REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION –MILIMANI

Civil Case 593 of 2001

NATIONAL INDUSTRIAL CREDIT

BANK LIMITED ……
PLAINTIFF

VERSUS

FRESHCO INTERNATIONAL LTD……..……..1ST DEFENDANT

PETER KAHARA MUNGA …….……2ND DEFENDANT

JAMES KAMAU MUHORO…….3RD DEFENDANT

JOHN MURIUKI MUHARA ……4TH DEFENDANT

JAMES GICHANGA KARANJA…….5TH DEFENDANT

RULING

I have before me a Motion on Notice dated 1st September, 2004 brought by the 2nd Defendant under Order XVI Rule 5, Order L Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling Provisions of the Law. The motion on Notice seeks one main prayer, that the suit filed by the Plaintiff/Respondent against the 2nd Defendant on 24th April, 2001 be dismissed for want of prosecution.

The Defendant's case is that the Plaintiff filed this suit on 24th April, 2001. It obtained exparte judgment against the 2nd Defendant which judgment was on the 2nd Defendant's application set aside on 11th December, 2001. The draft defence annexed to the application to set aside the ex-parte judgment was deemed as duly filed upon payment of the requisite court fees. The Plaintiff was to file its Reply if any within fifteen (15) days of 11th December, 2001. Nothing has transpired since that date with the result that the Plaintiff has suffered prejudice as he is in perpetual apprehension.

Anticipating the Plaintiff's argument that it has now filed an application for summary judgment, the Defendant contends that this was in response to his application for dismissal for want of prosecution.

The Plaintiff's case on the other hand is that it has been trying to locate the physical address of the 1st Defendant and its assets in order to execute the decree against it without success. It could also not establish the whereabouts of the assets of the 3rd, 4th and 5th Defendants. It is upon this failure that the Plaintiff turned to the 2nd Defendant against whom it has now filed a summary judgment application to which the 2nd Defendant has no defence. The Plaintiff further argues that the 2nd Defendant will suffer no prejudice if this application is declined – whereas if it is allowed the Plaintiff will be "highly prejudiced."

I have considered the application, the affidavits filed and the submissions of Counsels appearing. Having done so I take the following view of the matter. It is clear from the record of the court that since December, 2001 to the time of the filing of this application the Plaintiff took no step towards prosecuting this suit. This is a period of almost 3 years. The explanation given by the Plaintiff that it was trying to locate the physical address of the 1st Defendant or its assets and those of the 3rd, 4th and 5th Defendants is not satisfactory. The 1st Defendant is a limited liability company and was the principle debtor. It is not convincing that the Plaintiffs did not have particulars of the physical address, of the 1st Defendant in its record. In any event to take nearly three (3) years trying to establish the physical address of a company that the Plaintiff had advanced the sum it claimed in my view is not reasonable. There is no allegation that the Plaintiff could not trace the 2nd Defendant. He had filed his papers through his advocates. His liability is not dependent on the results of action against his Co-defendants. I find that the Plaintiff does not have an excuse for the said delay of nearly 3 years.

In Salkas ***Contractors Limited –v- Kenya Petroleum Refineries: Mombasa C.A. No.250 of 2003 (UR),*** the Court of Appeal quoted Salmon L.J. in ***Allen –v- Sir Alfred McAlpine & Sons Limited (l968) 1 ALL ER 543*** as follows:-

….the Defendant must show:

> (i) the 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 of the lien 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.This may be prejudice at the trial of issues between themselves and the Plaintiff or between each other or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule the longer the delay, the greater the likelihood of serious prejudice at the trial."

The Court of Appeal stated that the above principles apply in Kenya and had indeed been followed consistently by Kenyan Courts. Cheson J.as he then was applied the principles in the case of Tvita –v- Kyumbu (l984) K.LR. 441 when he observed 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 Plaintiffs 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 in the discretion of the Court."

Chesoni J. as he then was, was dealing with a situation where a Plaintiff after filing suit and pleadings had closed took no step for 2 ½ years before setting the case for hearing. Even when the Plaintiff took a hearing date ex parte and having served Counsel for the Defendant, he unilaterally requested for the removal of the case from the hearing list. The Learned Judge dismissed the suit for want of prosecution

The Court of Appeal in **Salkas Contractors Limited –v- Kenya petroleum Refineries Limited (supra)** was dealing with an appeal from an Order of Hayanga J. dismissing the appellant's suit. In the application before Hayanya J, pleadings had closed on or about 17th December, 1999. The Plaintiff took no action to set the case down for hearing. On 18th May 2001 the Defendant filed a Notice of Motion seeking the dismissal of the Plaintiffs suit. Hayanga J. dismissed the suit. The Court of Appeal as it rejected the appeal against Hayanga's Order observed:

> "In our independent opinion based on the record before us, no excusable grounds were advanced for the delay from 31st July 2000 and the Learned Judge was Plainly right in rejecting that excuse"
>
> It is clear that the inexcusable delay was for only about 1 year and 2 months.

Now applying the above principles to the circumstances of this case I have found that the period of almost 3 years is long and in the circumstances of this case inordinate and inexcusable. I agree with the 2nd Defendant that the continued silence and inactivity on the part of the Plaintiff was prejudicial to the interest of the 2nd Defendant. Perpetual apprehension of the 2nd Defendant to my mind is sufficient demonstration of the prejudice that the 2nd Defendant will suffer if this application is not allowed.

In the result and in the special circumstances of this case I am satisfied that the 2nd Defendant is entitled to the orders sought. Accordingly I order that the suit filed by the Plaintiff against the 2nd Defendant on the 24th day of April 2001 be and is hereby dismissed for want of prosecution with costs.

The 2nd Defendant shall also have the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-