REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(*Coram: Ojwang J.)*

CIVIL SUIT NO.487 OF 1992

KASSIM S. SUMRA…..…….....……..……..…PLAINTIFF/RESPONDENT
-VERSUS-
1. SOUTHERN CREDIT FINANCE LIMITED
2. SOUTHERN SHIELD HOLDINGS LIMITED.....DEFENDANTS/APPLICANTS
[formerly KENYA COASTAL HOLDINGS LTD]

RULING

Two applications came up simultaneously before the Court: 2nd defendant's Notice of Motion of ***2nd June, 2010***; and 1st defendant's Notice of Motion of ***12th July, 2010***. The first of these applications was brought under Orders XVI (Rule 5) and L (Rule 1) of the earlier edition of the Civil Procedure Rules which also cover the second application (though this one cites also Rule 6 of Order XVI aforesaid).

In the first application, 2nd defendant seeks the dismissal of the plaintiff's suit, for want of prosecution – the very object also sought in the second application. Both applicants, of course, seek costs in respect of both the application and the suit.

The 2nd defendant states that 18 years have elapsed since the suit was filed, and two years have elapsed since the matter last came up in Court, but the plaintiff has taken no action to have it set down for hearing.

For 2nd defendant, learned counsel, ***Mr. Samson Okong'o*** swore a supporting affidavit on ***2nd June, 2010*** deponing, *inter alia*, that:

(i) on 15th December, 1995 the plaintiff was allowed to amend the plaint so as to include 2nd defendant as a party; and indeed, the plaintiff filed an amended plaint on 19th December, 1995;
(ii) the 2nd defendant entered appearance on 8th January, 1996 and filed an amended statement of defence on 3rd June, 1996;
(iii) the last time this suit came up in Court was on 7th February, 2008 when it was scheduled for hearing but did not appear on the cause list;
(iv) the plaintiff has made no effort since 7th February, 2008 to have the suit heard, and this delay has gravely prejudiced 2nd defendant;
(v) the said delay in prosecuting the suit has prejudiced the 2nd defendant who, as a result, "may now not be able to trace its witnesses or its records for the purpose of its defence";

(vi) the default on the part of the plaintiff presents substantial risk that fair trial will not be possible if the suit is allowed to continue;
(vii) the plaintiff appears to have lost interest in the prosecution of the suit;
(viii) "it is just and equitable in the circumstances that [the] suit be dismissed for want of prosecution."

In his replying affidavit of ***2nd July, 2010 Kassim S. Sumra***, the plaintiff, made certain general statements, such as: ***"the affidavit of Samson Okong'o is incompetent and fatally defective";*** "***it is not true that I have not taken any interest in having this suit conducted"***; ***"I have been eager to prosecute this suit and should therefore not be driven away from the judgment seat."***

The more relevant depositions made by the respondent are: that he has taken prosecuting steps by filing issues for determination by trial – though the applicant did not respond; by letters of ***9th March, 2009*** and ***27th April, 2010*** he had invited the applicant to the Registry for the purpose of fixing hearing dates for the suit.

For 1st defendant, the Advocate with the conduct of the matter, ***Mr. Abdulhamid Aboo*** depones that the suit was filed through the firm of M***/s. Asige Kiverenge and Anyanzwa, Advocates*** on ***8th July, 1992,*** and 1st defendant entered appearance on ***23rd July, 1992***, but the last time the matter appeared in Court was ***7th February, 2008***, and the plaintiff has since "***failed and/or neglected to make effort to have this matter listed for hearing."***

The deponent avers that "***the inordinate delay in prosecuting the suit …has greatly prejudiced the 1st defendant in that if the suit is not dismissed, the 1st defendant will not be in a position to procure viable witnesses."*** The deponent depones that ***"the plaintiff has lost interest in prosecuting the …suit***," and ***"it would only be fair and just in the circumstances to dismiss the suit….for want of prosecution."***

