

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 384 of 2004

PATRICK KIRONO MWAURAPLAINTIFF

V E R S U S

KENYA COMMERCIAL BANK DEFENDANT

R U L I N G

This is an application (by notice of motion dated 22nd March, 2006) by the Defendant for dismissal of the Plaintiff's suit for want of prosecution. It is brought under Order 16, rule 5 (a) of the Civil Procedure Rules (the Rules). Under that paragraph, if within three months after the close of pleadings, the Plaintiff, or the court of 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.

There is a supporting affidavit sworn by the Defendant's advocate, **BRENDA N. KAMAU**. It is deponed at paragraph 6 thereof that the Plaintiff's failure to set the suit down for hearing has occasioned, and continues to occasion, great prejudice to the Defendant as it will be difficult to procure witnesses. These are matters that the deponent could not of his own knowledge prove. If they are statements of information and belief, the sources and grounds thereof have not been disclosed. See Order 18, rule 3(1) of the Rules. Paragraph 6 of the supporting affidavit must therefore be struck out, and it is hereby struck out.

The Plaintiff, who is acting in person, has opposed the application. Basically, he does not accept that there has been any inordinate delay in prosecuting the suit. All the same he undertakes to take all necessary steps to prosecute the suit within such time as the court would allow.

I have considered the submissions of the learned counsel for the Defendant and those of the Plaintiff, including the cases cited. The plaint herein was filed on 14th July, 2004. The Defendant filed its defence on 14th December, 2004. The same was served on 15th December, 2004. No reply to defence was filed by the Plaintiff. Pleadings therefore closed on 29th December, 2004. See Order 6, rule 11 of the Rules.

Since the pleadings closed the Plaintiff has not set the suit down for hearing. The present application was filed on 22nd March, 2006; there has therefore been a 15 month delay by the Plaintiff. Basically, the test to be applied in applications of this nature 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 allow an application to dismiss the suit for want of prosecution. The court will always endeavour to sustain an action rather than dismiss it because of the drastic nature of an order of dismissal of suit unheard.

In the present case, there has been inordinate delay in prosecuting the suit. I am not satisfied that the Plaintiff has offered any reasonable explanation for this delay. But on the other hand, the Defendant has not demonstrated that the delay has occasioned it, or is likely to occasion it, any prejudice. There will be prejudice, for instance, where witnesses can no longer be found because of the delay. But it has not been so alleged, paragraph 6 of the replying affidavit having been struck out. That being the case I am inclined

to sustain the action rather than dismiss it, notwithstanding the inordinate delay in prosecuting it. The Defendant will be sufficiently compensated by an award of costs.

In the event, I will refuse the application. It is hereby dismissed. The Defendant shall have the costs of the application hereby assessed at KShs. 15,000/00. The same must be paid within 30 days of delivery of this ruling; in default the Defendant may execute for the same. There will be a further condition; the Plaintiff must within 30 days of delivery of this ruling take a demonstrable step towards prosecution of the suit. In default the suit may be dismissed for want of prosecution without the necessity of a further application in that behalf. Those shall be the orders of the court.

DATED THIS 21ST DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 24th DAY OF AUGUST, 2007