REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1766 of 2000

KALIMA BAKERY LTD ……...……. PLAINTIFF

VERSUS

THE KENYA POWER & LIGHTING CO. LTD….. DEFENDANT

RULING

The Notice of Motion herein, dated 28/6/2006, under Order 16 Rule 5 of the Civil Procedure Rules seeks dismissal of the suit for want of prosecution, then costs of this application,

Supported by Abuga S. Mogusus's Affidavit of even date, the Application is on the grounds, ***inter alia***, that: - since 15/6/2002, the suit has not been set down for hearing and that the inordinate delay is prejudicial to the Defendant, as the suit was filed on 30/10/2000 and the Memorandum of Appearance and counter-claim filed on 4/12/2000.

In opposition, vide its grounds of opposition, dated and filed on 31/10/2006, the Respondent avers that:-

1. The Application is premature since issues for trial have not been settled, and the suit cannot be set down for hearing under the current practice of the Court till then,

2. The Defendant has not shown the efforts made to settle the issues for trial in order to cause the suit to be set down for hearing.

3. No prejudice, save as to costs, occasioned by the continued pendency of the suit herein.

Having closely read the pleadings herein, and heard the Learned Counsel for both sides, and considered the authorities cited and relied upon, I have reached the following findings and conclusions.

Order 16 Rule 5 of the Civil Procedure Rules, under which this Application is brought provides as under:-

"……If, within three months after the close of pleadings….. 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….."

In the instant case, it is common ground that there is delay running well beyond four years since the pleadings closed. The Defendant/Applicant contends that the delay is not only inordinate, but unexplained. On the other hand, while conceding the delay, the Respondent avers that the delay is explained in that, according to the Court practice, the issues for trial have not as yet been agreed upon and no hearing date can be set down for the suit until that is done. Accordingly, submits Counsel for the Respondent, the application for dismissal is premature and should be dismissed itself. Further, continued the Leaned Counsel, Mr. Kyalo, the Defendant/Applicant has not shown the efforts made to prepare the suit for hearing, since both sides have a responsibility to move the process.

Learned Counsel for the Respondent cited no authority to the effect that the High Court Practice of having issues for trial agreed upon before a case is set down for hearing has changed the provisions of Order 16 Rule 5, quoted herein above, which is the law.

My humble position on the matter is very simple, and that is that Courts interprete the Law, but do not get involved in making nor do they have the power to make, the law. Legislative issues are the domain of the Legislature, not the Courts. Accordingly, Court practice remains just that, no more. In any case, if the Practice has become so entrenched, and the Court feels such Practice should become Law, the machinery exists to effect the same. The Rules Committee still functions and would have introduced the necessary amendment to Order 16 Rule 5 to reflect the Practice, if that was deemed important. That has not been done, and Learned Counsel for the Respondent/Plaintiff, as a member of the Law Society of Kenya, has all the right to move the Rules Committee, through the Law Society Kenya, a member of the Committee, to do the necessary, if he thinks that that Practice is now mature to be elevated to the status of law.

I find the above submission far from satisfactory, and dismiss the same as lacking in both substance and judicial basis. Besides, if, and where, parties have failed to agree on the issues, such dispute has always been resolved in Court, where the issues are framed, with the Court acting, as usual, as the presiding body. But that has to be initiated by the Plaintiff, who bears the primary responsibility to prosecute his case, and with speed and diligence.

In the present case, I find, and hold, that the Plaintiff/Respondent has failed and, or, neglected to take the necessary steps to have the suit set down for hearing for a period of over four years, and that delay is unexplained and inexcusable. To term the current Application ***pre-mature*** is both arrogant and unwarranted.

It was also contended, by Learned Counsel for the Respondent, that the Defendant has done nothing himself to move the process, and essentially he is also to blame for the delay.

I have difficulty in accepting that view. True the provisions of Order 16 rule 5 of the Civil Procedure Rules permit the Defendant to set down the suit for hearing. But that provision gives the Defendant an option, which is not the case with the Plaintiff, to apply for the dismissal of the suit. The Defendant is here, today, in this application, by virtue of exercising the option given to him by the Law. He has lived up to his right.

I need to add that the filing of an application to dismiss a suit for want of prosecution, rather than setting down a hearing date, by the Defendant, is what a reasonable Defendant would do, and is expected to do. I see no sense in expecting a Defendant to assist the Plaintiff to sue him – the Defendant! I don't think reasonable people would choose such an option. Rather, they would opt for the measure, which disposes of the dispute once and for all – and that is have the suit dismissed.

Finally, on this issue of the obligations of the Defendant, it was submitted that since there is a counter-claim in the suit before me, the obligation of the Defendant is enhanced, and he should show what efforts he has put in place to have the suit heard.

That submission overlooks the fact that to the extent of the counter-claim, the Plaintiff is the Defendant, and he is at liberty to file an application to have the counterclaim dismissed for want of its prosecution. Here, the Plaintiff/Respondent has not done that. The reason is very simple. Whereas a

counterclaim can be a cause of action on its own, where, as in this case, the counterclaim is raised in a suit as part of the defence, it is so intertwined with that suit that the primary duty to prosecute the suit remains with the Plaintiff, and does not shift to the Defendant, until the suit is dismissed, upon which the counterclaim ripens, and if the Defendant so chooses, he can prosecute the counterclaim on its own merits.

All in all therefore, and for the reasons above, the application herein succeeds, and accordingly, I rule as under:

1) I dismiss the suit herein for want of prosecution

2) Order that the Plaintiff/Respondent herein, do pay the costs of both this application and the suit herein.

DATED and delivered in Nairobi this 15th Day of December, 2006

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O.K. MUTUNGI

JUDGE