REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO.313 OF 2005

INDUSTRIAL COMMERCIAL DEVELOPMENT CORPORATION.....PLAINTIFF

VERSUS

PETER RUTO.....1ST DEFENDANT

KIPKOSKEI RUTO (OBJECTOR).....2ND DEFENDANT

KIPSANG RUTO.....3RD DEFENDANT

RULING

This is a Motion on Notice seeking one primary relief which is that the suit against the 2nd Defendant be dismissed for want of prosecution. The grounds for the Application are that the Plaintiff has no interest in pursuing the claim against the Applicant and has inordinately delayed in taking any action to ensure the prosecution of the suit. The Application is supported by an affidavit sworn by the 2nd Defendant/Applicant. The Application was opposed and there is a Replying Affidavit sworn by one Isaac B. Mogaka the Plaintiff's Corporation Secretary.

The Application was canvassed before me on 25th May 2005. Having considered the arguments advanced before me, I take the following view of the matter. The Application has been brought under the provisions of Order XVI Rule 5(d) of the Civil Procedure Rules which provides as follows:-

> ***"5. If within three months after –***
>
> ***(d) the adjournment of the suit generally the Plaintiff or the Court of its own motion on notice to the parties does not set the suit down for hearing the Defendant may either set the suit down for hearing or apply for its dismissal".***

The 2nd Defendants' case is that since he filed his defence and Counter Claim on 31st March 2003, the Plaintiff has not taken any action in the suit. This default according to the 2nd Defendant is evidence that the Plaintiff is not interested in pursing the case against the 2nd Defendant. The Plaintiffs answer was that it had not gone to sleep as it has a judgment against the 1st and 3rd Defendants which judgment it has sought to be satisfied by the 1st and 3rd Defendants without success and as recently as January 2004 the Plaintiff moved the Court to execute against the 1st and 3rd Defendant but made no recovery. The Plaintiff further argued that the 2nd Defendant has his own claim and has also failed to prosecute it.

In Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd (1969) E.A. 696 Law J.A. observed as follows at page 699:

> ***" I am of the view that the provisions of the Civil Procedure Rules for the dismissal of suits for want of prosecution do not purport to be exclusive and do not fetter the Court's***

inherent jurisdiction to dismiss suits in circumstances not falling directly within those provisions, if it is necessary to do so to prevent injustice or abuse of the process of the Court…"

It is clear on this authority that the Court has discretion to dismiss a suit for want of prosecution in the exercise of its inherent powers. However, to avoid surprise the Courts inherent jurisdiction should be properly invoked. The record of this case does not show that this case has ever been fixed for hearing. It cannot therefore be said that this suit was adjourned generally. Indeed there is no evidence that discovery has been done. It is my view therefore that Order XVI Rule 5 (d) does not apply to the situation at hand. I have already found that the 2nd Defendant has not invoked the inherent powers of the Court and his plea would therefore be for dismissal. However if I am wrong and if the 2nd Defendant had properly invoked the inherent jurisdiction of the Court I would still hold that my discretion would not be exercised in favour of the 2nd Defendant.

In Ivita –v- Kyumba (1984) KLR 441. ***It was held as follows inter alia:***

"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 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 in the discretion of the Court."

This decision was of the High Court (Cheson J. as he then was) and has been approved by the Court of Appeal. See for example the case of **Salkas Contractors Ltd –v- Kenya Petroleum Refineries Ltd: C.A. No. 250 of 2003** in which the Learned Judges of Appeal cited with approval the said high court decision. In the same appeal, their Lordships cited the case of **Allen –v- Sir Alfred MCALPINE & Sons Ltd (1968) 1 ALL E.R. 543** where Salmon L.J. stated as follows on the principles to be applied in a case such as the one at hand.

> "A Defendant may apply to have an action dismissed for want of prosecution either (a) because of the Plaintiff's 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 of the line 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 themselves and third parties or between each other. 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."

Now looking at this matter in that perspective and in the light of the fact that the record shows that the parties have yet to agree on issues for trial or file separate lists of issues in default of agreement and

further that the 2nd Defendant himself has an unprosecuted Counter claim it cannot be said that this is an appropriate case for invocation of the Court's inherent powers to dismiss the suit for want of prosecution.

The Plaintiff has explained that it has been seeking satisfaction of a decree against the 1st and 3rd Defendants. It cannot therefore be said that the Plaintiff is guilty of intentional inordinate or inexcusable failure to set down the suit for hearing. The 2nd defendant has not also demonstrated that he will suffer prejudice if this suit is not dismissed. For the above reasons I would be disinclined to exercise the Courts inherent powers even if the jurisdiction had been properly invoked.

In view of the above conclusions, the situation is that there remains on record the Plaintiff's suit and the 2nd Defendants defence and Counter claim. The 2nd Defendant's application dated 15th January, 2005 and filed on 17th January 2005 is dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2005.

F. AZANGALALA

JUDGE

Read in the presence of :-

Chebet – Holding brief for Mulwa for the Defendant /Applicant

F. AZANGALALA

JUDGE