

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO. 852 OF 2001

TRUST BANK LIMITED.....PLAINTIFF

VERSUS

FIRST AMERICAN BANK LTD.....1ST DEFENDANT

AJAY SHAH.....2ND DEFENDANT

PRAFUL SHAH.....3RD DEFENDANT

R U L I N G

This is an application (by notice of motion dated 22nd December, 2004) by the 2nd Defendant for dismissal of the Plaintiff's suit as against him for want of prosecution. It is brought under Rule 5(a) or Order 16 of the Civil Procedure Rules (the Rules). Under that paragraph, 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 down the suit for hearing or apply for its dismissal. The 2nd Defendant has elected the latter option, as he was entitled to do. I have read the supporting and replying affidavits. I have also perused the court record. Finally I have given due consideration to the submissions of the learned counsels appearing. It appears not in dispute that pleadings in this case closed some time in 2001, and further, that by the time the present application was filed neither the Plaintiff nor the court of its own motion on notice to the parties had set the suit down for hearing. It is the 2nd Defendant's stand that this inactivity was brought by the Plaintiff's indolence or lack of interest in prosecuting the suit. On its part the Plaintiff has offered various reasons in a long replying affidavit why the suit has not yet been prosecuted. Among those reasons in the fact that there is pending an appeal before the Court of Appeal filed by the 2nd Defendant against an order of this court that refused to stay this and other suits pending hearing and determination of Nairobi HCCC No. 2155 of 2000. It seems to me that by choosing to await the outcome of the said appeal the Plaintiff was motivated by the desire that there should be an orderly conduct of all the litigation between and involving the parties pending in the courts. At any rate, as soon as the Plaintiff learnt that the 2nd Defendant was not of the same persuasion as is evidenced by the present application it moved to set the suit down for hearing and the same is now scheduled to be heard on 25th July, 2005. It also appears from the replying affidavit that there had been negotiations going on between the parties with a view to amicably settle the matters in dispute. A court of justice will not lightly shut out a litigant from the seat of judgment. It will endeavour to determine all the issues in controversy upon a proper hearing of the action. The circumstances of this case as disclosed by the main pleadings, the supporting and replying affidavits and the submissions of the learned counsels appearing militate against granting the drastic order sought. I will refuse the application. Costs thereof shall be in the cause. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF JUNE, 2005.

H. P. G. WAWERU

JUDGE

DELIVERED THIS.....DAY OF JUNE, 2005.