The plaintiff in his replying affidavit, of ***17th August, 2010*** depones that he had indeed, taken important steps in the prosecution of his suit: he has already filed issues for the Court's determination, as well as his list and bundle of documents – something the applicant has yet to do. The deponent avers that, by letters of ***9th March, 2009*** and ***27th April, 2010*** his Advocate had invited the defendants to the Court Registry for fixing of hearing dates, though the Court file could not be traced, and this caused delay. From these examples of initiative, the deponent avers, ***"it is evident that my Advocates have taken steps to have this suit listed down for hearing***"; and depones that he has been "***eager to prosecute this suit and should therefore not be driven away from the judgment seat";*** and deposes that it is "***only just, fair and equitable to have the suit herein heard and determined on merit."***

Counsel for 1st defendant submitted that the law of civil procedure dictated that the suit herein be dismissed: the law is that if after (i) the close of pleadings, or (ii) the removal of the suit from the hearing list, or (iii) the adjournment of the suit generally – the plaintiff, or the Court on its own motion on notice to the parties, does not set down the suit for hearing, then the defendant may either set the suit down for hearing, or apply for its dismissal. And so 1st defendant has come seeking the dismissal of the suit for want of prosecution.

Counsel relied on the High Court's [***Muchelule, J***] decision in ***Hildah Wangari Gethenji*** (*suing as administrator of the Estate of the late* ***Joseph Augustine Gethenji*** (*deceased*) ***v. Commissioner of Lands & 11 Others*** [2010] eKLR. The relevant passage in that Ruling reads:

"It should be noted that it was the plaintiff who filed the suit and it was her responsibility to set it down for hearing. The Court has the discretion to grant an application for dismissal of the suit for want of prosecution. Such [discretion] should be exercised in such a way that the plaintiff can be given an opportunity to remedy his default unless the defendant can demonstrate that either the default has been intentional or …there has been inexcusable delay [in consequence of which] there is a substantial risk that a fair trial of the issues in the case will not be possible."

Counsel submitted that the delay of two years, since the abortive listing of ***7th February, 2008***, "***is inordinate and inexcusable***", and is "***a clear indication that the plaintiff has lost interest in the suit***." Counsel urged: "***The plaintiff who dragged the defendant to Court, ought to ensure that [his] suit is prosecuted…"*** Counsel urged that the plaintiff ***"has not explained the delay"***; "***the [1st] defendant herein will suffer prejudice in that the inordinate delay will prejudice a fair trial of the issues in dispute."*** Counsel submitted that 1st defendant's employees who were well aware of the facts of the case ***"have already left the company and therefore if this application will not be allowed, then the defence case will be weak for lack of viable witnesses."***

Submissions were made on the same lines by counsel for 2nd defendant. Learned counsel submitted that 2nd defendant's list of documents, dated ***30th May, 2006*** had been filed and duly served upon the plaintiff's Advocates on ***6th June, 2006***, and so cannot be a justification for delayed prosecution of the suit.

Learned counsel contested the plaintiff's averment that he had invited the defendants for the fixing of hearing dates for the suit; in his words***: "A cursory look at the alleged letters annexed to the plaintiff's replying affidavit rings bells of suspicion as to their authenticity."***

The last contention by counsel, obviously, is inapt, as it invites the Court to take a decision on the basis of mere suspicion. In any case, had counsel raised the point out of conviction he would have been obliged, in proper procedure, to have the deponent called for cross-examination on the replying affidavit.

To support his client's case for dismissal of the suit, counsel invoked the persuasive authority of the English Court of Appeal in ***Allen v. Sir Alfred Mcalpine & Sons*** [1968] All E.R.; this was to supply three principles governing applications for dismissal of a case for want of prosecution – (i) there having been inordinate delay; (ii) there being no excuse for such delay; (iii) there being the likelihood that the defendant would be prejudiced by the delay. Counsel urged that all the foregoing grounds had, in this case, been realized.

