



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

Civil Suit 39 of 2006

FIDELITY COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

AZIM JAMAL VIRJEE 1ST DEFENDANT

FEISAL MOHAMMED MUGHAL.....2ND DEFENDANT

PIETY CELESTINO GOES.....3RD DEFENDANT

R U L I N G

The Notice of Motion application has been brought under Order L Rule 1, Order XVI Rule (a) of the civil Procedure Rules and Section 3A of the Civil Procedure Act. It is dated 30th March, 2009 and it seeks the following prayers.

1 THAT this Honourable Court be pleased to dismiss the Plaintiff's suit for want of prosecution.

2.THAT upon prayer number one (1) above being granted, this Honourable Court be pleased and allow the First, Second and Third Defendants' Counter-claim as prayed.

3. THAT the costs of this suit and application be awarded to the First, Second and Third Defendants/Applicants.

The application is based on grounds on the face of the application, the gist of which are; that the suit was filed on 3rd February, 2006 and that for a period of 15 months the Plaintiff or its Advocates have not taken any steps to prosecute the case. The application is supported by an affidavit sworn by Rose Ochieng', an Advocate practicing in the firm of Guram & Company Advocates, who are advocates on record for the Defendants. The affidavit summarizes the events in the case since the suit was filed. It also sets out the fact that the Plaintiff amended their plaint on 21st September 2006, eight (8) months after filing of the suit and that the Defendants filed their amended defence eight days after the amended plaint was filed. It shows that the Defendants have approved the Statement of Agreed Issues and that the issues are yet to be filed.

The application is opposed. The Plaintiff's Advocate Andrew Wandabwa, has filed a replying affidavit. In that affidavit, it is deposed that the same parties in this suit are embroiled in a Winding Up Cause No. 30 of 1999, which is partly heard before this court. The Advocate deposes that the Winding-Up cause is at a stage where the Receivers and Managers of Consumer Hire Purchase Limited are in the process of being cross-examined to determine whether they had misconducted themselves. The Advocate deposes

that the court's determination in the Winding-Up Cause would assist in reducing the judicial burden of determining the instant case and that that was the reason why the Plaintiff did not pursue its prosecution.

I have considered the submission by Mr. Billing for the Defendants/Applicants, and Mr. Wandabwa for the Plaintiff. Mr. Billing has in his submissions agreed that there is a pending Winding-Up cause between the parties in the suit. Counsel submitted that it was for that reason that the Defendants were not pursuing prayer 2 of the Notice of Motion application to have the Defendants' counterclaim granted as prayed in the amended defence and counter claim.

It appears to this court that the parties in this suit are genuinely embroiled in a Winding-Up Petition involving a company known as Consumer Hire Purchase. It is apparent that the Winding-Up Cause is related to the current suit, a matter which Mr. Billing for the Defendant has admitted and has explained that it is for that same reason that the Defendants have opted not to pursue prayer 2 of their Notice of Motion application.

The issue is whether this court should dismiss the Plaintiff's suit for lack of prosecution. The delay involved in the matter is 15 months, as set out in the face of the application which fact the Plaintiff has not contested. The principles to be applied in a case of this nature are set out the celebrated case of **Ivita vs. Kyumbu [1984] KLR 441** where Chesoni, J. (as he then was) held:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

Having considered the submissions by both counsel, and the affidavits sworn by both parties, it is my view that the delay involved in this matter is prolonged but it is not inordinate. The Plaintiff has advanced a reason why it has not set the suit down for hearing. The reason advanced is that there is a pending Winding-Up Cause which is directly related to the matters in issue in this case. Indeed from the plaint, the company, Consumer Hire Purchase Limited, is cited as the principle borrower and the Defendants in the suit are cited as the guarantors who gave personal guarantees as directors and/or shareholders of the principal borrower, to secure the borrowing by that company to the Plaintiff. I note from the defence that even though the borrowings pleaded in the plaint are contested, the existence of the company is nevertheless acknowledged. On a *prima facie* basis, it is apparent that there is a relationship between this case and the pending Winding-Up Cause. That being the case, the explanation given by Mr. Wandabwa for the Plaintiff, that the Plaintiff was minded to have the Winding-Up Cause heard and determined before setting the suit down for hearing, is a reasonable and acceptable explanation for the delay. I do find that the delay is therefore excusable in the circumstance. I must caution the Plaintiff that this excuse may not hold for any further delay in prosecuting the case.

The other part of the coin is that the Defendants must demonstrate what prejudice it stands to suffer due to the delay complained of and to show that justice will not be done due to the delay. The Defendants have not disclosed what prejudice they stand to suffer due to the delay complained of. I do not see evidence of any prejudice as the delay has not been inordinate.

In conclusion, I find no merit in the Defendant's Notice of Motion application dated 30th March, 2009 and therefore dismiss it with costs in the cause.

Dated at Nairobi this 19th day of June 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mrs. Sirai holding brief Mr. Billing for the Applicant

N/A for Mr. Wandabwa for the Respondent

LESIIT, J.

JUDGE