REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 250 OF 2001

NATIONAL BANK OF KENYA LIMITED……..PLAINTIFF

VERSUS

D. P. MAHINDA t/a JONES & JONES ADVOCATES…….....DEFENDANT

RULING

The defendant has made an application under the provisions of **Order XVI Rules 5 and 6, and Order L of the Civil Procedure Rules** seeking the orders of this court that the suit filed by the plaintiff against him be dismissed with costs for want of prosecution. The ground in support of the said application is that the plaintiff had not taken any steps or made any efforts to prosecute the suit for an inordinately long time without any reasonable cause or justification. The application is supported by the annexed affidavit of Dilipsin P. Mahida, the defendant. The application is opposed.Mrs Zipporah Mogaka, the Legal Services Manager of the plaintiff has sown a lengthy affidavit in opposition to the said application.

At the hearing of the application, Mr Kagucia Learned Counsel for the defendant submitted that the plaintiff had not made any effort to prosecute the case since pleadings were closed on the 20th of August 2001. He submitted that although the plaintiff had attempted to give the reasons for the delay in its replying affidavit, the issues deponed thereto did not satisfactorily explain why the plaintiff went to sleep after filing the suit. Learned Counsel contended that what emerged from the said replying affidavit was that the plaintiff was pursuing two different defendants over the same subject matter. It was contended that the plaintiff had been paid a substantial amount of the sum that it was claiming from the defendant by a defendant in the other suit. It was further contended on behalf of the defendant that he was not obliged to fix the case for hearing if the plaintiff failed to do so. It was further submitted that from the correspondences annexed to the replying affidavit, it was evident that the plaintiff was not prepared to pursue the claim against the defendant having in the first place filed the suit without any legal foundation. The defendant urged this court to find that the delay of three years and a half years in prosecuting a case is inordinate and in the circumstances ought to be dismissed for want of prosecution. It was contended that it mattered not that the parties were negotiating or that the defendant had acquiesced to the delay. The defendant referred to several decided cases in support of his submissions.

In reply, Mr Gachomo Learned Counsel for the plaintiff submitted that the subject matter of the suit were securities which had been prepared by the defendant. The plaintiff had sued the defendant for breach of retainer. A **Civil Suit No. 301 of 1993** *(Nakuru High Court)* had been filed against the borrower. Learned Counsel submitted that the money borrowed against the faulty securities had not been recovered by the plaintiff. Attempt to execute against the borrower had been made in vain. It was contended on behalf of the plaintiff that the reason why it delayed in pursuing the case against the defendant was because it was pursuing the recovery of the said amount borrowed from the borrower

against whom it had obtained judgment. It was further submitted that the plaintiff and the defendant had been in constant communication and therefore the defendant could not turn around and make allegations that the plaintiff had delayed in prosecuting the case. He urged the court to dismiss the application with costs.

I have read the application filed by the defendant. I have also carefully read the affidavit filed in support of the application and the replying affidavit filed by the plaintiff. I have also considered the submissions made by the parties to this suit. I have also perused the decided cases that the defendant sought to rely on in support of his application. The issue for determination by this court is simple; Has the plaintiff failed to make any effort to fix this case for hearing to the extent that the same should be dismissed for want of prosecution?

Order XVI Rule 5 of the Civil Procedure Rules provides that:

"If, within three months after

(a) the close of pleadings; or

(b) …….. (deleted)

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

(d) the adjournment of the suit generally, the plaintiff, or the court on 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."

Rule 6 provides that;

"In any case not otherwise for in which no application is made or step taken for a period of three years by either party with a view to proceeding in the suit, the court may order the suit to be dismissed; and in such a case the plaintiff, may, subject to the law of limitation, bring a fresh suit."

In the instant application, it is not disputed that pleadings were closed on the 20th of August 2001. It is further not disputed that since that time, the plaintiff had not made any effort to prosecute this case. Instead, the plaintiff appears to have concentrated its energy in pursuing a parallel suit filed against the borrower in the subject matter of the suit. If the rules were to be applied as in a mathematical equation, the plaintiff's suit would have been dismissed even before the defendant filed this application for dismissal for want of prosecution. The plaintiff has tried to persuade this court that its inordinate delay in prosecuting this case was caused by excusable reasons. The plaintiff has further implied that because the defendant was communicating with it in an apparent out of court negotiations, the defendant was therefore estopped from urging the court to dismiss the suit for want of prosecution.

I have carefully considered the arguments made by the plaintiff. I am also aware that I have discretion in this matter to allow or reject the application. I am not at all satisfied that the plaintiff has given any cogent explanation why it took no action in prosecuting this suit for a period of three and a half years. Even if I were to agree with the submission that the plaintiff was negotiating with the defendant, court processes are not predicated upon the whims of parties to the suit but are governed by rules. In the instant case the defendant has established that the plaintiff, having failed to prosecute its suit for three and a half years should have the same dismissed for want of prosecution.

The defendant cannot be estopped from taking advantage of the established rules.

There can never be estoppel against the law.

It is apparent that the plaintiff had two options; either to sue the borrower or to sue the defendant.

Instead of pursuing one option, it choose to pursue both. It ended up concentrating its efforts on the suit against the borrower to the detriment of its suit against the defendant. The plaintiff made its own bed; it must now lie on it; even if the bed were made of thorns. The plaintiff has to bear the consequences of its in inaction.

If failed to prosecute this case for three and a half years. I will allow the defendants application as a consequence of which the plaintiff's suit is hereby dismissed for want of prosecution.

The defendant shall have the costs of the application and of the suit.

DATED at NAKURU this 13th day of May 2005.

L. KIMARU

JUDGE