



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

CIVIL CASE 233 OF 2006

CONSOLIDATED BANK OF (K) LIMITED.....PLAINTIFF

VERSUS

JOHN NJOROGE GATHAMA.....1ST DEFENDANT

SWALEH MBARAK DOWRY

T/A SALEH TRADING COMPANY.....2ND DEFENDANT

R U L I N G

Before court is the Notice of Motion dated 2/12/2008 filed by the Defendant/Applicant seeking the dismissal of this present suit for lack of prosecution. The suit was filed in court on 13th October 2006 a period roughly 2½ years ago. The Defendant/Applicant argues that the Plaintiff/Respondent have failed to set the suit down for hearing terming this an inordinate and inexcusable delay on their part.

The Defendant/Respondent on their part oppose the application for dismissal and argue that the reason for the long time lapse is that they were awaiting the outcome of a Criminal Case No. 2292/2005 in which the Applicant was the accused.

In courts view a time lapse of 2½ years since filing a suit with no action by the Plaintiff is certainly an excessive period of time. Unless the Plaintiffs are able to satisfactorily explain such a delay the court would be inclined to allow this application. The Plaintiff/Respondent

do argue that since a criminal case had been instituted against the Defendant involving the subject matter of the suit i.e. Kshs.3.5 million, they (the Plaintiff) were relying on a common law principal that criminal cases take priority over civil cases and as such were awaiting the outcome of the criminal case before setting down this civil suit for hearing. This court is not aware of any such common law principle. The Plaintiffs have not cited any legal texts nor relied on any authorities to prove this so-called principal. Indeed as far as this court is concerned it is quite in order for both the criminal and civil cases to proceed concurrently, as the standard of proof required would be different in each case. Ms. Mbulikah for the Respondent further argues that the parties had come to a mutual understanding to allow the criminal case be finalized before proceeding with this suit. The Defendant however deny that such “***mutual understanding***” had ever been reached. In any event it would have made better legal sense if indeed such an agreement had been reached to file it as a consent in this case thus rendering it binding on both parties. Furthermore the judgement in the criminal case was delivered by Hon. Adika R.M. on 9th March 2008. That is one year ago. Even after the delivery of this judgement which the Defendant claim to have been eagerly awaiting they took no steps to set this matter down for hearing one year later. Finally on this point if the Plaintiff truly believed as they claim that the criminal case had priority and should be finalized first why did they as pointed out by Mr. Odongo for the Defendant/Applicant proceed to file this suit during the pendency of the criminal case. Why did they not await the outcome of that criminal case before filing these civil proceedings. These actions on the part of the Defendant clearly show that they did not really believe as they claim in the priority of the criminal case. This is just an after thought to explain their laxity in setting down the suit for hearing.

The next argument or reason advanced by the Plaintiff for the delay in prosecuting their case is that the exhibits they required were

held in the criminal case. Firstly the Defendant have availed no proof by way of a letter to the Executive Officer of the court concerned, that any attempt was ever made on their part to retrieve those documents. It appears that the Defendant lawyers contacted the police through O.C.S. Banking Fraud Investigation Unit in an attempt to retrieve the documents. By his letter dated 21/11/2008 the O.C.S. responded and rightfully informed them that any documents produced in a court of law as exhibits remain the property of the court and are no longer held by the police. Even after this clarification by the O.C.S. one month later on 8th December 2008 the Plaintiff again wrote to the O.C.S. asking to be informed the “**status**” of the documents. The Plaintiff did not bother to seek to obtain the documents from the court which held them and persisted in seeking them from the O.C.S. even after he had clearly informed them that the required documents were held by the court. This is laxity at best and negligence at the worst. In any event absence of the documents would not have prevented the Plaintiff from setting down the case for hearing. They could have and ought to have sought a hearing date even as they pursued retrieval of the documents. The fact that they failed to do this convinces the court that the Plaintiff/Respondent were quite comfortable to coast along having filed their suit. They have had no intention or plan to prosecute this suit. They have only been awakened from their slumber by the Defendant application for dismissal. Based on the foregoing, this court is satisfied that the delay by the Plaintiff in prosecuting this case actually has no proper or legal basis and are merely attempts to justify their delay in prosecuting this suit. The delay is certainly in the courts view unjustifiable but can it be termed inordinate so as to warrant a dismissal of the suit.

The delay we are talking about in this case is one of about 2½ years. The suit was filed on 13th October 2006 and to date the Plaintiffs have taken no action to prosecute it. Having considered the matter and taking all factors into account this court opines that a 2½

year delay cannot be termed inordinate. It is a fact that High Court diaries tend to be very congested and the Plaintiff may have been unable to secure early dates in any event. The court also considers that the amount of the claim is Kshs.3.5 million which is no small sum of money. In the interest of justice the Plaintiff ought to be given an opportunity to ventilate this claim and the court will not turn the Plaintiff away from the doors of justice despite their delay in prosecuting their suit. Therefore this court hereby dismisses the Defendants present application and orders the Plaintiff to set this suit down for hearing within ninety (90) days from the date of this ruling failing which the suit will stand dismissed. Costs to be met by Plaintiff/Respondent.

Dated and delivered at Mombasa this 27th day of May 2009.

M. ODERO
JUDGE

Read in open court

Mr. Mokaya holding brief for Mr. Odongo for Defendant/Applicant

No appearance by Plaintiff/Respondent