REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 321 of 2002

ZIPPORAH MUMBI NGUGI………………...……………......PLAINTIFF

VERSUS

JOSEPH NGAE NJUGUNA ……………………..……1ST DEFENDANT

TIGER FARM LTD ………………...……………………2ND DEFENDANT

KIMUNYU COFFEE PLANTATION LTD……..……...3RD DEFENDANT

M.A.D. WOOD sued as the Executor of the will of CECIL GEORGE ALLAN DREW...4TH DEFENDANT

GOLDEN FLEECE LTD…………………..………..…5TH DEFENDANT

RULING

By this application by way of Notice of Motion dated 11/5/2005 the 1st to 3rd defendants seek 4 primary orders to wit:

1) That the order for maintenance of status quo given on 27.3.2002 be set aside, discharged or varied.

2) That the order given on 27.3.2002 restraining the applicants from dealing with his 59,993 shares in the 5th defendant be discharged, varied or set aside.

3) That the order given on 27/3/2002 restraining the 5th defendant from dealing with L.R. No.4945/2 Karen be discharged varied or set aside.

4) That the suit be dismissed for want of prosecution.

The application is brought upon four principal grounds viz:

(a) That the plaintiff has for over 20 months failed, refused and/or neglected to prosecute the suit to the prejudice of the applicants.

(b) That it is unjusticiable and wrong for the order for maintenance of the status quo to continue in force as the applicants continue to suffer prejudice having been restrained from dealing with 59,993 shares in the 5th defendant.

(c) That the order restraining the 5th defendant from dealing with L.R. No. 4945/2 Karen has gravely prejudiced the day to day operations freedom of action and constituted a serious clog on its equity.

(d) That the plaintiff has lost interest in prosecuting the suit now that she enjoys interim orders.

The application is supported by an affidavit sworn by the 1st defendant sworn on 11.2.2005. He also swore a further affidavit on 14.3.2005. The application is opposed and there is a replying affidavit sworn by the plaintiff on 7.3.2002.

The application was canvassed before me on 24.3.2006 and 31.7.2006. The Advocates took me through the affidavits and the annextures and ably argued their respective client's cases. From the submissions made to me by counsel it seems to me that the applicants are aggrieved by the orders made by Osiemo J on 27.3.2002 which orders have adversely affected them while the plaintiff in whose favour the orders were made does nothing to prosecute this suit. The applicants' contention is that, the plaintiff has absolutely no reason why she has delayed in establishing her claim by prosecuting this suit.

Under Order XVI, Rule 5 (c) and (d) of the Civil Procedure Rules if within three months after the removal of the suit from the hearing list or the adjournment of the suit generally the plaintiff or the court of its own mention 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. The plaintiff attributes her failure to prosecute the suit to non-availability of her counsel who was engaged elsewhere. Otherwise she swears that she has always wanted to prosecute this suit in which she is claiming to trace her money currently represented in shares in the 5th defendant. With respect to the prayer to vacate the orders made on 27.3.2002, she contends that such an order would defeat the purpose of this suit and thereby deprive her of her KShs.30 million in which event she stands to suffer more hardship than the applicants.

I have perused the court record. It shows that on 12.1.2006 this suit was by consent fixed for hearing on 18th and 19th July, 2006. It was however on 17th July, 2006 removed from the hearing list of 18th July, 2006 because of shortage of judges. Would it be in the interests of justice in the circumstances to dismiss it? In my view it would not. It has been held before by eminent jurists that whenever possible a court of Law should endeavour to determine matters in dispute between the litigants upon hearing. In **Ivita –vs – Kyumba [1984] KLR 441**; it was held inter alia as follows:-

"**3 The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable and if it is whether justice can be done despite the delay. Thus even if the delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter for the discretion of the Court.**"

That decision was of the High Court (Chesoni J as he then was) and has been approved by the court of Appeal. In **Salkas Contractors Ltd – vs – Kenya Petroleum Refineries Ltd: C.A. No.250 of 2003 (UR)** the Learned Judges of the Court of Appeal cited with approval the said Chesoni's decision. In that appeal their Lordship cited the case of **Allen – vs – Sir Alfred MCalpine & Sons Ltd [1968] 1 All ER 543** where Salmon L. J. delivered himself as follows:-

“**A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiffs’ failure to comply with the Rules of the Superior Court or (b) under the Court’s inherent jurisdiction. In my view it matters not whether the application comes under limp (a) or (b) the same principles apply. They are as follows:-**

In order for such an application to succeed, the defendant must show:

(i) That there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.

(ii) That this inordinate delay is inexcusable. As a rule until a credible excuse is made out, the natural inference would be that it is inexcusable.

(iii) That the defendants are likely to be seriously prejudiced by the delay.”

Turning back to the matter at hand in the perspective of the above principles and in the light of the fact that this suit could have been heard on 12th July 2006 were it not for the shortage of judges, and further in view of the explanation given by the plaintiff, it cannot be said that this is an appropriate case for invocation of the court’s draconian powers to dismiss this suit for want of prosecution. The defendants/applicants have not demonstrated that they will suffer prejudice which cannot be compensated by costs if this suit is not dismissed. For those reasons I would not be inclined to exercise my discretion in favour of the applicants.

The applicants further seek that the orders made by my brother Osiemo J on 27.3.2002 be discharged varied or set aside. In the light of my above findings, I am not inclined to accede to the applicants’ prayers. This is because I have not found the plaintiff personally guilty of inordinate and/or inexcusable delay. I cannot in the circumstances punish her because of her counsel’s omissions or commissions.

Before proceeding to dismiss this application I will briefly mention the defendants objections to certain paragraphs of the Replying Affidavit. I have perused the impugned paragraphs. I am afraid I have not detected anything objectionable with respect to the same. I therefore decline to expunge them as sought.

In the result this application is dismissed. In the circumstances of this case, I make no order as to costs.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **2ND** day of **OCTOBER, 2006.**

F. AZANGALALA

JUDGE

2/10/2006

Read in the presence of: