



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 3162 OF 1995

**FORTUNE FINANCE
LIMITED.....PLAINTIFF**

VERSUS

GURSHAN SINGH BRAR.....1ST DEFENDANT

SHALIMAR FARM LIMITED.....2ND DEFENDANT

UNIVERSAL INSURANCE BROKERS LIMITED.....3RD DEFENDANT

RULING

The 3rd defendant's application dated 11th April, 2011 was brought under **Order 17 rule 2(3)** of the **Civil Procedure Rules** and seeks dismissal of this suit for want of prosecution. The 3rd defendant also sought an order that the plaintiff bears the costs of the suit. The application was made on the ground that the plaintiff has failed to take reasonable steps to prosecute the suit for more than 5 years since it was last adjourned on 28th June, 2005. The delay in prosecuting the suit is prejudicial to the defendant.

The application was supported by an affidavit sworn by **Mr. Kiragu Kimani**, a partner in the firm of Hamilton Harrison and Mathews Advocates who have the conduct of this matter on behalf of the 3rd defendant. Mr. Kimani stated, *inter alia*, that the suit was filed on 18th of October, 1995 and the 3rd defendant filed a statement of defence on 15th December, 1995. Between 1998 and 2000 the plaintiff failed to take steps to prosecute the suit and the court issued a notice for the plaintiff to show cause why the suit should not be dismissed for want of prosecution. The matter came up for mention for dismissal on diverse dates between March and June 2000 when it was stood over generally.

On 18th July, 2000 the 3rd defendant's advocate requested the court to dismiss the suit for want of prosecution. The matter was listed before a Deputy Registrar who delivered a ruling on 6th October, 2000 and rightly held that such an application ought to have been placed before a judge.

On 23rd May, 2001 the defendant made an application for dismissal of the suit for want of prosecution and the same was listed for hearing on 23rd July, 2001. It is not clear what became of that application.

On 10th December, 2004 the suit was fixed for hearing on 28th June, 2005 but on the material day the matter did not proceed. The plaintiff's advocate informed the court that the plaintiff was considering withdrawing the suit against the 3rd defendant. The matter was consequently stood over generally. It was again fixed for hearing on 23rd July, 2007. Come that date the matter was not listed for hearing.

It is therefore evident that since 28th June, 2005 when the matter was stood over generally the plaintiff has not set down the suit for hearing. The 3rd defendant continues to be prejudiced by the pendency of this matter, Mr. Kimani stated.

A replying affidavit was filed by **Odhiambo E. Ouma**, an advocate practicing in the name and style of Cheptumo & Company Advocates, who are on record for the plaintiff. The said advocates took over the conduct of this suit on 20th July, 2001. Mr. Ouma stated, *inter alia*, that since July, 2007 his firm did not take any step towards prosecution of the suit because the advocate who was handling the matter, **Mr. Stephen Bundotich**, left the firm without handing over the file or informing the remaining advocates about the position of the same.

Mr. Ouma urged the court to be guided by the overriding objectives of the Civil Procedure Act and allow the plaintiff one more chance to prosecute the suit. He added that the plaintiff ought not to be punished for its advocate's mistakes.

Both **Mr. Ouma** and **Ms. Gulenywa** for the 3rd defendant made brief submissions which I have taken into consideration.

There can be no dispute that since 1995 when this suit was filed, the plaintiff and its advocates have not demonstrated due diligence in prosecuting this suit, despite various attempts made by some of the defendants to have the suit dismissed for want of prosecution. The suit was before the court on 28th June, 2005 when it was stood over generally. Since that date, the plaintiff has not made any effort to prosecute the suit.

Although Mr. Ouma told the court that the firm of Cheptumo & Company Advocates took over the conduct of the matter on 20th July, 2001, I will equally say that the said firm has also been indolent in facilitating the prosecution of this suit. The fact that Mr. Bundotich left the firm sometimes after 28th June, 2005 cannot be a reasonable explanation for the delay. Over the last seven years or so the remaining advocates in the firm of Cheptumo & Company Advocates ought to have perused their office file and realized that there was need to make effort to prosecute the suit.

In **MOBIL KITALE SERVICE STATION vs. MOBIL OIL KENYA LIMITED & ANOTHER, [2004] 1 KLR 1**, it was held that it is the duty of the plaintiff and its advocate to prosecute a matter. That means that even if for whatever reason the plaintiff's advocate does not move the court for purposes of fixing a hearing date, the plaintiff has a duty to push its advocate to do the needful. A suit belongs to the parties and the advocate on record are only their agents.

In this matter it has not been demonstrated that the plaintiff has taken any initiative to ensure that the suit

is prosecuted expeditiously. **Section 1A** of the **Civil Procedure Act** states that the overriding objective of the Act and the rules made thereunder is to facilitate a just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. **Section 1A (3)** requires a party and/or its advocate to assist the court to further the overriding objective of the Act and to that effect, to participate in the processes of the court. In my view, the conduct of the plaintiff and that of its advocates amounts to total neglect of their responsibility in achieving the objectives of the overriding objective as stated under Section 1A of the Civil Procedure Act. In **E.T. MONKS & COMPANY LIMITED vs. EVANS [1995] KLR 584**, it was held that public policy demands that the business of the courts should be conducted with expedition.

I find that there has been inordinate and inexcusable delay in prosecuting this suit. That delay is prejudicial to the 3rd defendant. Consequently, I allow the application by the 3rd defendant and dismiss this suit for want of prosecution. The plaintiff shall bear the costs of the suit and the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2011.

D. MUSINGA
JUDGE

In the presence of:

Muriithi/Kirui – Court Clerks

Miss Gulenywa for the Applicant

Mr. Thuo for Mr. Marete for the 2nd Defendant

Miss Othero for the Plaintiff