

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 351 OF 2001

KENYA COMMERCIAL BANK.....PLAINTIFF

VERSUS

BROADWELL LTD.....DEFENDANT

RULING

The 3rd and 4th defendants made an application under **Order XVI rule 5(a)** of the **Civil Procedure Rules** seeking the order of this court for the plaintiff's suit to be dismissed with costs for want of prosecution. The said defendants state that the plaintiff had taken no steps to have the suit set down for hearing more than two years after pleadings had been closed. The application is supported by the annexed affidavit of Jinaro Kipkemoi Kibet. He swore a further affidavit on the 26th July, 2006.

The application is opposed. Otieno-Olola, advocate for the plaintiff swore an affidavit admitting to the delay in fixing the suit down for hearing. However, he deponed that the plaintiff took time before he could trace the other co-defendants of the 3rd and 4th defendants, hence the delay. He further deponed that the plaintiff undertook investigations to establish the whereabouts of the other defendants and also tried to establish whether the said defendants were possessed or had any attachable property. He deponed that the said investigators duly submitted their report on 5th November, 2004. He further deponed that the plaintiff should be given a chance to ventilate its suit since it would suffer irreparable loss if the suit is dismissed for want of prosecution.

At the hearing of the application, Miss Agutu learned counsel for the plaintiff reiterated the contents of the application and the supporting affidavit. She submitted that since pleadings closed on the 16th April, 2003, the plaintiff had made no effort for the matter to be listed for hearing. She submitted the plaintiff had at one time filed an application for summary judgment against the 3rd and 4th defendant when the application was struck out with costs. She maintained that the plaintiff appears to have lost interest in the case. She urged the court to dismiss the plaintiff's suit, as against the 3rd and 4th defendants, with costs.

Mr. Kisila for the plaintiff opposed the application. He reiterated the contents of the replying affidavit. He submitted that the plaintiff was keen to have the matter heard and determined hence the steps taken to fix the suit for hearing scheduled for the 22nd October, 2007. He submitted that the plaintiff had already filed and served the list of documents to the defendants. He argued that the plaintiff would suffer loss if the claim for a substantial sum of Ksh.46 million is not heard and determined on merits. He reiterated that the chronology of events and the steps taken as appears in the court record was a clear indication that the plaintiff had taken the necessary steps to have this suit ready for the hearing. He argued the court to understand that it was impossible for the plaintiff to fix the suit for hearing between December, 2004 and August, 2005 due to the unavailability of hearing dates. He submitted that the court should be hesitant before acceding to the application due to the nature of the case. He submitted that the delay in the hearing of the case had not prejudiced the defendants. He urged the court to find that the circumstances pertaining to this case were such that this court could not invoke its discretion to dismiss the plaintiff's suit for want of prosecution. He urged the court to dismiss the application with costs.

I have considered the rival submissions made by counsel for the parties to this application. The issue for determination by this court is whether the 3rd and 4th defendants have made out a case to have the case filed against them by the plaintiff dismissed for want of prosecution as envisaged by **Order XVI Rule 5**

of the **Civil Procedure Rules**. The said rule gives this court jurisdiction to dismiss a suit for want of prosecution if no step is taken to fix the suit for hearing a year after pleadings have closed. It is generally accepted that a suit will be dismissed for want of prosecution if the plaintiff fails to give satisfactory explanation for the delay in setting down the suit for hearing. (See **Habinder Singh Sethi vs The Standard & Anor. Nairobi HCCC.NO.314 of 2002 (Unreported)** and **Kenya Commercial Bank Ltd vs Jidraph Ngethe Thairo Nairobi HCCC.NO.3134 of 1987 (unreported)**).

In the present application, the 3rd and 4th defendants have established that the plaintiffs failed to take necessary steps to have this matter listed for hearing even after pleadings were closed over four years ago. However the plaintiff has given a satisfactory explanation for the delay. The plaintiff explained that it was unable to fix the case for hearing on account of the fact that it could not trace the other co-defendants of the 3rd and 4th defendants in time. The plaintiff further explained that it could not fix the case for hearing until investigations were concluded to determine whether the assets possessed by the defendants were of a nature that could satisfy a decree in the event that the plaintiff's suit would be successful. This court has noted that since the plaintiff obtained all the information that it needed to successfully prosecute the case, it has already listed the case for hearing. The plaintiff has shown seriousness in the prosecution of the case by filing the list of documents that it intends to rely on during trial.

In the premises therefore, I do find that the plaintiff has given cogent explanation for the earlier delay in fixing this suit for hearing. The fact that the plaintiff has made amends by fixing the case for hearing subsequent to the filing of the application has tilted this courts discretion in its favour. The application for dismissal of the suit for want of prosecution is unmeritorious. It is hereby dismissed. The plaintiff shall however play the 3rd and 4th defendant's costs for this application.

DATED at NAKURU this 24th day of OCTORER, 2007.

L. KIMARU

JUDGE