



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 565 of 2006

REINDER HOLDINGS LIMITEDPLAINTIFF/RESPONDENT

VERSUS

VICTORIA COMMERCIAL BANK LTD DEFENDANT/APPLICANT

RULING

- 1.** The plaintiff's suit was filed on 19th July 2006 seeking for declaratory orders that the charge over the suit property be declared null and void and the plaintiff be discharged from the charge and the security held by the defendant be returned. Simultaneously with the filling of the plaint the plaintiff filled a chamber summons under **Order 39 of the Civil Procedure Rules** seeking for interim orders of injunction pending the hearing of the suit. That application was determined and the plaintiff was granted an order of injunction restraining the defendants from dealing with the property known as **LR NO 20696 Malindi** until the hearing and determination of the suit. That order was issued on 17th July 2008.
- 2.** The defendant filed a notice of motion on 28th January 2010 under order 16 rule 5 seeking for orders that this suit be dismissed for want of prosecution. This application is based on the grounds that the plaintiff has failed, refused and or neglected to set the suit down for hearing and or failed to prosecute the same for a period of over 17 months. It was argued that failure by the plaintiff to prosecute this matter after such a long time is indicative that the plaintiff has lost interest with this matter. The continued pendency of the suit is causing the defendant prejudice. Moreover, since the order of injunction was issued the plaintiff stopped serving the loan. The defendant cannot exercise its rights under the charge documents as a result of the injunction orders.
- 3.** In further argument, it was submitted that the plaintiff has not taken any steps to prepare the matter for hearing. It has not complied with discovery nor have the issues been framed so that the matter can be set down for hearing. Under **Section 1(A) of the Civil Procedure Act** the overriding objectives in the administration of justice empowers this court to facilitate expeditious,

proportionate and affordable resolutions of civil disputes. Parties to civil proceedings or their advocates also have a corresponding duty to ensure efficient and timely disposal of proceedings.

4. Counsel for the applicant cited the case of **Chabaswony Chepkiyeng v Samson Emmaneul Kibet [2010] eKLR** where the Court of Appeal found a delay in filing an appeal was inordinate the appellant was found not to be enthusiastic in pursuing the appeal and his alleged illness was not such that he was totally incapacitated. Counsel for the plaintiff therefore submitted that although it was alleged in the replying affidavit that **Mr. Apopo** was sick, he was on and off office therefore the illness could not have prevented him or another counsel from taking steps to prosecute this matter.
5. This application was opposed by Patrick Muturi respondent's counsel who relied on his replying affidavit sworn on 14th May 2010. It is contended that the plaintiff had an option of setting down this suit as provided for under order 16 Rule 5. Counsel argued that the plaintiff has always been interested to prosecute this matter. He annexed correspondences that he received from the plaintiff who sought information on how far his case had gone. However, Mr. Muturi claims that his partner had been indisposed and to due to a heavy diary Mr. Muturi could not cope with all the matters but he has since prepared a list of documents which he sent to counsel for the defendant. He urged the court not to visit the mistake of counsel on an innocent client.
6. Counsel cited the case of **Ivita v Kyumbu [1984] KLR where the Court of Appeal** while dealing with a similar issue on whether to dismiss the suit on want of prosecution held as follows:-

1. The three months limitation period in the Civil Procedure Rules Order XVI rule 5 does not apply to a defendant's application to dismiss the suit and the defendant may take out a notice of motion to dismiss the suit for want of prosecution at any time after the three months limitation. A failure to take out such notice early does not prejudice the success of the defendant's application.

2. A defendant who has waived or acquiesced in delay is not entitled to a dismissal of the action for want of prosecution but mere inaction on the part of such defendant does not amount to a waiver or acquiescence.

3. The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court."

7. It is abundantly clear from the records since the plaintiff was granted an Interlocutory Order of Injunction on 3rd June 2008 no steps have been taken to prosecute this matter. It is almost two years since the order of injunction was issued and that seems to be the last step the plaintiff took in this matter. In my humble opinion the defendant is perfectly entitled to make this application both under the provisions of **Order 16 rule 5 and Section 1(A) of the Civil Procedure Act**. Those

provisions of the Law empower the court to apply the procedure proportionately to ensure ends of justice. In this case the plaintiff was granted an Interim Order of Injunction. It has not taken any steps to service the loan or to prosecute the matter so that the whole dispute can be determined. The explanation given by the counsel for the plaintiff for their failure to prosecute the matter is that one of the partners was indisposed was in and out of the office and Mr. Muturi was compelled to handle all the matters and deal with a heavy diary. That is not a justifiable reason; the record shows that it is Mr. Muturi who dwelt with this matter most of the time. Moreover the illness of a partner of Mr. Muturi when the record shows it was Mr. Muturi who handled this matter is not such that he was unable to carry out his duties or organize for somebody else to take over the brief or return the entire file to the plaintiff to seek alternative representation.

8. Parties should follow the law the provisions of the law are meant to serve a particular purpose and order 16 rule 5 is meant to ensure a party who files a suit also should take steps to fix it for hearing. Accordingly I find no justifiable reasons why I should not allow this application and dismiss this suit for want of prosecution. The application is allowed with costs.

RULING READ AND SIGNED ON 2ND JULY 2010 AT NAIROBI.

**M.K. KOOME
JUDGE**