REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 210 of 2005

JANET OSEBE GECHUKI…….....……PLAINTIFF

VERSUS

THE COMMISSIONER OF CUSTOMS & EXCISE

& RAJEN H. MALDE…….....……..DEFENDANTS

RULING

The background information to this application and ruling in respect of the same is that the plaintiff filed a suit herein dated and filed the same date of 24.2.05. The suit was accompanied by a chamber summons dated and filed the same date of 24.2.2005. A perusal of the record shows that the application came up for hearing on 19.10.2005 and was partly heard. It came up again on 8.11.2005 and 30.11.2005 for hearing but it was not reached due to a busy schedule of the Court.

During the pendence of the said application the first defendant was served and it entered appearance dated 14.4.2005 and filed the same date. The defence is also dated and filed the same date.

The court has not traced the memo of appearance and defence of the second defendant on record.

During the pendence of the first application the second defendant filed an application dated 16th day of February, 2006 and filed on 17.2.2006 seeking orders for the discharge of the interim orders issued on 24.2.2005 which were issued in respect of the application which is part heard and it is still pending hearing.

There is entry on the record as to what transpired on 30.11.2006. It is clear that on this date it is noted that the court had a long list and it could possibly not be heard on that date. It was marked S.O.G. for new dates to be taken at the Registry on priority.

In the meantime the 2nd defendants application dated 16.2.2006 and filed on 17.2.2006 intervened. There are 2 entries for 20.2.2006 and 27.2.2006 but it is not clear as which matter was being fixed for hearing. On 3.3.2006 the Court fixed the application of 16.2.2006 for hearing on 20.3.2006 on 20.3.2006 the application of 16.2.2006 was stood over to 28.4.2006. On 28.4.2006 the court was informed that the orders sought to be set aside are in respect of an application which is still pending hearing and was part heard before another judge. On the basis of this revalation the judge then seized of the matter, referred the matter to the judge before whom the application whose orders were being sought to be set aside was part heard.

On 5.5.2006 both applications were placed before the judge before whom the first application was part

heard. An election was made by the learned judge and the part heard application was fixed for hearing on 28.7.2006. There is no entry for 28.7.2006. The net effect of this is that the 2nd defendant's application of 16.2.2006 was left in abeyance and so it is still pending. The plaintiff's application of 24.2.2005 which is part heard before Justice Ojwang is still pending on record.

In the meantime the 2nd defendant filed the application subject of this ruling dated 28.2.2007 and filed on 16.3.2007 by way of notice of motion under order XVI rule 5(c) of the Civil Procedure Rules seeking orders that the plaintiff's action be dismissed with costs for want of prosecution and that costs for the application be provided for. The application has grounds in the body of the application, supporting affidavit and oral submissions in Court and the major ones are that:-

(1) pleadings closed on 22.3.2005 and since then the Plaintiff has not taken any steps as regards readying the suit for hearing and disposal by setting in motion discovery and inspection procedures.

(2) That there is also an interim application which is part heard which the plaintiff has not bothered to fix to have it disposed off.

(3) That the plaintiff has in her favour interim orders which she seems to be using to delay the disposal of the matter.

(4) The subject of the proceedings is a vehicle purchased by the second defendant and the longer the proceedings delay the more it depreciates and it is likely to lead to serious loss to the second defendant.

(5) That the application should be treated as un opposed as the replying affidavit cannot hold as the same has been sworn by counsel instead of it being sworn by the client. The said replying affidavit depones to contentious this matters and so the same should be struck out. Further it has annexed without prejudice correspondences which are not allowed in law and the same should be struck out.

(6) That the delay and mention on the part of the plaintiff is not excusable.

(7) Issues of negotiations cannot be relied upon as there were abandoned long ago and it was wrong for the plaintiff to continue pursuing them.

(8) There is no authority from the client to depone to contentious matters.

(9) The suit should not be allowed to stand as the same is causing hardship and prejudice to the applicant 2nd defendant.

