REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 551 of 2003

VENTURE CAPITAL AND CREDIT LTD. …….....……...….PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LTD ……....…DEFENDANT

RULING

The defendant seeks the striking out of the plaintiff's suit for want of prosecution.

Primarily, the defendant contends that the failure by the plaintiff to take steps to prosecute the case since 24th October 2003, constitutes inexcusable inordinate delay, which warrants the dismissal of the suit.

It is common ground that the Plaint was filed in court on 8th September 2003. At the same time, the plaintiff filed an application for a temporary injunction, to restrain the defendant from selling the suit property, L. R. No. 11531/3 Kangundo Road, Nairobi.

After hearing the preliminary objection to the application, the Hon. Ibrahim J. gave his verdict thereon, on 24th October 2003. The preliminary objection was based on the defendant's contention that the plaintiff had no locus standi to challenge the sale of the property in issue, being L.R. No. 11531/3, Kangundo Road Nairobi, as the said property belonged to Komarock View Estate Limited.

The Hon. Ibrahim J. upheld the preliminary objection, and discharged the interim orders which had hitherto been granted exparte.

Since then (24/10/03), the court records show that the plaintiff has taken absolutely no steps to have the suit set down for hearing. That fact is not in dispute.

However, the plaintiff contends that the defendant has moved the court under the wrong statutory provisions. As far as the plaintiff is concerned, the application made pursuant to the provisions of Order 16 rule 5 (d) of the Civil Procedure Rules could only succeed if the defendant was able to, inter alia, show that pleadings had closed. In this case, the pleadings had not yet closed because the defendant had not even been served with summons to enter appearance.

The position is that the plaintiff had not even extracted the summons for service on the defendant. Therefore, it believes that the defendant erred by purporting to move the court pursuant to Order 16 rule 5 (d).

In the plaintiff's considered opinion, the defendant could only have sought the dismissal of the suit under Order 5 rule 1 (7). But the defendant submits that the provisions of Order 5 rule 1 (7) are only applicable in cases wherein summons had expired, without their validity being extended. The said rule stipulates as follows;

"Where no application has been made under sub-rule (2) the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons."

Sub-rule (2) provides that where summons have not been served on the defendant, the court may extend the validity thereof from time to time, if it is satisfied that it is just to do so. The need to extend the validity of summons stems from the provisions in Order 5 rule 1 (1) which stipulates that a summons shall be valid, in the first instance, for twelve months from the date of issue.

Clearly, therefore, the plaintiff cannot be right when it says that even though no summons has been issued in this case, the defendant should have invoked the provisions of Order 5 rule 1 (7). That sub-rule is only applicable in instances wherein a period of twenty-four months had expired since the issuance of the original summons. In such situations, if the plaintiff did not seek to extend the validity of the original summons, the court could, without notice, dismiss the suit.

In this case, the plaintiff contends that no summons have yet been extracted. If that be the case, the provisions of Order 5 rule 1 (7) of the Civil Procedure Rules could not come into play, says the plaintiff.

Meanwhile, Order 16 rule 5 provides as follows;

"If, within three months after –

(a) the close of pleading; or

(b) (repealed)

(c) the removal of the suit from the hearing list; or

(d) the adjournment of the suit generally, 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."

Does the foregoing rule become applicable only when there has been a close of pleadings, as contended by the plaintiff? The answer is in the negative, as each of the three instances are independent. And, whereas on the face of the application, the defendant did not specify that it was invoking the provisions of Order 16 rule 5 (d), it said so during the hearing of the application. In the circumstances, I hold that if the defendant was able to prove the requirements of rule 5(d), there would be no need for them to also prove the requirements of rule 5(a).

In this case, the plaintiff has not taken any steps to prosecute the suit since 24th October 2003. As at the date when the defendant's application came up for hearing, on 17th March 2006, the plaintiff's state of inactivity had persisted for almost two-and-a-half years.

The plaintiff has not given any or any reasonable explanation for the inactivity. Therefore, I have no option but to hold, as I hereby do that the delay is inexcusable, as it has not been explained. And, as the rules provide that an application for dismissal of a suit may be made after the lapse of three months from the date when either the pleadings are closed, or the suit is removed from the hearing list, or the suit is adjourned indefinitely, I hold the view that a state of inactivity for a period of more than two years is inordinate, especially when no explanation is tendered for the said delay.

In **IVITA –VS- KYUMBU [1984] KLR 441 at 451,** Chesoni J. (as he then was) held as follows;

"The instant case is now 4½ years less two months. It has been left to go to sleep for 14 months and in my opinion where an action has been dormant for twelve months or more the defendants are entitled to apply to the court for its dismissal, and, unless the plaintiff shows sufficient reason for reviving it, the suit may be dismissed. Each case must be decided on its own facts and the matter is one of the discretion of the court, but his court will frown at any inexcusable delay, and it will do everything possible to enforce expedition of trial."

The reason why the courts frown at inexcusable delay is that public policy demands that the business of courts should be conducted with expedition, as Kneller J. held in the case of **E. T. MONKS & CO. LTD. –VS- EVANS [1985] KLR 584**

If a plaintiff exhibits a clear lack of desire to expeditiously prosecute his case, the defendant has the alternatives of either getting on with the case, or otherwise he can seek to have the case dismissed.

In **ALLEN –VS- SIR ALFRED MC ALPINE [1968] 1 ALL E.R. 543 at 546,** Lord Denning MR captured, in the following words, the fundamental reason why courts do dismiss suits for want of prosecution;

"The delay of justice is a denial of justice. …….

To no one will we deny or delay right or justice. All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3.Sc. 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, 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. It is the only effective sanction that they contain."

That being the case, I find no good reason to sustain this case which was, in any event, instituted by a plaintiff who has been found to lack the requisite locus standi. To continue having the suit hanging over the defendant's head, when no action has been taken for about two and a half years, is to deny or delay justice to the defendant. Accordingly, I now dismiss the suit for want of prosecution. The costs of the application dated 1st March 2005, as well as the costs of the suit, are awarded to the defendant. It is so ordered.

Dated and Delivered at Nairobi this 16th day of May 2006

FRED A. OCHIENG

JUDGE