REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 802 OF 2002

NILAM DOSHI.....PLAINTIFF

- VERSUS –

CREDIT AGRICOLE INDOSUEZ LIMITED FORMERLY TRADING AS BANQUE INDOSUEZ.....1ST DEFENDANT
GANSHYAM CHHOTABHAI PATEL.....2ND DEFENDANT
WILFRED J.C. KASHOMI.....3RD DEFENDANT
PALLINDER HOLDINGS LIMITED.....THIRD PARTY

CONSOLIDATED WITH
CIVIL SUIT NO.803 OF 2002

SANJITA SHAH.....PLAINTIFF

- VERSUS –

CREDIT AGRICOLE INDOSUEZ LIMITED FORMERLY TRADING AS BANQUE INDOSUEZ.....1ST DEFENDANT
GANSHYAM CHHOTABHAI PATEL.....2ND DEFENDANT
WILFRED J.C. KASHOMI.....3RD DEFENDANT
PALLINDER HOLDINGS LIMITED.....THIRD PARTY

CONSOLIDATED WITH
CIVIL SUIT NO.804 OF 2002

SANJITA SHAH.....PLAINTIFF

- VERSUS –

CREDIT AGRICOLE INDOSUEZ LIMITED FORMERLY TRADING AS BANQUE INDOSUEZ.....1ST DEFENDANT
GANSHYAM CHHOTABHAI PATEL.....2ND DEFENDANT
WILFRED J.C. KASHOMI.....3RD DEFENDANT

PALLINDER HOLDINGS LIMITED.....THIRD PARTY

RULING

1. This ruling relates to similar but separate notices to show cause issued by the court against the plaintiffs in all the above suits for dismissal of the suits for want of prosecution. The parties agreed that a single ruling do abide in all the matters. The proceedings in relation to the notice the subject of this ruling were taken in the file number HCCC No 802 of 2002.

2. On 22nd July 2011 the Honourable Court through the Deputy Registrar issued three separate notices to show cause to the plaintiff why the 3 suits should not be dismissed. The notices were fixed for hearing on 23rd September 2011. On that date, the plaintiff's counsel sought an adjournment to be heard on 29th September 2011. On the latter date counsels for all the parties appeared and agreed to proceed with their submissions on 14th November 2011 when I became seized of the matter. In the meantime and on 22nd September 2011, the defendants counsel filed an affidavit sworn by Allen Gichuhi on even date supporting the dismissal of suit for want of prosecution.

3. The plaintiffs counsel in turn had filed an affidavit sworn on 12th September 2011 to show cause why the suits should not be dismissed. There is also an affidavit of the third party sworn by Sanjeev Khagram on 27th September 2011 supporting the dismissal of the suit.

4. The plaintiffs position in a nutshell is that their counsel came on record on 9th June 2008 and has fixed the suits for hearing on a number of occasions. On 25th October 2009 the parties appeared before the Honourable Justice Luka Kimaru when certain directions to prepare the suit for hearing were given. The plaintiff claims to have prepared its bundles of documents and forwarded them to the defendants law firm as part of discovery and inspection and in trying to come up with a common bundle of documents. The defendants counsel did not reply in good time forcing the plaintiff to file its bundle on record. The plaintiff also fixed this suit for hearing on 15th December 2011 even as the Notice to show cause was pending. The plaintiff says it is not entirely to blame for the delay as there have been many changes in its legal representation and that in any event it is now ready to prosecute the suit, has filed its documents and taken a date. Accordingly and in the interests of justice, the suit should not be dismissed. It pleaded for accommodation by the court under the provisions of article 159 of our constitution.

5. The defendants and third party opposed the application. Reliance was placed on the replying affidavit aforementioned as well as written submissions dated 29th September 2011. The gist of it is that the plaintiffs have changed lawyers 4 times and too often. Due to the delay in prosecuting this old matter, the defendants and third party aver they can no longer get a fair trial. The delays, are inexcusable and should be punished by dismissal of the suit. The suit has been set down for hearing on 4 previous occasions. Even a previous application for dismissal had been argued before Justice Muga Apondi. The defendants and third party are thus prejudiced by the plaintiffs' inertia and submitted that under the overriding objective of the court at sections 1A and 1B of the Civil Procedure Rules, the suit should be dismissed with costs.