Counsel for the 1st defendant supports the application although no papers were filed by them.

Counsel for the plaintiff has opposed the application on the grounds set out in the replying affidavit, annextures, oral submissions in court and case law. The major ones are as follows.

(1) That the deponents in the supporting affidavit relate to his own personal knowledge and so it is not true that he has deponed to contentious matters which should have been deponed to by his client.

(2) That it is not true that they respondents have exhibited correspondences falling in the category of without prejudice as none of them is indicated to be on a without prejudice basis.

(3) That negotiations took a bit of time as parties explored the possibility of settling the matter amicably.

(4) That there is a pending interlocutory application which has been partly argued and it is part heard fully argued by Respondent. It is the applicant/defendants who are supposed to wind up their submissions and they should also have made efforts to fix the matter for hearing before moving to have the same

dismissed.

(5) That delay in the disposal of the matter has also been occasioned by requests for adjournments by the defence, an attempt to have the file transferred to Milimani Commercial Court and the filing of an intervening application by the second defendant seeking the discharge of the interim orders granted herein.

(6) That the plaintiff Respondent has been inviting the defendants to attend court for the fixing of hearing dates to have the interim part heard application disposed off but oneach occasion they are invited they never turn up. The Plaintiff/respondent was surprised when he received an application seeking to have the suit dismissed for want of prosecution.

(7) He maintains that the plaintiff/respondent has been diligent in the prosecution of the suit but it is the defence who have been frustrating their efforts.

(8) The provisions of law as interpreted by cases referred to state the correct position in law save that the court has to bear in mind the fact that:

(i) Each case depends on its own facts and circumstances.

(ii) The exercise of the power is discretionary.

(iii) Dismissal of pleadings is a drastic power which have to be applied sparingly.

(iv) In the circumstances of this case the conduct of the parties is of paramount consideration.

(v) That in the circumstances of this case there is no delay caused as they have explained in detail the actions they have been taking in trying to bring the matter to its final conclusion.

(vi) The crucial test that this court is to deal with is to determine whether the delay is excusable or not. It is their stand that in the circumstances of this case, the delay if any is excusable as the plaintiff is not the sole cause of the delay. And therefore there is room for doing justice to the parties in the matter. They maintain that they have shown sufficient cause to warrant this court in exercising its discretion in their favour by declining to dismiss the suit for want of prosecution.

On the courts assessment of the facts herein, it is clear that the application is brought under order XVI rule 5(c) which deals with dismissal of pleadings for want of prosecution. It states 5 *"If within three months after –*

(a) the close of pleadings or

(b) the removal of the suit from the hearing list or

(c) the adjournment of the suit from the hearing list or

(d) the adjournment of the suit generally the plaintiff or the court on 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".

This provision has been applied in numerous cases relied upon by both sides. The plaintiff relied on the case of **SAGOO VERSUS BHARJI [1990] KLR 459** in which the plaintiff failed to take out summons for directions and to set down the suit for hearing. It was held inter alia that it is not the practice of the courts to exercise the drastic power of dismissing a suit unless satisfied that there has been intentional in ordinate or in excusable delay on the part of the plaintiff and that there is a risk that the delay would inhibit a fair trial or that would cause prejudice to the defendants. In this case the order was declined because it had been shown that the suit had only been recently filed, there was no specific order which

had been willfully disobeyed, nor had it been shown that the prejudice had occured or was likely to occur. On that account the court saw no justification to dismiss the suit.

