



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)
CIVIL CASE NO. 178 OF 2007

DEPOSIT PROTECTION FUND BOARD
 [Suing in the name of TRUST BANK Limited]
 [In Liquidation].....PLAINTIF

VERSUS

VICTORIA DISTRIBUTORS LIMITED.....1ST DEFENDANT
 HOUSE OF DAWDA LIMITED.....2ND DEFENDANT
 BRITANIA PLASTICS LIMITED.....3RD DEFENDANT
 VICTORIA DIMPEX LIMITED.....4TH DEFENDANT
 VICTORIA CARRIERS LIMITED.....5TH DEFENDANT
 JAMBO SWEETS LIMITED.....6TH DEFENDANT
 BINGO SWEETS LIMITED.....7TH DEFENDANT

RULING

The defendants through their Advocate Guram & Company Advocates filed a notice of motion application under Order L Rule 1, Order XVI Rule 5(a) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, seeking the following orders:

- 1. THAT the Plaintiff’s case as against the Defendants be dismissed for want of prosecution.**
- 2. THAT the costs of this application and of the entire suit be awarded to the Defendants/Applicants.**

The application is premised on the following grounds which are on the face of the application.

- (a) There has been inordinate delay by the Plaintiff and or it’s Advocates on record in prosecuting this suit consistently in Court now for over one (1) year and two (2) months.
- (b) The Plaintiff’s apparent disinterest and delay in prosecuting this suit further is inordinate and inexcusable.
- (c) The Defendants should not be kept in indefinite abeyance by the Plaintiff’s reluctance in prosecuting his case in court further.
- (d) The Defendants have a good claim against the Plaintiff’s claim and are anxious for an expeditious disposal of this case.

In his submissions Mr. Billing, the applicant’s counsel urged this court to grant prayers No. 1 and prayers

No. 2. Besides the above, the applicant's counsel submitted that they are relying on the grounds set out on the face of the application. In addition to the above, he also submitted that they are relying on their written submissions and the list of authorities. The learned counsel referred this court to paragraph 1 of the plaint which clearly indicates that Trust Bank went into liquidation on 24th August, 2001. According to the applicant's counsel, the deponent in the replying affidavit, called Mr. Munyalo Nthuli never stated that he was authorised by the liquidator to swear the affidavit. Secondly, Mr. Billing also submitted that there is no affidavit by the liquidator explaining the delay in prosecuting the suit. He took issue with the excuse by the deponent that they have not managed to file their list of documents until 31st March, 2010 and yet these documents are being referred to in the plaint. It is the contention of the applicant's counsel that the bank went into liquidation on 24th August 2001. That means that the liquidator had a duty to have the documents by the year 2007 when filing the suit. Apart from the above, the applicant's counsel reminded this court that their application was filed on 4th March, 2010 while the respondent filed their list of documents on 1st April 2010 as an afterthought and an attempt to derail the application. He concluded his submission by stating that the delay by the respondent does not augur well for them.

On the other hand the application has been opposed by Mr. Moya who appeared for the respondent. The respondent's counsel has relied on the replying affidavit of Mr. Munyalo Nthuli and the list of authorities filed on 12th April 2010. In addition to the above, he has also relied on their written submissions filed on 13th May, 2010. He classified their grounds broadly into the following:

- (a) The plaintiff is keen to proceed and execute the hearing of the matter.
- (b) The delay was not flagrant and unduly prolonged or inexcusable.
- (c) There will be no prejudice suffered by the defendant if the matter goes for trial.
- (d) It is in interest of justice and part of the overriding interest of the court to allow the case go for full trial.
- (e) The plaintiffs have made efforts to prosecute the case while the defendants who have a counterclaim in the matter have not made any efforts to prosecute the counter claim.

In support of his submission, the respondent counsel quoted the case of **Francis Githinji vs. Stephen Kageni Gitau, Allen vs. Sir Alfred McAlpine [1968]** 1 All ER page 5 and 18. According to the learned counsel, the court stated that a matter should only be dismissed if a fair trial is not possible. On the basis of the above, the learned counsel urged this court to hear the matter on merit. He further added that the plaintiff has already filed its issues and the list of documents. On the basis of the above, he has prayed that the application be dismissed. In support of that submission he has quoted the case of **Pacific Frontier Seas Limited vs. Irmard Beig & Anor. [2004] eKLR.** In that case, the court dealt with the issue of a deponent to swear an affidavit. In this particular case the affidavit was deponed by an advocate.

This court has carefully considered the opposing submissions by the learned counsels. From the record it is crystal clear that this case was filed on 5th April 2007. That means that this case is already 3½ years old. Unfortunately after the plaintiff filed this suit he went to slumber since the record shows that no action has been taken to prosecute this case. Order XVI rule 5 states as follows:

“5. If, within three months after –

(a) the close of pleadings, or

(b).....

(c) The removal of the suit from the hearing list, or

(d) The adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.”

In the case of **Fitzpatrick vs. Batger & Co. Limited [1967] 2 All ER. 657 at page 658 Lord Denning M.R.** stated as follows:

“It is the duty of the plaintiff to get on with the case. Public policy demands that the business of the Courts should be conducted with expedition. This action has gone to sleep for nearly two years, {just about one year in our case}. It should now be dismissed for want of prosecution.”

Apart from the above, in the case of **Interact Limited and Sudhir J. Patel vs, Dinners Club Africa**

Limited CA No. 3 of 2000 the Court of Appeal in its ruling held as follow:

“There is also inherent power in the court to dismiss the suit if the delay in prosecuting it is inordinate. See also the case of Mukhisa Biscuits Co. vs. West End distributors [1969] EA 696” to the same effect.

Turning to this particular case, it is obvious that the plaintiff/respondent has not taken any action whatsoever for the last 3½ years apart from filing the reply to defence. Needless to state the delay is not only inordinate but also unreasonable. From the conduct of the plaintiff/respondent it is obvious that after filing this suit they lost interest in prosecuting the same for reasons better known to themselves. It is a basic principle that litigation must come to an end. It is not fair for the plaintiff to have this case hanging over the heads of the defendants for such a long period of time. The inordinate delay in this case is inexcusable and hence due to the above, I hereby concede to the application. In that regard, I hereby dismiss the plaintiff’s case against the defendants for want of prosecution. I hereby order that the costs of this application and of the entire suit be awarded to the defendant/applicants.

Those are the orders of this court.

MUGA APONDI
JUDGE

Ruling read signed and delivered in open court in the presence of:

Mrs. Ochieng for Billing -Defendants’/Applicants’ Counsel -present
Moya - Plaintiff’s/Respondent’s Counsel - absent

MUGA APONDI
JUDGE
8TH OCTOBER, 2010