REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 228 OF 2008

THIKA COFFEE MILLS LIMITED ……....…..……PLAINTIFF

VERSUS

HON. JOHN NJOROGE MICHUKI ……DEFENDANT

RULING

This is an application (chamber summons dated 30th January 2007) by the Defendant seeking an order for dismissal of the Plaintiff's suit for want of prosecution. It is brought under Order 1, rule 5 (c) of the Civil Procedure Rules (the Rules). Under that rule, if, within three months after the removal of the suit from the hearing list, the Plaintiff, or the court of its own motion on notice to the parties, does not set down the suit of hearing, the Defendant may either set the suit down for hearing or apply for its dismissal. It is the Defendant's case that since removal of the suit from the cause list of 20th March 2006 during the main **call-over**, the Plaintiff has not taken any steps to take fresh hearing dates.

The Plaintiff has opposed the application as set out in the replying affidavit filed on 3rd May 2007 which is sworn by one NASEEM MACHOOKA who describes himself as a manager of the Plaintiff. The grounds for opposing the application as disclosed by the replying affidavit are:-

1. That the supporting affidavit is defective for being sworn by an advocate acting in the matter, and that therefore the application is incompetent.

2. That it is not true that the Plaintiff lacks interest in prosecuting the suit.

3. That it is the Defendant who has on various occasions prevented prosecution of the suit by inviting the Plaintiff to seek an out-of-court settlement.

4. That the Plaintiff is interested in prosecuting the suit and should be allowed to do so in the interests of justice.

I have considered the submissions of the learned counsels appearing, including the authorities cited. It is common ground that the suit was removed from the cause list of 20th March 2006 in a **call-over** held before that date. It also appears from the court record that since 20th March 2006 the Plaintiff has not set down the suit for hearing.

Before I consider the merits of the application, I have to decide the issue raised about the alleged defect of the supporting affidavit. It is submitted on behalf of the Plaintiff that paragraph 5 of the supporting

affidavit deposes to a contentious matter, and that therefore the affidavit is defective and ought to be struck out along with the application it purports to support. That paragraph states:-

"**5. That due to this lack of interest manifested by the failure by the Plaintiff to expeditiously prosecute the case, the same remains hanging over the Defendant's head thereby causing him unnecessary anxiety."**

Objection has been taken to the deponed fact that the suit continuing to hang over the Defendant's head is causing him unnecessary anxiety. Rule 3(1) of Order 18 of the Rules requires that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove,

"**Provided that in interlocutory proceedings, or by leave of the court, an application may contain statements of information and belief showing the sources and grounds thereof."**

The Defendant's counsel has not shown the sources and grounds of the information or belief that the Defendant is suffering anxiety on account of the suit. Paragraph 5 of the supporting affidavit must therefore be, and is hereby, struck out.

But there is no merit in the submission that the entire supporting affidavit must be struck out for having been sworn by an advocate acting in the matter. There is no rule of procedure or law barring an advocate acting in a matter from swearing an affidavit therein. But it has been stated by many learned judges of this court as well as of the Court of Appeal that where a party is available to swear an affidavit it is not desirable for an advocate to swear the affidavit because he thereby risks embarrassment by being called from his privileged position as counsel to be cross-examined on the affidavit he has sworn. However, where the facts are such that he is able of his own to prove them, or as provided for in the proviso to rule 3(1) above, the advocate may swear an affidavit, especially if his client is not readily available to swear the affidavit.

Regarding the merits of the application, the court will not dismiss a suit for want of prosecution unless it is satisfied:-

1. That the default has been intentional and contumelous.

2. That there has been prolonged or inordinate and inexcusable delay on the part of the Plaintiff or his advocate.

3. That such delay will give rise to a substantial risk that it will not be possible to have a fair trial of the case, or is such as is likely to cause or to have caused serious prejudice to the defendant.

4. That except in cases of contumelous conduct by the plaintiff, the power to dismiss an action for want of prosecution should not be exercised within the currency of any relevant period of limitation as the plaintiff could then simply file another action or these principles see "**HALSBURY'S LAWS of ENGLAND",** 4th **Edition, Volume 37, paragraph 448**. It has also been repeatedly held by our higher courts that, the power to dismiss a suit for want of prosecution being so drastic, it should be exercised only as a last resort, and where the suit can be heard without further delay, an application for dismissal ought to be refused.

I have considered the application with the above principles in mind. I do not find that the Plaintiff's failure to prosecute the suit has been intentional and contumelous. There is no evidence that the Plaintiff has failed to prosecute the case due to some ulterior motive. Nor has he been in disobedience of any court order requiring him to take some action towards prosecution of the case.

But there has been a fairly long delay of some ten (10) months between the removal of the suit from the hearing list of 20th March 2006 and the bringing of this application on 30th January 2007. The Plaintiff did not take any action at all in those ten (10) months towards prosecution of the suit. What is his explanation for this lapse? He states in paragraph 6 of the replying affidavit that it is the Defendant

"**who has on various occasions prevented the prosecution of this matter by his suggestion that (the matter is) amenable to out-of-court settlement"**.

He has annexed a number of correspondences exchanged between the advocates, one of which was written on a without-prejudice basis. But those correspondences span the period 16th to 31st May, 2001, long before the suit was removed from the hearing list of 20th March 2006. There is thus no explanation for the ten-month delay, which delay I consider inordinate in the circumstances of this case. The delay is inexcusable.

It has not, however, been demonstrated by the Defendant that the delay will give rise to a substantial risk that it will not be possible to have a fair trial of the case, or that the delay is such as is likely to cause or has caused serious prejudice to the Defendant. For this reason alone I will refuse the application. It is hereby dismissed. But to show the court's reprehension of the delay in prosecuting the suit, I will award costs of this application, hereby assessed at KShs. 35,000.00, to the Defendant. The same shall be paid within fourteen (14) days of delivery of this ruling. In default the Defendant may execute for the same.

I will further order that the Plaintiff do take, within thirty (30) days of delivery of this ruling, a demonstrable step towards prosecution of the suit. In default the suit shall stand dismissed for want of prosecution without necessity of any further application.

Those shall be the orders of the court.

DATED AT NAIROBI THIS 5TH DAY OF JUNE 2007

H. P. G. WAWERU

JUDGE