In two decisions **SARAH ACHIENG ACHOR VERSUS PETER EVEREST OTIENO T/A CLEAR PRINT STATIONS AND ANOTHER MILIMANI COMMERCIAL COURT HCCC NO. 549/2001 by** Njagi J. And **NATIONAL HOSPTIAL INSURANCE FUND VERSUS EQUITY BUILDING SOCIIETY NAIROBI MILIMANI COMMERCIAL COURT HCCC NO. 29/2003** Emukule J. traced the current application of this rule to **LORD DENNING'S** reasoning in the case of **ALLEN VERSUS SIR ALFRED MC APLINE AND SONS LTD [1968] ALL E.R.543,** quoted by Chesoni J. as he then was **IN WITA VERSUS KYUMBU [1984] KLR 441.** In Allens case at page 378 the following words are stated "*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. So the overriding consideration always is whether or not justice can be done despite the delay. At page 561 it is stated* "as a rule when inordinate delay is established until a credible excuse is made out the natural inference would be that it is inexcusable. It is an all time saying, which will never wear out however often said that, justice delayed is justice denied". At page 546 and 547 "*The delay of justice is a denial of justice ….. to no one will we deny or delay right or justice. All throughout the year man(and woman) have protested at the law's delay and counted it as a grievous wrong hard to bear, Shakespeare raises it among the whips and scorns of time (**HAMLET ACT 3 SC.I. Dickens)** tells how it exhausts finances, patience, courage. Hop(Black Horse C.1). to put right this wrong, we will in this court do all in our power to enforce expedition and if need be we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit. It is mainly effective sanction that they contain".*

561"If he (i.e. the plaintiff) personally to blame for the delay no difficulty arises. There can be no injustice in his bearing the consequences of his own fault"

The applicant/defendant on the other hand referred the court to the case **SAFINA LTD VERSUS JAMNADAS (K) LTD MILIMANI COMMERCIAL HCCC. 1427 of 2000.** At page 2 paragraph 2 lien 8 from the bottom Kasango J. observed:-

"*It is obvious that when parties file court actions it is expected that they would follow the prosecution of such action with diligence. It was the plaintiff's responsibility to ensure that the case was prosecuted without delay …. Any delay in such proceedings can sometimes lead to prejudice to the defendant. The plaintiff has itself to blame for having gone to sleep in this matter".*

In the case of NGIBUINI VERSUS HOUSING FINANCE COMPANY OF KENYA

ILIMANI COMMERCIAL COURT HCCC NO. 265/01 where the plaintiff was enjoying exparte interim orders and had not bothered to process the interim application or the main suit for hearing and where the defendant had at least fixed the interim application once for hearing Ondeyo J. as she then was found in action on the part of the plaintiff and dismissed both the interim application as well as the main suit for want of prosecution.

In the case of AL AMIN AGENCY VERSUS SHARRIF OMAR AND ANOTHER MSA 272 OF 1996 MARAGA J. set out what he believes to be factors and principles that a court considering such an application should look into. These were derived from decided authorities considered in that ruling as well as the learned judges own construction of order XVI Rules 5. These are:-

(1) Dismissal of a suit for want of prosecution like the striking out of pleadings should be regarded to be a draconian action which should only be taken in exceptional cases because such an action deprives the plaintiff of his cause of action against the defendant and in some cases where the issue of limitation arises leaves them with no remedy at all. Such an action should therefore be taken down on laid down principles.

(2) The test to be applied in applications such as this is whether there has been prolonged inordinate and

inexcusable delay in having the case heard and if there has been such delay whether justice can nonetheless be done.

(3) That even though there is prolonged or in ordinate delay if the court is satisfied with the plaintiffs excuse for delay and justice can still be done to the parties the suit will not be dismissed and will instead be ordered to be set down for hearing as soon as possible.

(4) The suit will not also be dismissed if it is shown that the defendant waived or acquiesced in the delay. But mere in action on the part of the defendant cannot however amount to waiver or acquiescence. There must be some positive action on the part of the defendant which intimates that he agrees that the case should proceed thus inducing the plaintiff to do further work and incur further expenses in the prosecution of the case.

(5) Should however be further series delays on the part of the plaintiff after the defendants acquiescence in or waiver of the earlier delay, the whole history of the case may be taken into account in deciding whether or not the case should be dismissed.

(6) There is no fast or hard rule as to what amounts to delay. In some cases a few months will amount to inordinate delay. In others it will be a period of years. Intentional and contumelious delay even though short will be inexcusable.

(7) Each case depends on its own facts.

