**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT KISUMU**

**Civil Suit 8 of 1997**

**NATIONAL BANK OF KENYA LTD. …….....…….……..PLAINTIFF**

**VERSUS**

**MARGARET ATIENO NDOLO ……. DEFENDANT**

**RULING**

This suit was filed initially at the High Court in Eldoret on the 19th September 2002. It is for a claim of

KSh.4,081,286/10 cts., arising from a loan and/or overdraft facility granted by the plaintiff National Bank of Kenya Limited to the defendant Margaret Atieno Ndolo. The defendant filed a statement of defence denying the claim and praying for the dismissal of the suit. A reply to defence was filed by the plaintiff and so was a reply to plaintiff's reply to defence by the defendant. The matter was thereafter set down for hearing and after some adjournments it was lastly fixed for hearing on 13th October 2004, on which date it did not proceed at all.

On 13th April 2006, the present application dated 28th March 2006 was filed by the defendant.

The application remained in abeyance while the parties engaged in negotiations to have the matter settled. The negotiations did not succeed and on the 22nd November 2006, when the application was placed before the court for hearing an order was made by the Court to have the matter transferred to the High Court at Kisumu.

On 9th July 2007, the parties appeared before Lady Justice Mugo sitting at the Kisumu High Court and indicated that they wished to give negotiation a chance before proceeding with the present application. The matter was stood over generally and a mention date given for 30th July 2007.

No settlement had been reached as at that date (30th July 2007) and a date for the hearing of the application was taken.

On 21st January 2008, the matter came up for hearing of the application but was adjourned and finally fixed for hearing on 23rd April 2008.

On the 23rd April 2008, the matter came up for hearing of the application and it proceeded in the

absence of the plaintiff despite having been notified of the date.

A return of service confirming service of the hearing notice upon the plaintiff through its advocates Mutei & Company Advocates Eldoret, was accordingly filed. Mr. Olel appeared for the defendant/applicant and argued the application. He relied on the grounds contained in the body of the Notice of Motion and the facts contained in a supporting affidavit deponed by the applicant dated 28th March 2006. He contended that the suit was last in court for hearing on 13th October 2004, when it was stood over generally and since then no steps have been taken to prosecute the matter. He relied on the decision of the High Court in the case of **IVITA Vs. KYUMBU [1984] KLR 441** where it was held that:-

**"The test applied by the courts in an application for the dismissal of a suit for want of prosecution is 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 direction of the court."**

Mr. Olel further contended that the plaintiff has not given any explanation as to the delay in having the matter prosecuted. He therefore urged the court to dismiss the suit for want of prosecution or alternatively have it struck out for being an abuse of the court process in that there is already another suit **(KSM HCCC 386/97)** involving the same parties and subject matter.

Although the plaintiff did not attend the hearing of the application it did file a replying affidavit dated 26th September 2006, deponed by its Kisumu Branch Manager.

In the said affidavit the plaintiff contends that the delay in having the matter fixed for hearing was occasioned by its previous advocates from which it has since withdrawn instructions. It concedes that there is another suit pending in Kisumu but contends that the suit involves the same parties and a different cause of action. It therefore urged the court to dismiss the present application.

With regard to the first segment of the application, the dismissal of suits for want of prosecution is provided for by **Order XVI Rule 5 if the Civil Procedure Rules [CPR]** which states that:-

**"If, within three months after:-**

**(a) the close of pleadings, or**

**(b) ---------- or**

**(c) the renewal 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."**

The provision gives a defendant the option to either set down the suit for hearing or apply for its dismissal. By this application, the defendant has settled for the later option and therefore what arises for determination by this court is whether she is entitled to exercise of the court's discretion in her favour.

The test applicable is similar to the one set in the case of **IVITA Vs. KYUMBU (Supra)** and all that may be asked is whether the delay was prolonged and whether the plaintiff has given a satisfactory explanation for the delay. The case was filed on 19th September 2002, and the first hearing date was availed by the court on 7th October 2003, but this was not to be. The record does not show what exactly took place on that date.

The next hearing date was set for 13th October 2004, and was fixed on 14th April 2004, by the plaintiff.

Nothing happened on the 13th October 2004. There is even no indication that the matter was presented before the court for hearing. The matter simply went into a prolonged sleep until the 13th April 2006, when it was awoken by this application at the behest of the defendant. It took about one and half years from the last date of hearing (i.e. 13th October 2004) to the 13th April 2006, when this application was filed.

Indeed there was prolonged delay in having the suit set down for hearing after the last hearing date. The explanation for the delay as contained in paragraph 4 of the replying affidavit is that it was not the plaintiff's fault but probably that of its former advocate. The explanation is vague and laced with uncertainty. The word *"Probably"* is an expression of uncertainty. It amounts to having no excusable or any reason for the delay.

The plaint was filed on 11th September 2002, by Mburu Okara & Co. Advocates who were still on record upto and including the 13th April 2006, when this application was filed. A change of advocates occurred on the 16th May 2006, with the filing of a name of change of advocates in which Tom Mutei, Advocate, was appointed to act for the respondent in place of Nyairo & Co. Advocates.

