REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang J.)

CIVIL SUIT NO. 283 OF 2008

CLEMENT OTIENO OKUMU.....PLAINTIFF

-VERSUS-

1. **BARCLAYS BANK OF KENYA LTD.**
2. **PARESHKUMAR NANJIBHAI.....DEFENDANTS**
3. **BHUDIA ARJAN HARJI**

RULING

The 2nd and 3rd defendants moved the Court by Notice of Motion dated ***21st July, 2010*** and brought under Orders XVI [Rule 5(a)], L [Rule 1] of the earlier edition of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya). The application carries one main prayer: ***"THAT the plaintiff's suit herein be dismissed for want of prosecution."***

The application rests on the following grounds:

(i) the plaintiff had filed the plaint together with a Chamber Summons application under certificate of urgency, both dated ***9th October, 2008***, and thereafter, on ***16th October, 2008*** filed an amended plaint;

(ii) the 2nd and 3rd defendants entered appearance on ***5th November, 2008*** and subsequently filed their defence on ***18th November, 2008***;

(iii) it is over 19 months since pleadings closed;

(iv) since the close of pleadings, the plaintiff has never set the main suit down for hearing;

(v) the Court had granted interim injunctive orders pending the hearing and determination of the suit, and these remain in force and the plaintiff continues to enjoy the same, to the disadvantage of the defendants;

(vi) "it is in the interest of justice and public policy that litigation must come to an end."

(vii) "it is apparent that the plaintiff is no longer interested in proceeding with this matter";

(viii) "it is in the interests of justice and fairness that the orders sought are granted as prayed."

Pareshkumar Nanjibhai, 2nd defendant, swore on behalf of both applicants a supporting affidavit, as the basis of evidence, on ***22nd July, 2010***; and the plaintiff, on ***11th August, 2010,*** made depositions which, in their essence, deny the applicants' averments.

Attributing his stand to a belief in the truthfulness of his Advocate's advice, the deponent deposes: ***"the application is incompetent, bad in law and should be struck out…***" The deponent denies "***the contents of paragraphs 7, 8 and 9 of the [supporting] affidavit and in particular, that the failure to list the matter for hearing is deliberate or geared towards continuing to enjoy the injunction given as alleged."*** The deponent also censures the applicants for the lack of progress in hearing the suit (para.9): "***the 2nd and 3rd defendants have themselves not attempted to fix this case for hearing***." Such a stand leads the deponent to express his veritable belief "***that it is not true …there is lack of interest on my part to pursue this case and I accordingly pray that the application should be dismissed with costs."***

Learned counsel, ***Mr. Abed*** for the applicants, submitted that the plaintiff's suit concerns landed property, L.R. No. 3564/I/MN which the applicants had already purchased at the time the plaintiff secured injunctive relief against them; that the applicants had taken as innocent purchasers, and the suit property had been transferred to them; and the plaintiff who had a dispute with 1st defendant, obtained temporary restraint orders against the applicants herein.

Counsel submitted that the applicants herein had filed their defence on ***18th November, 2008;*** and the plaintiff filed no reply to defence. Interim orders were granted in favour of the plaintiff on ***29th July, 2009***; pleadings closed 14 days after service of the defence statement upon the plaintiff.

Counsel submitted that, 19 months since the pleadings closed, the plaintiff has not taken any steps to set down the suit for hearing. Counsel made submissions on the terms of Order VI, Rule II; and on judicial interpretation of the same: ***Anthony Ambaka Kegode & Another v. Four Ninety Investment Limited & 3 Others*** [2006] eKLR (***Kasango, J***); he submitted that time for close of pleadings, with respect to 1st and 2nd defendants, began to run "*from the date of service of their defence upon the plaintiff."*

Counsel urged that the plaintiff is guilty of prolonged and inexcusable delay in prosecuting the suit; and that "***it is within the Court's prerogative to dismiss the suit [by virtue of] Order XVI, Rule 5 of the Civil Procedure Rules."***