(8) Also to be considered is whether there has been disobedience of a pre-emptory order of the court. If there has been it is regarded as intentional and contumelious and the suit will be dismissed.

(9) It is of the greatest importance in the interest of justice that cases should be brought to trial within reasonable time. When they are delayed there is a risk of denying justice not just to defendants but even to the plaintiffs as well because

(i) where a case is one in which at the trial disputed facts will have to be proved by oral testimony and there is prolonged delay, there is a risk that witnesses may die or disappear.

(ii) The recollection on those that remain of events that happened several years back may have grown dim and in such case there will be a substantial risk that a fair trial of the issues is no longer possible.

(10) The defendant has not only to show that there has been inordinate or prolonged delay but also that because of that delay it is no longer possible to have a fair trial. He also has to prove that he is likely to be seriously prejudiced by the delay.

On the question as to whether Counsel should have deponed the replying affidavit or not the defence referred the court to the ruling in **NAIROBI HCCC 2779/98 SOLOMON NDOLO OBEDE VERSUS NATIONAL BANK OF KENYA** where at page 2 of the said ruling Mitey J. a he then was quoted Ringera J. as he then was in **KISYA INVESTMENTS LTD AND ANOTHER VERSUS KENYA FINANCE CORPORATION LTD AND OTHERS HCCC NO.3404/93,** had held that by deponing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box and he is liable to be cross-examined on his depositions. On the basis of that finding, Mitey J. he then was made observations that he believes that "*it is not part of an advocates brief to swear affidavits in contentious matters on behalf of a client who can properly do so himself. An advocate should jealously keep his position by declining to be drawn into controversies between parties however genuine or strong his client's case may appear to him*".

In the case of **ABDALLA HALMAN AL-AMRY VERSUS SWALEH S.A. BAHAZIR MSA C OF 63 OF 1995** Waki J. as he then was (now JA) at page 3 of the ruling line 8 from the top said this "*I have stated before that such Affidavit sworn by Advocates when their clients are available to swear on their own knowledge to the truth of the matters stated are bad in law and will not be admitted*". *In the case of*

CANE LTD VERSUS DOLPHINE HOLDINGS LTD AND ANTOHER Justice Mbaluto at page 2 of the ruling stated:-

"Also irregular is the habit which is becoming all too common these days of advocates swearing affidavits on behalf of their clients in contentious matters which practice can lead to the awkward situation whereby an advocate may have to be put in the witness box to be cross-examined in a matter in which he is appearing. That practice should be discouraged.

On without prejudice correspondences the Court was referred to the case of **D.O.SANGA AND ANOTHER VERSUS RELI CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LTD MILIMANI COMMERCIAL COURT HCCC NO.109100.** In this case objection was raised to annexture JMO 5 which bore the words "on a without prejudice basis". **OYANGO OTIENO J.** as he then was (now J.A.) quoting from **PHIPSON** on evidence 12th Edition page 552 at paragraph 20-61 dealing with facts excluded by privilege where it states is "without prejudice. Protects subsequent and even previous letters in the same correspondence; and an admission made during a bona fide attempt to settle a dispute has been excluded even when not expressly made without prejudice. The test is whether the communication was part of a genuine attempt to settle a dispute. If so the whole course of the negotiations is protected. It is immaterial that it can be said from individual documents that they contain no offer. Equally, the mere fact of the heading of a document "*without prejudice is not in the least decisive. If its protected status is challenged, then the court must look at it and establish its true nature. Documents which came into being under an express or tacit agreement that they should not be used to the prejudice of either party will not be ordered to be produced on discovery"* On the basis of the foregoing Onyango J. (now JA) summarized the test to be applied as "*thus the real test is whether the communication was a part of a genuine attempt to settle a dispute and if a document was made under an agreement whether express or tacit that it should not be used to the prejudice of either party then such a document should not be produced"*. On the basis of the above the annexture JMO5 which had been marked "without prejudice" was rejected from production. In the case of **AMUNGA VERSUS UNITED INSURANCE CO. LTD NAIROBI, HCCC 1186/00 Visram** J. ruled that the mere marking of correspondence as without prejudice does not automatically render them in admissible. Such statements are not excluded unless they are made in the course of negotiations for the settlements of a dispute.

