REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 205 OF 2010

(Being an appeal from the Ruling of the Resident Magistrate dated 1st day of July 2010 in Nakuru Chief Magistrate's Court

Civil Case No. 925 of 2003)

JOHN NJUGUNA NDUNG'U.....1ST APPELLANT

GRACE WAMBUI KUNGU.....2ND APPELLANT

VERSUS

WARNER LAMBERT LIMITED.....RESPONDENT

RULING

This Ruling relates to a Notice of Motion dated 1st November 2010 brought under a Certificate of Urgency by the Defendant/Applicant for review of my order of 14th October, 2010, declining the stay of the hearing of CMCC No. 925 of 2003.

I have read both learned counsel's grounds, and Supporting Affidavit on reasons why my orders for 14th October 2010 should be reviewed and set aside. The grounds for review of court orders or judgment are set out in Order XLIV, rule 1 of the Civil Procedure Rules, and there is no need to regurgitate them here. This is because the Defendant's application raises basically one issue, priority in hearing of applications and suits. There is, I think little dispute in the proposition that applications filed first have priority in listing for hearing. That is more a rule of common sense than law. It is not always observed for applications filed later may quite often take precedence for various reasons. A common reason is urgency, to arrest a ship or aircraft about to set sail, or fly out to a foreign jurisdiction, to arrest a transaction that could be detrimental to an applicant's interest, for instance of land. In the listing of suits for hearing it could be due to diligence or indolence on the part of some counsel, or instructing parties.

In order to cater for these diverse and conflicting interests, rules of procedure govern the setting down of cases for hearing and consequences of inaction by parties or their counsel. For example Orders IXB rule 1, and Order XVI rule 5 set out the procedure on the procedure for setting down cases for hearing and dismissal respectively.

Order IXB rule (1) empowers a Plaintiff at any time after the close of pleadings, upon giving reasonable notice to every defendant who has appeared, to set down the suit for hearing. The critical test is that the plaintiff or his Advocate where he is represented, must give reasonable notice to every dependant who has appeared at the time when the suit is given a date or is fixed for hearing. The reason for this is obvious, so that a mutually convenient date is fixed for hearing and thus avoid unnecessary and costly adjournments.

This rule unfortunately is obeyed more in breach than observance. Even where parties or their Advocates are given reasonable notice, they or their agents, the Law Clerks fail to attend the Registry on dates for taking or fixing hearing dates. Hence one sees, Hearing Notices sent out, and at times false affidavits sworn that the notices were served when they in fact were not so served.

The other procedure for fixing or setting down hearing dates, or dismissal of suits is set out in Order XVI rule 5 and 6 of the Civil Procedure Rules. Rule 5 of that Order is in these terms –

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

(a) the close of pleadings, or

(b) the removal of the suit from the hearing list, or

(c) 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.

This order and rule is the genesis of the Defendant's contention, that once the Plaintiff had failed to set down the suit for hearing, and the Defendant had applied for dismissal of the suit for want of prosecution, the Plaintiff cannot defeat that application by fixing a hearing date, worse still, without reference to the Defendant as required by Order IXB rule (1) (supra). The Defendant's counsel's contention is also that once the application for dismissal had been filed, and set down for hearing, it had priority over the suit and should have been heard first.

These arguments evoke two issues. ***Firstly*** that a party who obtains a date for hearing of a suit *ex parte* breaches the provisions of Order IXB rule 1, that is, the other side, the Defendant ought to have been given reasonable notice for appearance before the registry. I agree with this contention. ***Secondly,*** what happensto an application for dismissal of suit where the suit has been set down for hearing during the pendency of an application for dismissal thereof for want of prosecution?

In the case of **Ivita vs. Kyumbu [1984] KLR 441** Chesoni J *(as he then was)* reiterated the test which courts regularly apply in applications for dismissal of suit for want of prosecution. These tests are ***"whether the delay is prolonged and inexcusable, and if 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."***

I might add that under the oxygen provisions introduced by Sections IA and IB of the Civil Procedure Act *(Cap 21 Laws of Kenya)* the overriding objective of the Act and rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The court is bound to handle all matters presented before it for the purpose of attaining timely disposal of proceedings and other proceedings in the court at a cost affordable by the respective parties.

It would be costly and poor use of the court's legal and administrative resources to argue and determine an application for dismissal of suit while the suit is fixed for hearing. Apart from denying the plaintiff a right to be heard where he has demonstrated the wish to be heard by setting down the suit for hearing it is

also harsh and oppressive for a defendant to insist to be heard where on an application for dismissal the suit has been set down for hearing. That will be unjust to litigants.

Whereas no suit should be allowed to hang over a Defendant's head *like the sword of Damocles* in my humble view, once a suit has been set down for hearing, it takes precedence over an application for dismissal for want of prosecution. In such a case the Defendant's remedy is in costs incurred in filing and serving such an application.

This is the logic that informed my order of 14th October 2010 and it is the same logic which informs me now in declining to review and set aside the said order. I therefore dismiss with no order as to costs the defendant's application dated 1st November, 2010 and filed on 2nd November, 2010 and argued before me by Mr. Mahida on the 2nd of November, 2010. I further direct that the lower matter CMCC No. 925 of 2010 be given another date on priority for hearing if the 5th of November 2010 is not suitable to the defendant. Those are the orders.

Dated, delivered and signed at Nakuru this 3rd day of November 2010

M. J. ANYARA EMUKULE

JUDGE