REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 740 of 2003

BANK OF INDIA ……………………..............................…...…………………PLAINTIFF

VERSUS

SURGILABS LIMITED………………...........................……...…………..1ST DEFENDANT

RAMESH SHAMJI BHATT………...........................…………..…………2ND DEFENDANT

MRS JAGDEEP RAMESH BHATT…………...........................………3RD DEFENDANT

BHAGWANJI RAICHAND SHAH …………...........................………4TH DEFENDANT

RULING

The plaintiff filed this suit in 1992, there was no activity in the matter between 1997 and 2001 and consequently the court on its own motion dismissed this suit under order XVI Rule 6 of the Civil Procedure Rules.

The plaintiff applied for the setting aside of that dismissal and by a ruling dated 5th December 2002 that dismissal was set aside. The said dismissal was set aside on the basis that the defendant had filed, on 3rd August 1998, an amended defence and accordingly the period required by Order 16 Rule 6 had not expired, when the suit was dismissed.

Following the setting aside the suit was next fixed for hearing on 4th November 2004, when it was adjourned generally by consent of both parties. The matter was again fixed for hearing on 26th April 2005 when again by consent of both parties the suit was adjourned generally.

There was no further fixing of this suit for hearing and now an application of the defendant dated 31st January 2006, seeks dismissal of the plaintiff's suit for want of prosecution.

The defendant by its supporting affidavit after narrating the history of this matter as aforesaid stated that when this suit was list for hearing April 2005, and prior to the hearing date, the defendant filed its list of documents and forwarded the issues to the plaintiff but that as at the date of hearing, 26th April 2005, the plaintiff had not filed list of documents nor had it prepared issues for consideration by this court. This averment was not disputed by the plaintiff.

It was further argued on behalf of the defendant that the continued presence of this case causes

prejudice to the defence case because there are vital documents no longer available to the defendant. The defendants affidavit deponed that:

“**The defendants had intended to call witnesses from the Central Bank of Kenya at the trial, as the plaintiff’s contraventions of the Exchange Control Act and its disregard of express directions made by the Central Bank were some of the issues raised by the Defendants in the Amended defence. However, more than 15 years have passed since the contraventions and violations took place, and the exchange control Act was repealed in December 1995. I am aware that the file in respect of the transaction related to this matter has been destroyed by the Central Bank of Kenya and I am therefore apprehensive whether any witness from the Central Bank of Kenya can now be found who will be able to testify from their own knowledge as to the specific facts relating to this transaction………”**

The defendant annexed a letter dated 22nd May 2002 from Central Bank of Kenya addressed to the defendant’s counsel, which stated in part:

“**We wish to advise that the Central Bank of Kenya will not be able to make available the file referenced EC 51/52/014 because the bank’s records relating to that period have since been destroyed………..”**

Defence counsel submitted that failure to prosecute this suit as demonstrated in the defendants application made this a proper case for the court to exercise its jurisdiction under Order 16 Rule 5.

The application was opposed and in that opposition the plaintiff filed grounds of opposition.

In opposition counsel for the plaintiff argued that the plaintiff had a pending application dated 10th January 1996, and that that application was fixed for hearing on 16th May 2006.

That the present firm for the plaintiff came on record on 14th January 2006.

That the dismissal, on 18th June 2001 was on the basis that both parties had not taken any action for three (3) years.

There were some submissions on when the court diary opened for fixing of hearing of suit but the court rejects those submissions because they are tantamount to evidence being adduced from the bar.

Indeed this suit was filed in 1992 although it bears the year 2003 in its title.

The application is brought under Order 16 Rule 5, which provides that if within three (3) months the suit has not been set down for hearing the defendant may either set the suit down for hearing or apply for its dismissal. The option of doing either is given to the defendant. In this case the defendant opted for dismissal.

When a court is faced by such an application I am of the view that the surrounding circumstances of the case are open to scrutiny. That is the period since filing suit can have a bearing whether the court can exercise its jurisdiction to dismiss the suit because more often than not that scrutiny will reveal a pattern of non-activity of the plaintiff, in regard to fixing dates for hearing.

I am also of the view that one issue which bears heavily on court to exercise its jurisdiction is the prejudice that such delays cause to the defendant. In this case I am of the view that the prejudice was immense. The intervening period has seen the defendant’s material evidence destroyed by the Central Bank of Kenya.

The plaintiff is obligated on filing the case to take all steps necessary to have the suit disposed. More often than not that is not what happens in our courts. Plaintiffs often file case only to let it go to sleep and

that at sometime is at the prejudice of the defendant.

I do not find that it is a defence to the defendant's application that there is a pending application for dismissal of the defendant's defence. In any case that application to strike out defence is dated 10th January 1996, there is no explanation offered by the plaintiff why ten years later that application has not been disposed. Indeed it seems that it is on the defendant filing its application to dismiss the suit that the plaintiff rushed to the court registry to fix its application dated 10th January 1006 for hearing, on 16th May 2006.

The plaintiff's failure to file a replying affidavit only hampered its explanation to the delay of the disposal of this case. The fact that the plaintiff recently changed its advocate is not a complete defence to the application for dismissal.

The plaintiff is a bank and it is expected that it either has legally trained personnel or a department that follows up its cases that are pending in court. What inquiry then has been made by the plaintiff to its legal adviser on the obvious delay in the conclusion of their suit. It seems none. The plaint sought recovery of kshs 1, 650, 557. 35 or alternatively kshs 740, 756. 60 and Swiss Francs 66, 600. Due to passage of time the value of that money has obviously dropped. That on its own does not seem to have perturbed the plaintiff.

This case is indeed a case of the plaintiff being guilty of unreasonable delay in the disposal of its case. There is nothing that the defendant has done to disbar it from seeking an application for dismissal. Not even that they consented to the removal of the suit for hearing twice, the plaintiff, after all was a party to these consents.

The application is merited and the court grants the following orders:

(1) That this suit is dismissed for want of prosecution with costs to the defendant.

(2) That the defendants are also awarded costs of the Notice of Motion dated 31st January 2006 and amended on 11th May 2006.

MARY KASANGO

JUDGE

Dated and delivered this 15th May 2006

MARY KASANGO

JUDGE