Applying they principles gathered from the various decisions in cases cited to this court by both sides it is clear that in determining the application the court, has to answer the following questions.

(1) Whether the plaintiffs Counsels deponing of the replying affidavit has deponed to contentious issues and therefore the affidavit is fatally defective and un maintainable.

(2) Whether the numerous correspondences annexed to the replying affidavit fall into the category of without prejudice correspondences in capable of being produced in evidence and should therefore be expunged from the court record and are not to be relied upon.

(3) Whether the 2nd defendant applicant has not only shown that there has been inordinate or prolonged delay but also that because of that delay it is no longer possible to have a fair trial.

(4) Whether in the circumstances of this case the defendant should have set down the suit for prosecution before moving to have it dismissed for want of prosecution.

(5) And lastly which way and or in favour of whom is the courts discretion to be exercised in the circumstances of this case.

As regards contention that Counsel for the Plaintiff has deponed to contentious matters, particular objection has been raised in respect to paragraphs 5,11,26, 32,38, 40 as being contentious it is now trite law established by judicial practice as shown by case law already cited in this ruling that it is undesirable for Counsel to depone to contentious matters when the client is available to depone to the same. Such was the holding by courts of concurred jurisdiction in the case of **SOLOMON NDOLO OBEDE VERSUS NATIONAL BANK OF KENYA LTD NAIROBI. HCCC 2779/98 AND ABDALLA H.A.**

VERSUS SWALEHS A.B. MSA C.A. 63/95. Though not binding on this court they state the correct position in judicial practice as the role of Counsel in a proceeding is not to be partisan but to be as impartial as far as they can go in order to bring on board all the relevant issues involved in the case to enable the court arrive at a just decision in the matter for ends of justice to all the litigants involved. Where a partisan stand is taken there is a likelihood of personalizing proceedings likely to lower standards of professionalism called for in the conduct of Court proceedings. And lastly there is a risk of requiring Counsel to be cross examined on the deponents thus throwing not only the affected Counsel but all those involved in the proceedings in an awkward position of having to call upon Counsel to handover the brief to another Counsel. This court has revisited those paragraphs in abid to determine whether they are contentious or not. Paragraph 5 refers to the conversation between both Counsels in paragraph 4 of the replying affidavit and has nothing to do with the client. Paragraph 11 refers to a telephone conversation between Counsels. There is nothing contentious about that as this is a normal way of conducting business by Counsels involved in the same matter or on behalf of those who are involved in the matter. Such a deponent does not invite cross-examination. What it invites if incorrect is a response from the named Counsel through a further affidavit. Absence of a controverting deponent leaves it standing as being correct. There is nothing controversial about paragraph 26 as that can be confirmed by the entries of the court record. A perusal of the court record entry shows that indeed on that date it is **MR. KHANGRAM** who drew the courts attention to the fact that the court had a long list before it and could not possibly reach the matter and the same should be marked S.O.G. There is also nothing contentious about paragraph 32 as the contents can be confirmed by court entries of 28.4.2006. The correctness of the deponent is confirmed by the entries in the court file Paragraph 38 refers to what the clerk did. This is contentious as it invites an affidavit or a cross-examination of the clerk to confirm if the deponent is true. The objection on paragraph 38 is upheld. Paragraph 40 is partially contentious in so far as it relates to a missing file but not contentious as it relates to the writing and posting of the correspondence. However, since a deponement cannot be mutilated, it either stands or falls, this court has no alternative but to strike it out.

All in all paragraphs 5,11,26 and 32 are sustained. Paragraphs 38 and 40 are struck out.

