REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 227 of 1997

SPENCON KENYA LTD…….....1ST APPLICANT/DEFENDANT

AND

KERICHO MUN. COUNCIL…….....……APPLICANT/3RD PARTY

VERSUS

HEMA INVESTMENT.LTD…….....……RESPONDENT/PLAINTIF

RULING

The defendant and the 3rd party have each brought applications seeking more or less the same orders.

The defendant's application is dated 20th April, 2009 and seeks that the *"suit be dismissed with costs"* while that brought by the 3rd party is dated 5th May, 2008 also seeking that the suit be dismissed for want of prosecution and in the alternative that the suit be struck out as it does not disclose any cause of action.

It is the contention of the defendant and the 3rd party that the matter was last in court on 3rd May, 2006 when the plaintiff's application dated 26th April, 2004 was dismissed. That since that date the plaintiff has not taken any steps to list the suit for hearing. That the case has been pending for over ten (10) years having been filed on 13th May, 1997; that the suit property having been sold by Kenya Commercial Bank in exercise of its statutory power of sale, the plaintiff lost interest in the matter as there is no cause of action. Counsel for the defendant and 3rd party have cited the following authorities in support of their arguments:

i) **Allen** Vs. **Sir Alfred MacAlpine & Sons, Ltd**. (1968) 1 All ER 543
ii) **Mukisa Biscuit Manufacturing Company Limited** Vs. **West End Distributors Limited** (1969) EA 696 and
iii) **E.A. Portland Cement Company Limited** Vs. **Tausi Assurance Company Ltd. & Another**, Milimani H.C.C.C.No.1946 of 1994

In a replying affidavit sworn by Samwel Kiprono Sang, the Managing Director of the plaintiff, it is argued that the application has not been made in good faith as the applicants (the defendant and the 3rd party) ought to have exercised the first option to list the case for hearing; that the delay was partly caused by the delayed ruling in respect of the plaintiff's application dated 26th August, 2004; that the plaintiff has always been and is still keen to prosecute the matter; that the matter was last in court on 22nd September, 2008 and not 3rd May, 2006 as alleged in the application.

I have considered the averments in the affidavits and the arguments by counsel for the defendant and the 3rd party as well as those by the plaintiff in person (his counsel having failed to attend court). Both applications are brought pursuant to **Order 16** of the **Civil Procedure Rules** and were argued together. The 3rd party's application is premised under **rule 5(d)**, while that of the defendant under **rules 5 and 6.** In respect of the latter, if within three months after the adjournment of the suit generally, the plaintiff does not set down the suit for hearing, the defendant may himself set down the suit for hearing or apply for its dismissal. In the former, the defendant relies on **rules 5 and 6**. **Rules 5** has three instances when the suit may be dismissed for

want of prosecution, one of which I have already stated above. The other two instances relate three months after the close of pleadings or removal of the suit from the hearing list. Right away it may be noted that at no time was the suit listed for hearing hence **rules 5(c)** and **(d)** are inapplicable.
The pleadings were, however, closed fourteen (14) days after service of the defence in terms of **Order 6 rule 11** of the **Civil Procedure Rules.** Summons for direction were taken on 30th July, 1997. Within three months, the suit could not have been set down for hearing as the defendant sought in an application dated 23rd June, 1997 for a 3rd party notice and the plaintiff subsequently filed an application for amendment of the plaint. That application was dismissed by Apondi, J on 3rd May, 2006. This is the relevant date in so far as this application is concerned.
Two issues have been raised, namely whether the suit ought to be dismissed on account of delay by reason of want of prosecution and secondly whether (in the alternative) it ought to be struck out as it does not disclose reasonable cause of action following the dismissal of application to amend the plaint. It is the plaintiff's contention that after the dismissal, the matter was before the court on 22nd September, 2008, some nine (9) months before the filing of the defendant's application but two (2) months after the 3rd party's application. I confirm that indeed the plaintiff's advocate took a date in the registry on 23rd July, 2008 for the mention of the matter on 22nd September, 2008. On that date, while counsel for the defendant was present, the plaintiff's counsel did not attend and the matter was stood over generally.
It would appear that the plaintiff's counsel was only woken up when the 3rd party filed this application. I reiterate that the relevant date remains 3rd May, 2006 when the court dismissed the plaintiff's application for amendment of the plaint. It follows that no steps were taken to list the suit for hearing between 3rd May, 2006 and 20th April, 2009 when the last application herein was filed.
For the reasons I have explained earlier in this ruling, the provisions of **rule 5(a)**, even **(b)** although repealed, **(c)** and **(d)** do not apply, a suit will only be dismissed for want of prosecution on the court's own motion under **rule 6** aforesaid if no steps are taken for a period of three (3) years to proceed with the suit.

Two important things are to be noted from this. First, whether or not to dismiss a suit in the circumstances enumerated in **rule 6** is a matter of discretion from the use of the word *"may."* Secondly, the failure to take steps must be for a period of 3 years. In strict computation of time under **section 57** of the **Interpretation and General Provisions Act** the delay is below three (3) years. The suit cannot therefore be dismissed for want of prosecution.

On the 3rd party's alternative prayer for striking out the suit, it must be noted that a suit can only be struck out under **Order 6 rule 13** of the **Civil Procedure Rules** which was not cited. Be that as it may, it is settled law that a suit can only be struck out if:

(a) it discloses no reasonable cause of action or defence or
(b) it is scandalous, frivolous or vexatious, or
(c) it may prejudice, embarrass or delay the fair trial of the action, or
(d) it is otherwise an abuse of the process of the court.

Apart from the fact that the relevant provision of the law was not cited, the ground upon which the application is premised is not specified.

Assuming from the averments that it is premised under (a) above, **sub-rule 2** of **rule 13** does not permit any evidence to be adduced. The 3rd party has filed an affidavit in support, thereby presenting evidence. Furthermore, if it is on ground (a) above, the application ought to have a concisely stated that the suit *"discloses no reasonable cause of action."* See **D.T. Dobie & Co. (K) Ltd**. Vs. **Muchina** (1982) KLR 1 where the provisions of **Order 6 rule 13** were explained. I may only add that the power to strike out is drastic and must be resorted to sparingly. The court must always strive to sustain the suit.
For these reasons, the two applications fail and are dismissed with costs to the plaintiff.

Dated, Signed and Delivered at Nakuru this 16th day of April, 2010.

W. OUKO
JUDGE