The plaintiff's claim in the replying affidavit, a defence to the charge of dilatoriness, had been that "***there has been negotiations going on between the parties with a view to settling the matter***" [para.8 (b)]; but learned counsel denied this, and submitted that ***"[the plaintiff] has not annexed any documentary proof of such negotiations."***

Counsel submitted that the plaintiff's conduct has been inequitable:

*"On **13th October, 2008** the Court granted interim ex parte injunctive orders against all the defendants herein. On **29th July, 2009** those orders were extended after…inter partes hearing [of] the plaintiff's …*

application dated 9th October, 2008… [Ever] since the interim orders were granted, the plaintiff has enjoyed the Court's protection, to the disadvantage of 2nd and 3rd defendants…The orders of ***29th July, 2009*** *ensured that the plaintiff remained on the suit property pending the hearing of this matter. The plaintiff has thus taken an unfair advantage over 2nd and 3rd defendants by sitting on his obligation to ensure a speedy determination of the matter."*

Counsel urged that "***unless the orders sought are granted, the Court will unwittingly assist the plaintiff in continuing with his actions that defeat the same equitable principles whose protection he enjoys."***

For the plaintiff, learned counsel ***Mr. Mabeya*** urged that the Advocates for 2nd and 3rd defendants/applicants "***are not properly on record and therefore the application is incompetent and fatally defective."***

This contention rests on the representation, for the plaintiff, that *M/s. Ndegwa Muthama & Katisya Associates*, Advocates had come on record for 2nd defendant on ***14th June, 2010*** (notice of change of advocates dated ***8th June, 2010***), *while M/s. Balala & Abed, Advocates* came on record for 2nd defendant and 3rd defendant on ***23rd July, 2010*** "*purporting to take over the conduct of the matter from M/s. Sachdeva & Co. Advocates."* Counsel urged that it would only be proper if M/s. Balala & Abed, Advocates were taking over from M/s. Ndegwa Muthama & Katisya Associates, in respect of 2nd defendant.

Counsel raised questions as to the date of close of pleadings: on the ground that *"the applicants have not exhibited service of the said Defence upon ourselves and our contention is that we were not served with the 2nd and 3rd defendants' statement of defence."* Consequently, ***Mr. Mabeya*** urged that "*pleadings were not and have not been closed, as against the 2nd and 3rd defendants."*

Dispensation of justice by the Court is highly dependent on the Court's objective and conscientious perception of ***facts.*** While it may be assumed that the ***full trial*** of the main cause does place the Court in a position to perceive such crucial matters of evidence, invariably there is difficulty when, at the ***interlocutory stage***, without the full canvassing of evidence, the Court must determine a question affecting the rights of the parties; and hence, at this stage, the Court is guided by *prima facie* scenarios only.

In the instant matter both sides rely on certain representations of fact the truth of which, in each case, is not obvious. The plaintiff/respondent states that certain out-of-Court negotiations were in progress between the parties; 2nd and 3rd defendants deny this; no document has been placed before the Court to show probable reality.

On the side of 2nd and 3rd defendants, similarly, it is contended that full service of pleadings did take place; and therefore pleadings closed and, by Order VI, Rule II, the plaintiff ought to have taken action to fix the main cause for hearing. Just as the plaintiff contends, 2nd and 3rd defendants have not produced a return of service to validate their averment regarding closure of pleadings.

After considering the submissions, and also discounting those essentially technical points that should not trump the Court's criterion of ***merits,*** as contemplated in Article 159(2) (d) of the Constitution of Kenya, 2010, I have come to the conclusion that, though the application is potentially meritorious, it can only be entertained after proper service of pleadings, and after it is certain that the pleading stage has closed.

Therefore I hereby disallow the application, and make Orders as follows:

(1) The defendants shall serve their pleadings within 14 days of the date hereof, and shall duly file a return of service of the same.

(2) The plaintiff, upon receipt of due service, shall within 14 days complete his part, and the pleadings shall thereupon close.

(3) Upon closure of the pleadings the suit shall be listed for mention and hearing directions within 14 days.

(4) The costs of the instant application shall be in the cause.

Orders accordingly.

SIGNED at **NAIROBI** …….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 15th day of November, 2011.

H.M. OKWENGU
JUDGE