As regards the "*without prejudice"* correspondence, the decisions cited to this court namely **CANELAND LTD VERSUS DOLPHINE HOLDINGS LTD** and another Milimani HCCC 1135/98 and **UAMUNGA VERSUS UNITED INSURANCE CO.LTD NAIROBI HCCC.1186/00 supra,** show clearly that the correspondences falling into this category firstly are those marked without prejudice and secondly even if they do not bear the "without prejudice words" they are covered. The test is whether the communication was part of a genuine attempt to settle a dispute. Further if a document was made under an agreement whether express or tacit that it should not be used to the prejudice of either party then such a document should not be produced. The paragraphs objected to are paragraph 16,17,21 and 22. This court has revisited those paragraphs and find that indeed the said paragraphs annexes POK4,5,7 and 8. This court has perused them and it is satisfied that indeed they were written in pursuance of attempted negations with a view to reaching an amicable settlement of the dispute herein. Though decisions on the subject, cited to this court are decisions of courts of concurrent jurisdiction, the learned judges seized of the matter quoted English decisions and accepted legal texts on the subject. Though of persuasive value, this court is persuaded by them and rules that they state the correct position in law and there is no need to depart from them. On that account objection to paragraph 16, 17, 21 and 22 is upheld and those paragraphs are expunged.

As for the rest of the replying affidavit the paragraphs save for 38 and 40 struck out earlier they are sustained though deponed by counsel as they relate to transactions on routine office matters within the knowledge of the Counsel. If they were to be deponed to by the client though this would not be improper, they would be deponed to on the basis of knowledge and belief from the Counsel. It is the lawyer who has first hand information on the official actions on the case.

As regards inordinate delay negatiring getting a fair trial, it is correct that pleadings closed on 22.3.2005 as that assertion in ground (a) and deponent in paragraph 4 of the supporting affidavit have not been disputed by the Plaintiff. It is also evident that from 22.3.2005 to the date of filing of the application under review was close to two years and yet pretrial preparations like filing of issues, agreed or separately

and discovery had not been complied with. As observed by Maraga J. in the **AL AMIN AGENCY CASE SUPRA** there is no fast and hard rule as to what amounts to delay. In some cases a few months will amount to inordinate delay. In another it will be a period of years. Intentional and contumelious delay even though short will be in excusable. The secret is that each case depends on its own facts. The peculiar circumstances of this case are that there is in place an interim application which accompanied the filing of the Plaint which is part heard. There is also an interlocutory application filed by the 2nd defendant who is the current applicant for setting aside the exparte interim orders which is also still pending on the record. These two applications have kept the file alive from 17.4.2005 up to 5.5.2006. That period was interrupted by the applicant filing the current application on 16.3.2007. The court appreciates that as at 16.3.2007 a period of 9 months had lapsed without either applications being set done for hearing or the main suit being processed for hearing. In this courts opinion the pendency of these two applications interfered with the processing of the suit for hearing. It was necessary for both parties either to agree to abandon them in favour of main trial or apply to have them dismissed for want of prosecution before turning to the main suit. This court has given due consideration to this and has arrived at the conclusion that the presence of the two applications cannot be ignored. This court takes judicial notice of the fact that in normal routine judicial practice in a situation like this the court as well as litigants would expect a pronouncement on the interlocutory intervening applications for that to pave the way for the taking of pre-trial procedures and final setting down of the action for trial. It therefore follows that the stand taken by the plaintiff that they were under the impression that there were to be disposed off first is not remote. Proceeding to trial without making a pronouncement on those two applications by either abandoning them on record or hearing and disposing them off, would leave the proceedings in an awkward and embarrassing position, although readying the action for trial and commencing trial would have the effect of having them deemed abandoned and or over taken by event, the two applications belong to either party. The 2nd defendants application if heard and upheld, it would have disposed off the plaintiffs part heard application. By it pending it has contributed to the holding of the trial. Both parties are therefore to blame for the delay. As to whether it is inordinate it will be dealt with when dealing with the discretion of the court.