Counsel also recited the following passage from the Court of Appeal's decision in ***Mukisa Biscuit Manufacturing Company Limited v. West End Distributors Limited*** [1969] E.A. 697:

"It is the duty of a plaintiff to bring his suit to an early trial and he cannot absolve himself of his primary duty by saying that the defendant consented to the position."

Counsel submitted that the plaintiff has lost interest in the prosecution of the suit, and that there has been an inordinate and inexcusable delay, with the effect that ***"a fair trial would not be possible if the suit is allowed to continue***."

Counsel for the plaintiff, by contrast, urged that the overriding consideration must be, ***whether or not justice can be done despite the delay***; and he cited the persuasive authority of the English Court of Appeal, ***Paxton v. Allsopp*** [1971] 3 All E.R. 370, at p.378 (*per* ***Edmund Davies, L.J***.):

"I began this judgment…by saying that I found this a truly difficult case, and I did so because of what seems to me the fundamental approach in applications of this kind. If I may be acquitted of immodesty by quoting some words of mine used in *Austin Securities Ltd. V. Northgate and English Stores Ltd.* ***[1969] 2 All E.R. 753, at 756], where having set out the familiar tests to be applied in such cases, I said:***

'But these questions are, as it were, posed en route to the final question which overrides everything else and was enunciated by LORD DENNING, M.R., in *Allen v. Sir Alfred McAlpine & Sons Ltd* [1968] 1 All E.R. 543 at 547 *in thesewords*: ***"The principle on which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away…" So the overriding consideration always is whether or not justice can be done despite the delay. Thus, LORD DENNING, M.R., referred later in his judgment in***

that case [1968] 1 All E.R. at p. 548, to "delay…so great as to amount to a denial of justice.'"…..'….."

Relying on those principles, counsel for the plaintiff herein, urged that the defendants have not satisfied the relevant conditions, and so their applications merit dismissal.

Learned counsel urged that the plaintiff had not delayed in fixing the case for hearing since the last date in Court, ***7th February, 2008***; and that the plaintiff had not lost interest in the suit.

Counsel went further to urge the plaintiff's case on the basis of the principle explicated by ***Edmund Davies, LJ in Paxton v. Allsopp*** (supra):
"Assuming, without admitting, that there was delay in fixing the case for hearing, we submit that the delay was not inordinate or inexcusable."

For the matter was last in Court on ***7th February, 2008***; and the plaintiff invited the defendants for the fixing of hearing dates by a letter of ***9th March, 2009*** – after a period of less than one year; and made yet another such invitation on ***27th April, 2010***.

Counsel urged that the defendants have partly contributed to delay in the hearing of the suit: (i) 1st defendant is yet to file a list and bundle of documents – with the effect that the plaintiff knows not what documents that defendant wants to rely on; (ii) 2nd defendant, though duly filing a list of documents, is yet to file and serve the bundle of documents. And as a consequence, the process of discovery of documents is, to-date, incomplete. Counsel submitted that insofar as the defendants have contributed to delay in fixing the suit for hearing, they are not entitled to an order for the dismissal of the suit. In a Ruling in a similar case, in ***John Misoga Lwangu & Others v. Fort Properties Limited & Four Others, Mombasa*** HCCC No. 698 of 1994, ***Mr. Justice D.K. Maraga*** thus appositely remarked:

"Before a defendant is heard on an application for dismissal of a suit for want of prosecution he must show that he has put his house in order and that there is nothing from his end that can hinder the hearing of the case. As I have said even if this case were fixed for hearing today it could not still have been heard as the defendants have not made discovery."

Learned counsel submitted that the defendants have made no challenge to the evidence in support of the respondent's position; and that they have failed to show any prejudice that they would suffer owing to alleged delay in fixing the case for hearing: they have not stated the particulars of the witnesses they will miss, if the suit proceeds to hearing.

