REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 1855 of 2000

AIRDUCT ENGINEERING LIMITED…….....……...PLAINTIFF

VERSUS

GRAHAM SILCOCK & JOHN STANLEY WARD

JOINT RECEIVERS & MANAGERS OF

INDUSTRIAL PLANT EA. LTD.……..…...1ST DEFENDANT

INDUSTRIAL PLANT EA. LTD.…….……2ND DEFENDANT

R U L I N G

The Defendants have by an application dated 21st January, 2008 expressed to be brought under Order XVI Rule 5(a) and Order L rule 1 of the civil Procedure Rules sought the dismissal of the case against them as filed by the Plaintiff on 19th October, 2000, be dismissed for want of prosecution.

The grounds for the application as cited on the face of the application are:

(a) That the Plaintiff has failed and/or neglected to set down this suit for hearing.

(b) That a fair trial will not be had on account of the delay as over 7 years have passed since the suit was filed.

(c) Justice delayed is justice denied.

(d) Public policy demands that suits be determined expeditiously without leading to serious backlogs in the administration of justice.

The application is supported by the affidavit of ALLEN W. GICHUHI, Advocate. In the affidavit the Advocate sets out steps taken in the matter since inception. It is averred by the said Advocate that since 25th November, 2002, no further step has been taken in the case to have it set down for hearing.

The application is opposed. The director of the Plaintiff Company HARMEL SINGH SAGOO, has filed a replying affidavit dated 22nd April, 2008. The gist of the said affidavit is that pursuant to a court ruling of 24th July, 2002, the Defendant released certain machinery and equipment to the Plaintiff with the last set of equipments being released on 25th March, 2003. Mr. Sagoo deposes that parties attempted to settle

the matter unsuccessfully. The deponent also annexes a copy of an application filed in this case by the Defendants in which an order was sought to have the matter marked as settled. Mr. Sagoo deposes that the application remained filed in court until 2006 when the Defendant withdrew it. Mr. Sagoo has also annexed a letter from the Plaintiff's advocates to the Defendant's advocate inviting them to fix a date for the hearing of the case. The letter is dated 26th March, 2008.

The Plaintiff has also opposed the application through Grounds of Opposition filed in court on 18th April, 2008. The grounds raised therein are the ones substantiated in the replying affidavit and I need not repeat them except the last two grounds where it is stated as follows:

"***6. That the present application is therefore frivolous, vexatious and incompetent.***

7. That the present application is an abuse of the process of court."

The Defendants advocate filed written submissions in which he annexed several authorities which he relies upon. I have considered the written and oral submissions by Mr. Gichuki for the Defendant and cases relied upon.

The plaintiff has not filed any submission. I have considered the oral submissions by Mr. Kurgat made on behalf of the Plaintiff.

Having considered submissions by Counsel, I am of the view that the issue for determination is quite simple. Mr. Gichuki's position is that the substratum of the Plaintiff's case ceased to exist the moment machinery and equipment held by the Defendants were released to the Plaintiff Company. Mr. Gichuhi argued that what is pending in the matter was a claim for damages for trespass, interest and costs and that since the Plaintiff has not set the suit down for hearing since 2002, then the matter should be dismissed. Mr. Kurgat's argument is that the issue whether the substratum of the case does or does not exist is a matter that could not be determined in an application for dismissal of the suit. Mr. Kurgat argues further that the Plaintiff was not to blame for failure to set the suit down for hearing since the failure was militated by negotiations engaged by the Defendants between 2003 and 2006, and the Defendants application filed in 2005 seeking to have suit marked adjusted or settled.

Having considered the submissions by both Advocates and affidavits by both parties, it is quite clear to me that there has been negotiations between the parties up to and including 2006 which fact has not been controverted by the Defendant. It is also clear that an application by way of Notice of Motion was filed by the Defendant in 2005 seeking to have suit marked adjusted or settled. The basis upon which the application dated 11th November, 2005 was grounded were correspondences exchanged between the parties between 17th December, 2004 and 29th July, 2005, as stated on the body of the Notice of Motion. That application acknowledged that some negotiations between the parties had taken place up to 2005 when the motion was filed. The fact that the motion was eventually withdrawn by the Defendant does not change the facts stated on the body of the application especially in regard to negotiations conducted by both parties. Taking all these facts into consideration, the delay involved in the matter is far less than that alleged by the Defendants in their application. The last step taken by the parties in this case was in November, 2005 and not 2002 as alleged. The delay involved is therefore less than 3 years.