As regards whether it is no longer possible to get a fair trial the court finds nothing to suggest that this is the position. All that is required is to get a pronouncement on the two applications and then set in motion pretrial procedures and get a priority date and the trial will kick off. There is nothing on record to negative fair trial.

As to whether the 2nd defendant should have fixed the matter for hearing first, it is on record that a reading of Order XVI rule 5 gives him that election, which election is discretionary on his part. Whether he should have done so or not depends on the facts of each case and is tied to circumstances leading to a denial to exercise of the courts discretion, either in favour of the plaintiff to sustain the action and make appropriate orders as regards final disposal or in favour of the defendant and have the action dismissed. In deciding which way the axe should fall on the exercise of the courts discretion, this court is guided by the principles set out earlier on in this ruling. It also borrows the reasoning in of **MOHAMED WARSAME J.** in the case of **MARK OMOLLO AGENG AND THREE OTHERS VERSUS THE ATTORNEY GENERAL AND 4 OTHERS KISUMU HCCC. NO.326 OF 1995.** At paragraph 2 on page 2 of the ruling, the learned judge observed that the onus to set down the suit for hearing lies on the Plaintiff as he is the one who is in pursuit of a remedy.

(ii) After setting it down for hearing there must be a desire to have it prosecuted. There must be present an urge to have it finalized shown by taking all the necessary steps at their disposal to achieve an expeditious determination of his claim.

(iii) There must be a credible excuse of the plaintiff is to resist an application for dismissal. There must be genuine reasons to enable the court to exercise its discretion in their favour.

(iv) This primary burden cannot be shifted on to the defendant unless there is evidence to show that the defendant has waived or acquiesced in the delay. In the absence of waiver and acquiescence, the defendant ought to invoke the process of the court towards that end as soon as it is convenient.

This court has taken into account the totality of the foregoing assessment and reasoning both for and against the application herein and it is inclined to exercise its discretion in favour of the 2nd defendant for the major reason that the sole cause of the delay herein is the presence of the interlocutory applications one by the plaintiff dated 24.2.2005 and another by the 2nd defendant dated 16.2.2006. Both are undetermined. From the entries on the record and from the facts displayed here in either party could have fixed the m for hearing and disposal. Both parties are therefore to blame for not taking steps to dispose off those applications.

(2) The current application under review only asks the court to dismiss the main action and not the two applications. The court appreciates that such an action if allowed will also cater for the determination of the two application but in doing so this Court would have robbed the parties substantial justice of having a decision made on those applications. A proper approach by the applicant should have been to withdraw their own application, apply to dismiss the plaintiffs part heard applications as well as the main suit.

(3) Having ruled that presence of the two interlocutory applications kept the file alive the primemovern of the processes leading to the finalization of the interlocutory application were the advocates and not the parties. The Plaintiffs Counsel is to blame for not making efforts to have either application heard. If this had been disposed off that would have shut out the 2nd defendant's application. The second defendant's Counsel is also to blame because had he moved to have his application disposed off, it would have determined the plaintiff's application. This being the position it is now trite law established by judicial practice and decisions that litigants should never be punished for wrongs committed by their Counsels. This is a fit case for invoking and applying that rule.

(4) Indeed the subject matter of the proceedings is a depreciatable asset. The best way to go about this is not to deny the plaintiff a right to be heard on her claim on merit by dismissing her claim. But by countering mischief if any by requiring parties to move within a time frame within which to move for compliance with the pre-trial preliminaries and thereafter ensure that the matter do proceed to hearing on a priority basis.

(5) As regards objection raised to the affidavit sworn by Counsel, paragraphs 16,17,21,22,38 and 40 are struck out and expunged together with the annextures annexed thereto. The rest of the affidavit is sustained for the reasons given.

(6) The net result of the foregoing is that the suit is sustained but a timeframe within which to move and dispose off the interim applications will be given by the Court. This will be followed by a time frame within which to comply with the pre-trial preliminaries and then pave way for the trial to proceed on a priority basis.

(7) Costs of the application will be in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY, 2007.

R.N. NAMBUYE

JUDGE