REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 128 of 2003

PROTEIN AND FRUIT PROCESSORS LTD ……..….PLAINTIFF

V E R S U S

1. CREDIT BANK LIMITED

2. LINCON IRUNGU KAMAU

3. JOSEPH GIKONYO (T/a GARAM INVESTMENTS)
….DEFENDANTS

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.

This is an application (by notice of motion dated 7th March, 2006) by the Defendants for dismissal of the Plaintiff's suit for want of prosecution. It is brought under Order 16, rule 5(d) of the Civil Procedure Rules (the Rules). That rule provides that if, within three months after 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 do so or apply for its dismissal. Section 3A of the Civil Procedure Act, Cap. 21 (the Act) is also invoked. The grounds for the application appearing on the face thereof are:-

1. That the Plaintiff has failed or neglected to set down the case for hearing for more than twelve months since it was last in court.

2. That the matter was last in court on 11th February, 2005 when ruling was delivered on the application dated 16th March, 2004.

3. That it is incumbent upon the Plaintiff to take further steps towards hearing of the suit, yet he has failed to do so.

There is a supporting affidavit sworn by the Defendants' advocate, **ASHITIVA B. MANDALE**. It is deponed therein that the Plaintiff's application for temporary injunction dated 19th March, 2003 was argued on 6th and 12th may, 2003; that ruling thereon was given on 18th September, 2003; that by application dated 16th march, 2004 the Defendants sought a review of the said ruling of 18th September, 2003; that the application for review was argued and ruling thereon delivered on 11th February, 2005,

whereby the application was struck out; that since then the Plaintiff has not taken any step to set the suit down for hearing; and that it is apparent, therefore, that the Plaintiff has lost interest in prosecuting the suit.

The Plaintiff has opposed the application as set out in the grounds of opposition dated 2nd May, 2006. Those grounds are:-

1. That the application is incompetent, frivolous, vexatious and in bad faith.

2. That the application offends the Civil Procedure Act and Rules.

3. That the Defendants have not come to court with clean hands.

These grounds do not say much; a party filing such grounds in the circumstances of this case really has no answer to the application. There is also what purports to be supplementary grounds of opposition dated 16th June, 2006 and what purports to be an affidavit in support thereof. Both were irregularly filed, and without leave of the court. They are improperly on record and are hereby struck out. There is no replying affidavit.

I have considered the submissions of the learned counsel for the Defendant and those of the Plaintiff's director who appeared for the Plaintiff, including the cases he cited. I have also perused the court record. That record shows that the Plaintiff has never set this suit down for hearing. Before the filing of the present application, the suit was last before a judge on 11th February, 2005 for delivery of a ruling upon an application dated 16th March, 2004 which had been argued on 14th December, 2004. So, the matter had not come up for hearing of the suit on 11th February, 2005. There is no order on record that day adjourning the suit generally. It therefore cannot be dismissed upon the very specific provision of paragraph (d) of rule 5 of Order 16.

But the court has inherent power to dismiss the suit for want of prosecution where the circumstances do not fit any of the specific conditions set out in rules 2, 5 or 6 of Order 16. The Defendants herein have invoked that power. The power will be exercised as set out in the following passage from **Halsbury's Laws of England, 4th Edition, Vol. 37 at paragraph 448**:-

"**The power to dismiss an action for want of prosecution, without giving the plaintiff the opportunity to remedy his default, will not be exercised unless the court is satisfied (i) that the default has been intentional and contumelious, or (ii) that there has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his lawyer, and that such delay shall give rise to substantial risk that it is not possible to have a fair trial of the issues in the action, or is such as likely to cause, or to have caused, serious prejudice to the defendants either as between themselves and the plaintiff or between them and third parties. The power to dismiss an action for want of prosecution, other than a case of contumelious conduct by the plaintiff, should usually be exercised within the currency of any relevant limitation period, and since the plaintiff may avail himself of his right to issue a fresh writ, the non-expiry of the limitation period is generally a conclusive reason for not dismissing an action that is already pending".**

I accept this passage as a correct statement of the law. In the present case, I find that the Defendant is not guilty of any intentional or contumelious default. But there has been inordinate delay. Is this delay excusable? Without a replying affidavit, there is no explanation for the delay; it is therefore inexcusable.

Has it been demonstrated that the delay will give rise to a substantial risk that it will not be possible to have a fair trial of the action, or is such as is likely to cause, or to have caused, serious prejudice to the Defendants, either as between themselves and the Plaintiff or between them and third parties? No such substantial risk has been demonstrated. It will still be possible to have a fair trial of the action,

notwithstanding the Plaintiff's inordinate and inexcusable delay in prosecuting the case. It has often been said that the power to dismiss a plaintiff's suit unheard is draconian and must be exercised sparingly and in clear cases; it has also been said that the court's inclination should be to preserve the suit for hearing and disposal on merit rather than to dismiss it unheard.

After considering all the matters placed before the court in light of the principles set out above, I am inclined to preserve the suit for hearing and disposal on merit, rather than dismiss it unheard. I must therefore refuse the application by notice of motion dated 7th March, 2006. It is hereby dismissed. However, I will award costs of the application to the Defendants. Those costs are hereby assessed at KShs. 20,000/00, and must be paid within 14 days of delivery of this ruling. In default the Defendants may execute for the same. The Plaintiff must also, within 30 days of delivery of this ruling, take a demonstrable step towards setting down the suit for hearing; in default, the suit may be dismissed for want of prosecution without the necessity of another application in that regard. Those shall be the orders of the court.

DATED AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 21st DAY OF SEPTEMBER, 2007