Counsel urged that justice can only be done to all the parties herein ***"if the case is fixed for hearing and heard on merit***"; and that the plaintiff ***"has been, and is still, keen to have this suit heard and determined on merit."***

It is common cause that the suit herein has its origin in pleadings nearly two-decades old; and this necessarily presents a case-management challenge, in view of the Judiciary's policy that the disposal of cases should be expeditious. But the crucial moment from which the conduct of the parties, in relation to the programming of hearings must be considered in this instance, is ***7th February, 2008*** when the matter was scheduled but failed to be shown on the cause list. Thereafter, as the evidence shows, the plaintiff took the initiative, several times, of calling the Advocates with the conduct of the case, to come to the Registry for hearing dates to be taken. Although the parties have, to-date, not taken hearing dates, it will be impossible for any hearing at all to take place so long as the pre-trial stages of discovery and inspection of documents will not have taken place. It emerges from the evidence that, whereas the plaintiff has duly filed and served his list and bundle of documents, 1st defendant has taken no action in this regard; and 2nd defendant has filed and served the list but not the bundle of documents.

On these facts alone, will it be right, that the defendants should seek the dismissal of the suit for non-prosecution? The plaintiff avers that he has been guided by matters of grievance, and questions of merit, in filing the suit, and that he is anxious to proceed with the same. But the defendants contend, in

broad terms, that owing to the non-prosecution of the suit for decades, they stand to suffer injustice if the suit proceeds, because they will be unable to trace witnesses and relevant records.

For purposes of resolution of the dispute at this stage, I find the plaintiff to make a more focused case than the defendants, who have given no specific evidence on the nature of the alleged prejudice linked to their possible witnesses and their records.

I see cause, besides, to adopt the principle expressed by ***Maraga, J*** in ***John Misoga Lwangu & Others v. Fort Properties Limited & Four Others*** (supra): although the defendants ask the Court to dismiss the suit, they fail to show that they took all actions which it behoved them to take, to enable the prosecution of the suit to proceed. So long as the defendants have not given full discovery of documents, it does not lie in their mouths to say, the plaintiff is at fault in not getting his suit timeously heard.

I would also consider the broad question of justice, as contemplated in the persuasive authority, ***Paxton v. Allsopp*** [1971] 3 All E.R. 370: does the delay in the trial, in the instant case, portend grave injustice to any of the parties? The plaint, dated ***8th July, 1992*** and amended on ***19th December, 1995***, carries the pleading that:

"the 1st and 2nd defendants wrongfully and unlawfully and without reasonable excuse jointly and severally terminated [the plaintiff's] employment on allegation that the plaintiff had failed and/or refused to comply with a director's instructions [for] his transfer from Southern Credit Finance Company Limited to Southern House";

and on that basis, the plaintiff claims damages, falling under several heads. To these pleadings, there are counter-pleadings by 1st defendant (amended defence of ***11th March, 1996)*** and 2nd defendant (amended defence of ***10th May, 1996***).

It is clear that a serious grievance, sounding in the law of employment has come before the Court, and that there is a contest, in the form of the statements of defence. For the plaintiff, this is (and judicial notice is to be taken) an important matter of personal welfare, social and economic standing which, clearly, touches on the scheme of justice; and there will inevitably be perceived injustice if the dispute is not heard and determined on the merits.

On the side of the defendants, as already noted herein, no convincing case has been placed before this Court that the preservation of the suit to hearing stage, will wreak any grave injustice to those parties. The Court's discretion is to be exercised, in such a context, to preserve the suit, so that it is heard and determined on the merits. I will, therefore, make Orders as follows:

(1)The 1st defendant's Notice of Motion of 12th July, 2010 is dismissed.

(2) The 2nd defendant's Notice of Motion of 2nd June, 2010 is dismissed.

(3) In respect of both applications, the costs shall be in the cause.

(4) The parties shall complete the pre-trial arrangements within 21 days of the date hereof; and the matter shall be listed before the High Court for directions for hearing.

SIGNED at **NAIROBI** …….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 29th day of September, 2011.

H.M. OKWENGU
JUDGE