REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI MILIMANI COMMERCIAL COURTS

Civil Suit 1996 of 2000

BULLION BANK LIMITED…….....….……PLAINTIFF

VERSUS

KISHORE SUNERJI ADESHARA ……..…….1ST DEFENDANT

JAYSHREE KISHORE ADESHARA……...…….2ND DEFENDANT

HARISH SONI……..3RD DEFENDANT

RULING

The application is a Notice of Motion dated 7th March, 2008, expressed to be brought under **Order L rule 1** and **Order VI rule 5** of Civil Procedure Rules and Section 3A of Civil Procedure Act. It seeks orders dismissing this suit against the 3rd defendant for want of prosecution and for costs.

The are 3 grounds cited as the basis of this application. These are:

a) THAT pleadings on this matter closed in April, 2006 when we served our defence upon the Plaintiff.

b) THAT the plaintiff has since then failed to list this matter for hearing nor has he invited parties to fix this matter for hearing.

c) THAT two years have since elapsed since this matter was listed before the Honourable Court.

The application is supported by an affidavit sworn by **SANDRA OGOT,** an Advocate practicing in the firm of Oyatta & Associates who are the advocates on record for the 3rd defendant. The gist of the affidavit is that since the ex-parte judgment entered against the 3rd defendant was set aside, and since the 3rd defendant filed it's defence on 19th April, 2006, the Plaintiff has not taken any steps to have the case

set down for hearing.

The application was opposed. The Respondent has filed a replying affidavit sworn by WILFRED OROKO the Manager Legal Services in the Plaintiff Bank. The gist of the affidavit is that the Respondent will raise preliminary objection on a point of law that the application was misconceived, frivolous, scandalous, abuse of the court process and bad in law. The other important fact disclosed in the affidavit is that the plaintiff is still investigating the 3rd Defendant in order to establish the real issues between it and the 2nd Defendant, which are vital for the adjudication and determination by the court. It also points out the fact that discovery and inspection of documents as provided under Order X of the Civil Procedure Rules are yet to be undertaken and that therefore the suit is not ready for hearing.

The Applicant as represented by Ms Ogot Advocate. Counsel reflected the facts of the case as set out in the supporting affidavit and as supported in the affidavit of the Respondent. Ms. Ogot relied on the ruling of **Waweru J** in **FRANCIS KAROBIA VS STEPHEN GITAU HCCC NO. 53 OF 2005** where he observes as follows:

"***Unless the delay is prolonged, flagrant and inexcusable and is such as to do great injustice to the defendant, or indeed to both the Plaintiff and the Defendant, the court will not dismiss the suit. Put another way, the court will not dismiss a case for want of prosecution unless It is satisfied that the default has been intentional and contumelious or that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or is such as is likely to cause or have caused serious prejudice to the Defendant".***

Counsel urged Court to find that the Respondent has been indolent and as shown in it's affidavit, the Respondent was not ready to prosecute the Applicant at the time the suit was filed.

Mr. Watako appeared for the Respondent Mr. Watako urged that the application was brought under the wrong provisions since the enabling provisions were **Order L rule 1.**

I think that the Respondent's Advocate did not read well. The application is brought under **Order L rule 1** and **Order XVI rule 5** of the Civil Procedure Rules which are the correct provisions invoking the Court's jurisdiction to dismiss the suit for lack of prosecution.

The Counsels second complaint is that the application is supported by an affidavit sworn by an Advocate and so is incompetent. I do not think that that is the correct position. The Advocate swore to matters which came to her knowledge by virtue of being seized with the matter. The facts deponed to are infact confirmed by the Respondent in it's own replying affidavit. The affidavit cannot be challenged under **Order XVIII** and neither does it render the application incompetent.

Mr. Watako has urged the Court to find that the Court is being urged to invoke is discretionary and that it should only be invoked where sufficient explanation for the delay is not given. Counsel submitted that reason for the delay is the fact the Respondent has been overwhelmed trying to execute against the 1st and 2nd Defendants. Counsel relies on the case of **KIHARA VS BARCLAYS BANK HCCC NO. 33 OF 2002** at page 6 where

Azangalala J observed:

"***Now applying the principles stated in the above quotations to the circumstances of this cause, I have found that the period of delay of 21/2 years is long but it is not in the circumstances of this case inordinate and inexcusable. The explanation offered by Counsel for the Plaintiff is not unreasonable. I have also not found that the Plaintiff has lost interest in this case. The Defendant has not demonstrated that it will suffer prejudice if this suit is not dismissed"***

I have considered the application at hand. Most of the facts of this case are not in dispute. The suit was filed on 9th November, 2000. The Plaintiff obtained ex-parte judgment against all three Defendants. The ex-parte judgment against the 3rd Defendant was set aside on 4th March, 2006 and the 3rd Defendant filed the defence within time as ordered by the Court. It is not in dispute that it has been two years since any step was taken in this matter. Regarding the Respondents explanation for the delay, there are two explanations given. One that the Respondent has been busy trying to execute against the 1st and 2nd Defendant thus the delay. The other is that it is still conducting investigations against the 3rd Defendant before it can prepare the suit for hearing. The issue is whether the explanation is reasonable.

I do not find the explanation reasonable because what the Respondent is truly saying is that it will not be ready to prosecute the 3rd Defendant in the near future as it is engaged in certain investigations which it needs for purposes of determination by the court. The nature or scope of the investigations have not been disclosed. That admission, that it is carrying out investigations into the 3rd Defendant, is a clear demonstration that the Respondent is not ready to prosecute the matter anytime soon even if given the chance. The Respondent's conduct is contumelious and it does not deserve the exercise of discretion in it's favour.

The Applicant has stated that it continues to suffer prejudice due to the delay in prosecuting the case. The Respondent does not appear apologetic for this delay. The case is a clear, straight forward matter and there is no possible reason why the Respondent is not bent on proceeding with the matter.

Having considered this application I am of the view that given the circumstances of this case, the Applicant deserves to have the Court's discretion to be exercised in it's favour. I therefore allow the application, dismiss the Plaintiff's suit against the 3rd Defendant with costs and order that the Plaintiff to pay the 3rd Defendant's costs of the suit.

Dated at Nairobi this 9th day of May, 2008.

Ochieng holding brief Oyatta for Applicant/3rd Defendant

Luseno holding brief Watako for Respondent

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

LESIIT, J.

JUDGE