



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 193 OF 2006

(FORMERLY CENTRAL REGISTRY HCCC NO. 907 OF 2001)

1. REAL VENTURES LIMITED

2. JAY-JO HOLDINGS LIMITEDPLAINTIFFS

V E R S U S

1. AKIBA BANK LIMITED

2. VALLEY AUCTIONEERSDEFENDANTS

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

I have before me an application by notice of motion dated 18th May, 2006. It is by the 1st Defendant. It seeks under Order 16, rule 5(a) of the Civil Procedure Rules (the Rules) two main orders, for dismissal for want of prosecution of the Plaintiffs' application by notice of motion dated 25th March, 2002 and also the Plaintiffs' suit against the 1st Defendant. The said application dated 25th March, 2002 sought many and varied orders, including an order to review and set aside the order of the court of 8th November, 2001. I cannot find in the court record such an order, but it is stated that the order dismissed the Plaintiffs' application for interlocutory injunctions.

Under the aforesaid rule, if within three months of close of pleadings the plaintiff, or the court of its own motion on notice to the parties, does not set the suit down for hearing, the defendant may either set the suit down for hearing or apply for its dismissal. The application is supported by the affidavit of one ISABEL GITHINJI, a legal officer with the 1st Defendant. I have read the same.

The Plaintiffs have opposed the application as set out in the replying affidavit filed on 14th June 2006 sworn by one MUKESH VAYA, a director of the 1st Plaintiff. I have also read the same.

I have considered the submissions of the learned counsels appearing. No authorities were cited. I have also perused the court record. It does appear that pleadings in this suit closed some time in July, 2003 after service of the amended defence. It is also borne out by the record that since then the suit has not

been set down for hearing.

But the record also shows that on 6th October, 2003 an application by notice of motion dated 9th July 2003 was argued before Rimita, J(as he then was). The application, filed by the Plaintiffs, sought one main order framed as follows:-

“That the question of law in this suit as to whether or not the charge in question is an invalid charge that cannot be enforced for want of proper execution thereof for having been procured and executed by persons with no authority in law to procure or execute the same be decided before any evidence is given or any question or issue of fact is tried.”

Rimita, J reserved ruling for 7th October, 2003. It appears that the Judge never delivered the ruling – at any rate the record does not show that he did. Rimita, J has since retired.

The record further shows that the next action taken by any party was on 9th December, 2004 when an application by notice of motion dated 8th December 2004 was fixed for hearing on 11th February, 2005. This application was by the 1st Defendant, and it sought transfer of the suit from the Central Registry to the Commercial Division of the court. The application, which was opposed, was eventually allowed on 28th February, 2006. The present application was subsequently filed on 18th May, 2006.

Basically, the test to be applied in applications to dismiss suits for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. If the court is satisfied that justice can still be done to the parties the action will be permitted to proceed to hearing. See the case of **IVITA –vs- KYUMBU, [1984] KLR 441**. Unless the delay has occasioned, or will occasion, prejudice to the Defendant the court will not dismiss the suit for want of prosecution. The court will always endeavour to sustain the suit rather than dismiss it, given the drastic nature of an order to dismiss a suit unheard.

In the present case, I do not find that there has been any prolonged delay occasioned by the inactivity of the Plaintiffs. As already seen, there was delay occasioned apparently by the retirement of Rimita, J. Then there was the delay occasioned by the 1st Defendant’s own application to transfer the suit from the Central Registry to the Commercial Division. It took about 14 months for the application to be disposed of.

The justice of the matter demands that the Plaintiffs be permitted to prosecute the suit. The suit raises an important issue of law, and it is best that the same be determined on merit. I am therefore inclined to refuse the application for dismissal of the suit.

Matters are rather different regarding the Plaintiffs’ application by notice of motion dated 25th March, 2002. That application was filed on 25th March, 2002. I can find no explanation at all in the replying affidavit why it had not been prosecuted by 6th October, 2003 when Rimita, J heard the application by notice of motion dated 9th July, 2003. The latter application was also by the Plaintiffs. It is apparent that they had lost interest in the earlier application, and they chose to pursue a new line. There is no reason why the application dated 25th March, 2002 should be permitted to remain on record.

In the result, the application by notice of motion dated 18th May, 2006 is allowed in part and dismissed in part. Prayer No. 1 is hereby allowed and the Plaintiffs’ application dated 25th March 2002 is dismissed with costs for want of prosecution. Prayer No. 2 of the application seeking dismissal of the suit for want of prosecution is dismissed. The just order regarding costs of this application is that parties bear their own costs of the same. There will be orders accordingly.

DATED AT NAIROBI THIS 29TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 31st DAY OF AUGUST, 2007