since the close of the pleadings and the Plaintiff has failed and/or neglected to set down this suit for hearing.

(b) A fair trial will not be had on account of the delay.

(c) Justice delayed is justice denied.

Opposing the application, Mr. Rustam Hira for the Plaintiff/Respondent confirms in his replying affidavit that no steps have been taken to list the case for hearing since October, 2008 and concedes that the delay was due to an oversight on his part. He states in his said affidavit that the counterclaim by the Defendants is so closely inter-twined with the Plaintiff's claim that the two cannot be separated. He finally stated that by virtue of the provisions of Order XVI Rule 5(d) of the **Civil Procedure Rules,** the fact that one party does not set down a suit for hearing does not preclude the other party from doing so. He thereupon urged the court to dismiss the application with costs as it was not merited.

With leave of the court, the rival parties filed their respective submissions which I have examined.

After considering the application and the submissions of the parties, I note that **O.XV1 Rule 5(a)** and **(d)** of the **Civil Procedure Rules** under which the application is made is warded as follows-

"5. If, within three months after-

(a) the close of pleadings; or

(b) …
(c) …

(d) the 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 may either set the suit down for hearing or apply for its dismissal ”

In the case of **IVITA v KYUMBU [1984] KLR 441**, it was held 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. 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 available time. It is a matter in the discretion of the court.

From a close consideration of this principle one discerns that it has two main prongs. The first one is whether the court is satisfied with the excuse for the delay and secondly, whether justice can still be done to the parities. Mr. Hira's excuse for the delay in fixing this case for hearing was that it was an oversight on his part. While I commend him for his honesty, that is not a satisfactory excuse. However, the nature of this matter is such that it may still be possible to do justice to the parties in spite of the delay, and given its nature *vis-a-vis* the counterclaim, I think that the matter ought to be given a chance to be heard.

Being of that persuasion, I decline to dismiss the suit and on the contrary I direct that the parties do take a hearing date at the Registry on priority basis.

As the present delay was caused by the Plaintiff, I direct that the Plaintiff will meet the costs of this application in any event.

L. NJAGI
JUDGE

DATED and **DELIVERED** at **NAIROBI** this 21st day of November, 2012.

MUTAVA
JUDGE