It is unknown whether Nyairo & Co. Advocates is the one and same Mburu Okara & Co. Advocates and if it is not, it would follow that Mburu Okara & Co. Advocates is still validly on record as representing the respondent.

The reason given for the prolonged delay is definitely absurd and unbelievable. It is far from satisfactory.

However, in the English Case of **[Allen Vs. Sir Alfred McAlpine {1968} 1 All ER. 543]** which was considered in the case of **Ivita Vs. Kyumbu (Supra), the Master of the Rolls Lord.** Denning stated as follows:

**"The principle on which we go is clear when the delay is prolonged and inexcusable and is such as to do grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straight away ------."**

Using the said enunciation by **Lord Denning, the court in another English decision Paxton Vs. Allsopp [1971] 3 ALL ER 370** stated:-

**"So the overriding consideration always is whether or not justice can be done despite the delay -----"**

The delay was referred therein as delay so great as to amount to denial of justice. In this case, was the delay so great as to amount to a denial of justice to the applicant?

This court would hold that despite the delay, it was not so great as to amount to a denial of justice to the applicant. This is demonstrated by the fact that despite the present application and prior to its finally being fixed for hearing, the applicant and the respondent were engaged in negotiations to settle the dispute between themselves without the involvement of the court. Indeed the hearing of this application was deliberately delayed to give room for negotiations and when the negotiations failed, the applicant quickly had the application fixed for hearing.

The applicant was ready and willing to settle the case with the respondent. If she felt prejudiced and subjected to injustice would she have agreed to put her application in abeyance to negotiate settlement??

It is apparent that she agreed to negotiate rather than purse her application within the shortest time

possible because she never felt prejudiced or subjected to injustice by the respondent's delay in setting down the case for hearing. Her conduct mitigates against exercise of discretion in her favour on account court of want of prosecution by the plaintiff.

With regard to the second segment of the application that the suit be struck out for being an abuse of the process of the court, the applicant contends that there is another pending suit involving her and the respondent being Kisumu HCCC No. 386 of 1997.

Mr. Olel submitted that this is the second suit involving the same parties and issues similar to the aforementioned HCCC No.386 of 1997.

In the replying affidavit the respondent concedes that there is another suit between the applicant and itself but contends that the subject matter is different.

Respecting this suit, in the plaint dated 26th August 2002, at paragraph six there is an averment indicating non-existence of previous proceedings in any court between the applicant and the respondent over the same subject matter.

The plaint was supported by a verifying affidavit deponed by the respondent's Branch Manager Kisumu called Musa K. Yego.

Paragraph three of the same plaint refers to a sum of

KSh.4,081,286/10 cts. being arrears arising from the applicant's default in repayment of a loan and/or overdraft facility granted to the applicant by the plaintiff at the applicant's request.

There is no indication as to when the amount was incurred. The statement of defence filed by the applicant on 31st October 2002, is a denial of the indebtedness and a contention that if such existed then the respondent honoured it at its own risk without any arrangement with the applicant as the offer was only for KSh.500,000/=. The defence does also not indicate the year or period of any transaction between the applicant and the respondent even though it suggests that if anything, the applicant was indebted to the respondent only in the sum of KSh.500,000/=.

The plaint in Kisumu High Court case No. 386 of 1997 is dated 18th November 1997. It is annexture marked **"MAN 1 (a)"** in the supporting affidavit. It however does not show when it was actually filed in court. It refers to overdraft facilities granted to the applicant by the respondent. It also refers to a figure of KSh.500,000/= and the period of the transaction having been in the year 1996. The suit was actually filed by the applicant against the respondent after the respondent made an attempt to exercise its statutory power of sale of a charged property. The respondent's defence in the suit (**i.e. annextures marked MAN 1(b)** in the supporting affidavit) does also refer to an amount of KSh.500,000/= which it contends the applicant bound herself to repay together with the usual commission, bank charges, legal and other costs. This court has had the opportunity to peruse the actual court file No. 386 of 1997 and has noted that the suit is pending and was last in court before Justice Warsame on 4th April 2006, for an application which did not proceed and was stood over generally. The application is dated 14th March 2006, by the applicant herein. The plaint in this case omits vital details such as the date and/or period of the disputed transaction and the nature of the alleged loan and/or overdraft facility.

With such omissions it is highly probable that the issues raised in the first case No.386/97 and this case may conflict or overlap them. The respondent is therefore being less than candid when it states in its replying affidavit that the cause of action in this matter is different from that in case No. 386/97. A demonstration of such lack of candidness is already displayed in paragraph six (6) of the respondent's statement of claim indicating that there is no pending suit and there has been no previous proceedings in any court between the respondent and the applicant herein. This court in the circumstances fully agrees with the applicant's contentions that this case is an abuse of the court process.

Order **VI rule 13 (1) (d) of the Civil procedure, Rules** empowers the court to strike out any pleading of the ground that it is otherwise and abuse of the process of the court.

The plaint giving rise to this suit is an abuse of the process of the court.

The suit must and is hereby struck out and dismissed with costs to the applicant.

Those are the orders of the court.

Dated and signed this 30th day of April 2008.

**J. R. KARANJA**

**JUDGE**