Under **Order XVI rule 5** of the **Civil Procedure Rules**, the duty to set down the suit for hearing is a joint responsibility of the Plaintiff and the Defendant. Of course the variations being that the Defendant has an alternative option of applying to have suit dismissed instead.

IVITA VS. KYUMBU [1984] KLR 441 sets out the principles to be had when considering an application of this nature**. Chesoni, J.** as he then was, adopted **LORD DENNINGS** sentiments deploring Plaintiffs neglect or delay in prosecuting its case in **ALLEN VS. Mc APLINE [1968] 1 ALL ER 543. Chesoni, J. in IVITA's** case, supra, put it in the following manner:

"***A defendant who has waived or acquiesced in delay is not entitled to a dismissal of the action for want***

of prosecution but mere inaction on the part of such defendant does not amount to a waiver or acquiescence. 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 discretion of the court."

I have considered the holdings in the cases relied upon by Mr. Gichuhi i.e. **Peter Muinami vs. Barclays Bank of Kenya**, **Milimani HCCC No. 1046 of 1999, ANTHONY KEGODE –V- FOUR NINETY INVESTMENT LIMITED & OTHERS HCCC No. 379 of 2004, FITZ PATRICK –V- BAYGER & CO. LITD [1967] 2 ALL ER 657, NILANI VS. PATEL [1969] EA 340, SHEIKH –V- GUPTA [1969] EA 140 and VICTORY CONSTRUCTION CO. LIMITED VS. DUGCIAL [1962] EA 697.**

Having considered all these cases it is quite evident that in Kenya the primary consideration in applications for dismissal of cases, is not the delay or the flagrant and culpable inactivity *per se*.

The primary consideration is whether the delay is prolonged and if so whether one, the Plaintiff has a reasonable and cogent explanation for the delay that could render the delay excusable and two, whether justice can still be done despite the delay. The Defendant has to show that it will be prejudiced by the delay.

On the Plaintiff's part, the delay we are looking at is between 11th November, 2005 when the Defendant's application was made to have suit adjusted, and January, 2008 when the instant application was filed, a period of two years and two months. The Plaintiff's explanation is that parties were engaged in negotiations and secondly that hearing dates were not availed in the meantime.

Regarding the negotiations between the two parties, the Defendants were not candid that such negotiation took place before the instant application was made. In fact Mr. Gichuhi for the Defendants urged the court to disregard the Defendant's application of 11th November, 2005 and therefore ignore the evidence of negotiations between the parties which were the basis of that particular application.

Even without determining whether the Plaintiff's explanation is reasonable or acceptable to warrant the court to find it excusable, the court cannot ignore the Defendant's lack of candour in the matter. The Defendant is asking the court to exercise its discretionary power in his favour. For such discretion to be exercised in the Defendant's favour, he ought to have made full disclosure of all the facts of the case especially those which may have limited the suit from being fixed for hearing. Having considered this matter, I find that the Defendant was guilty of selective disclosure.

In regard to the Plaintiff's responsibility to explain the delay, the delay involved here is long. However, it is not inordinate, the Plaintiff having given a reasonably and acceptable explanation to the effect that the parties were engaged in negotiations.

The Defendants onus was to show that the delay will cause them to suffer prejudice. No attempt has been made by the Defendants to demonstrate the prejudice the Defendants may suffer as a result of delay in this matter.

Having considered this application, I have come to the conclusion that the same is not merited. I do agree however that there has been prolonged delay in this matter and accordingly I rule as follows: -

1. The application dated 21st January, 2008 be and is hereby dismissed.

2. The Plaintiff do set down the suit for hearing within 30 days from date herein.

3. Each party to bear their own costs for the application.

Dated at Nairobi, this 23rd day of June, 2008**.**

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

No appearance for Defendant/ Applicant

Kitur holding brief Mr. Oseko for Respondent

LESIIT, J.

JUDGE