REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 319 OF 2006

NATIONAL BANK OF KENYA LTD.....PLAINTIFF/ RESPONDENT

VERSUS

ARVINDKUMAR MAVJO LADHA.....1ST DEFENDANT/APPLICANT

KASOBJI RAMJI PATEL.....2ND DEFENDANT/APPLICANT

GOPAL RAMJI LADHA.....3RD DEFENDANT/APPLICANT

MAVJI RAMJI LADHA.....4TH DEFENDANT/APPLICANT

RLCO STEEL FABRICATORS LTD.....5TH DEFENDANT/APPLICANT

R U L I N G

The application before the court is made by way of a Notice of Motion dated 9th July, 2010, and brought under Order XVI Rule 5; Order L Rule 1 of the Civil Procedure Rules; and Section 3A of the Civil Procedure Act. By the application, the Applicant moves the court for orders that this suit be dismissed with costs for want of prosecution, and that the cost of the application be granted the Defendants.

The Application is based on the ground that since the filling of the suit, no action has been taken by the Plaintiff to prosecute this suit and the same should not be left hanging over the Defendants' heads indefinitely.

At the oral canvassing of the Application, Mr Mutua held brief for Mr Masinde for the 1st, 2nd, 4th and 5th Defendants, but the Plaintiff was neither present nor represented. The court noted that according to the court record, the application was filed on 2nd August, 2010. On the same date, it was given a date for hearing on 21st October, 2010. The hearing notice was duly served upon the Plaintiff's Advocates on 17th August, 2010, and their clerk acknowledged service thereof. It is instructive that the hearing notice served read partly as follows –

"…TAKE FURTHER NOTICE that if you do not attend by yourselves or a person authorized by law to act for you such order will be made and proceedings taken as the court may think just and

expedient."

Against that background, the Plaintiffs' Advocates were placed on notice that if they failed to attend court either by themselves or by a person authorized by law to act for them, the court would be at liberty to make such orders as it may think just and expedient. Granted that the matter was scheduled for hearing on 21st October, 2010, and that the Respondents' Advocates were served on 17th August, 2010, this court took the view that they had more than 2 months notice to prepare to attend court or instruct another counsel to hold their brief. However, they took none of those steps but instead declined to attend court.

The court further noted that upon service of the hearing notice, the Defendants' Advocates' clerk also endorsed the said hearing notice as follows –

"**Received under protest as Advocate handling matter will be engaged in another hearing. Date taken exparte. 12:00 p.m".**

It is noteworthy that this endorsement does not disclose any details regarding the Advocate handling the matter; the nature of the matter that the Advocate was going to attend to; nor the court where the hearing would be taking place. Noting that the Respondents' Advocates were given sufficient notice to attend court, and that they chose neither to attend nor to authorize another person to hold their brief without ascribing any sufficient reason for doing so, the court allowed the Applicants to proceed exparte.

Mr Mutua for the Applicants told the court that Mr Masinde, whose brief he was holding, relied entirely on the court record. That record showed that the suit herein was filed in court on 16th June, 2006. It also shows that the last act done by the Respondent was to file a reply to the 5th Defendant's statement of Defence, and that was on 2nd October, 2008. Pleadings closed 14 days thereafter, and no further action had been taken to fix the case for hearing. He submitted that this was prejudicial to the Applicants and urged the court to grant the prayers for dismissal and costs and prayed.

Since Mr Masinde opted to go by the court record, I note that the last act done in this matter by the Respondent was to file a reply to the 5th Defendant's statement of defence. That was more than 2 years ago. Order XVI Rule 5 of the Civil Procedure Rules under which this Application was brought states as follows –

"**5. If, within three months after –**

(a) the close of pleadings; or

(b) (deleted)

(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 my either set down the suit for hearing or apply for its dismissal."

The pleadings in this matter were closed 14 days after the filling of the reply to the 5th Defendant's statement of defence on 2nd October, 2008. That would place the date when pleadings were closed at 16th October, 2008. From that date to the date of the filling of this Application, there had been a spell of about 2 years during which the Plaintiff did not take any action to advance the cause of the hearing of this case. In addition to that delay, I note that the Respondent in this matter did not file either a replying affidavit or grounds of opposition to the application before the court. Coupled with the failure to attend court for the hearing of the application, this portrays, in my view, the Respondent's loss of interest in this matter. It has been lying dormant for about 2 years now and when that is looked at in the context and from the perspective of the date of the agreement which is the subject matter of this suit and which was 31st December, 1998, memories of many ordinary mortals may have considerably faded. There is also the

danger of documents having been lost or misplaced. Such factors would make it prejudicial to the Plaintiffs if the case is not prosecuted with haste.

Arising out of these concerns, I find that neither has the reason for not setting down this suit for hearing been given, nor has any material been placed before the court to enable the court exercise any discretion in favour of the Plaintiffs'. In those circumstances, I am persuaded that the Applicants are entitled to an order for dismissal of this suit under Order XVI Rule 5 (a) for want of prosecution, if only to protect the Applicants from unnecessary prejudice. I accordingly make the following orders –

(i) That this suit be and is hereby dismissed with costs for want of prosecution.

(ii) **That the costs of this application be and are hereby granted to the applicants**.

Order accordingly.

DATED and **DELIVERED at NAIROBI** this 11th day of November 2010

L NJAGI

JUDGE