6. I have heard the rival arguments. I have also studied the court record, the pleadings, depositions and considered the legal authorities cited in court. I am of the following considered opinion.

7. Order 17 rule 2(1) and (2) provides as follows;

"2. (1) in any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit".

These suits were filed way back in the year 2002. They have not been heard on their merits. Some of the reasons for that must be the many changes in counsel for the plaintiff. Its current lawyers are the 4th on record. This is not also the first time the plaintiff has been faced with an application for dismissal. On 29th September 2005 the 2nd and 3rd defendants had filed a chamber summons seeking dismissal of the suit for want of prosecution. The cause of action itself dates back to about 15 years as per the pleadings. That is the reason why the defendants and third party say they can no longer get a fair trial as there are no longer credible witnesses and some documents may be missing.

Although Mr. Oyatta, counsel for the plaintiffs says that delay to prosecute the suit was occasioned by the failure of the defendants to approve a common bundle, it is a weak platform. I say so because there was nothing to prevent the plaintiffs from fixing the suit for hearing and filing its own bundle. True, there were directions of court of 21st October 2009 before Justice Luka Kimaru requiring a common bundle to be filed by 20th November 2009.

But that order also stated that in default, the plaintiff files its separate bundle. On the further mention on 25th November 2009 the matter was stood over generally.

8. The delay in prosecuting these suits is too lengthy and inexcusable. The affidavit of David Oyatta at paragraphs 4, 5, 6 and 7 blames the delays on changes of the plaintiffs counsel and his efforts to secure a common bundle. I have stated that those are not good grounds for not prosecuting its case with the necessary vigour. The law unfortunately is also not on the plaintiff's side. I have already set out order 17 rule 2 (1) and (3) which ground properly the notice to dismiss. In the decision in *Fitz Patrick Vs. Batger & Co Ltd* [1967] 2 ALL ER 657 Lord Dennig delivered himself thus;

"It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. Just consider the times here. The accident was on 13th December 1961. If we allowed this case to be set down now, it would not come up for trial until the end of the year. That would be six years after the accident. It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution".

Again, with the coming into force of section 1A and 1B of the Civil Procedure Rules as read together with articles 50 and 159 of the constitution, it is incumbent on the court to do substantial justice to the parties. The overriding objective therein enjoins this court to expedite its business and to utilize judicial resources in an efficient manner. When there has been such a big and inordinate delay since the filing of the suit in 2002 and where the cause of action is 15 years old, there is a sense in which the defendants and third party are prejudiced from a fair trial by the inertia of the plaintiff. And it is not the first time, as I have said, that an application to dismiss the suit has been made. If authority for this is required, it is found in *Mugo Njogu Vs Mary Githinji* [2010] e KLR where the court stated;

"With the overriding objective in place, it is no longer acceptable in my view for the court to automatically excuse the mistakes and lapses of counsel. Counsel have a role and duty to assist the court in realizing the overriding objective and incompetency or lapses of counsel derogate from the objective".

The court has inherent power in those circumstances to dismiss the suit in the interests of justice see *Mukisa Biscuit Manufacturing Company Vs West End Distributors* [1969] E.A. 696.

9. In the result, I am of the considered opinion that the plaintiff has failed to show cause to the satisfaction of the court that it should remain on the seat of justice. The plaintiff has not placed sufficient matter before the court to enable the court exercise discretion in its favour not to dismiss the suit. On the contrary, the dictates of justice and the overriding objective to do justice requires that the defendants, who have over the years defended the proceedings that the plaintiff has not prosecuted for all those years, be freed from the hold of the plaintiff's inertia.

10. The order that then commends itself to me to make is to dismiss the suit by the plaintiff. As the

notices to show cause were taken out by the court *suo moto* I shall not order costs. As stated at the beginning this ruling the order shall also apply and abide in the two other suits being HCCC 803 of 2002 *Sanjita Shah Vs Credit Agricole Indosuez and others* and HCCC No 804 of 2002 *Sanjita Shah Vs Credit Agricole Indosuez and others*.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 2nd day of December 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of
Mr. Oyatta (present) for the Plaintiff.
Mr. Karungo (present) for the Defendants.
Mr. Karungo for Sanjeev for the Third Party.