REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL CASE 1328 OF 2000

SANSORA WIRE & NAIL WORKS LTD……..……..PLAINTIFF

VERSUS

SHREEJI ENTERPRISES KENYA LTD…….DEFENDANT

R U L I N G

This is an application by way of Motion, seeking the dismissal of the Defendant's application dated 8th April, 2003, on the grounds that the Defendant had failed to prosecute it. The application is expressed to have been brought pursuant to the provisions of Order 16 Rule 5, and Order 50 Rule 1, of the Civil Procedure Rules, as read together with Section 3A of the Civil Procedure Act.

The history of this matter is that the suit was filed on 25th July 2000. Upon service, the Defendant entered appearance on 15th August 2000, and then filed a Defence on 5th September 2000.

It was the Defendant's contention that the Plaintiff had failed to supply goods which were in accordance with the description and sample agreed upon between the parties. Furthermore, the Defendant asserted that the parties had not agreed on the price to be paid for the goods, yet the Plaintiff went ahead to charge unreasonable and exorbitant prices.

In the light of the Defence filed, the Plaintiff filed an application for summary judgement; that application was filed on 4th April 2001. When that application came up for hearing, on 27th September 2001, the parties recorded a consent judgement in favour of the Plaintiff.

Thereafter, the Defendant filed an application on 23rd November 2001, requesting the court to allow it to pay the decretal amount by monthly instalments of Kshs. 100,000/=. That application was scheduled to be heard on 18th January 2002, but was not dealt with on that date, as the court file was, reportedly, missing.

On 13th February 2002, the Plaintiff filed an application for the re-constitution of the court file. That application was heard and granted by the court, on 18th February 2002. The Plaintiff then moved swiftly and procured a Certificate of Costs on 22nd February 2002. That was followed with steps, to execute the Decree, which culminated in a proclamation being issued over the Defendant's property.

The Defendant reacted quickly, by filing an application for stay of execution, as well as for leave to pay the decretal amount by monthly instalments. The new application was filed on 8th April 2003. Simultaneously with that application, the Defendant filed a Notice of Withdrawal of Application, by which he withdrew the earlier application dated 22nd November 2001, which had been filed in court on 23rd November 2001.

On 14th April 2003, the parties recorded a consent order in the following terms:

> **"1. THAT the judgement debtor do pay to the decree holder Kshs. 3,965,934/= on or before 24th April 2003**
>
> **. 2. THAT the application dated 8th April 2003 is stood over to 24th April 2003 for hearing the bit concerning the payment of the debt by instalments.**
>
> **3. THAT there be a stay until 24th April, 2003".**

On the date when the application was scheduled to be heard, the parties adjourned it to 2nd June 2003. Meanwhile, the interim orders for stay of execution was extended.

The other significant happenings that are directly touching on this application took place as follows:

> (i) On 30th June 2003, the Plaintiff canvassed the Notice of Preliminary Objection which had been filed on 11th April 2003.
>
> (ii) On 21st July 2003 Nyamu J. delivered his Ruling on the Preliminary Objection. He held that the Defendant was precluded from prosecuting the application dated 8th April 2003 until such time as its Notice of Withdrawal of the earlier application had been given effect by the court.
>
> In other words, the court upheld the Plaintiff's Preliminary Objection, and directed that the application dated 8th April 2003 be stayed.
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> (iii) On 30th October 2003, the parties agreed to adjourn the earlier application (dated 22nd November 2001) for hearing on 10th December 2003. The reason cited for that mutual adjournment was that the parties were negotiating a settlement.
>
> (iv) Nothing seems to have been done in the court proceedings between 30th October 2003, and 10th March 2005. On the latter date, the parties again notified the court that negotiations were ongoing, with a view to settling the matter.
>
> (v) When negotiations did not yield the desired goal, the parties fixed for hearing, the "matter." And when the matter came up for hearing before me, on 14th June 2005, the parties were in agreement that application being dealt with was the Notice of Motion filed by the Plaintiff on 8th April 2003.

When canvassing the application, Mr. Ashitiva advocate for the Plaintiff/Applicant submitted that the provisions of Order 16 rule 5 of the Civil Procedure Rules were applicable to the dismissal of suits as well as applications. The said Rule 5 reads as follows:-

> "5. **If, within three months after –**
>
> **(a) the close of pleadings; or**
>
> **(c) the removal of the suit from the hearing list; or**
>
> **(d) the adjournment of the suit generally, 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 light of the usage of the word "**suit"** as opposed to "**application**" in Order 16 Rule 5, the court sought to know from the applicant how the Rule could be applied to a scenario such as the one before me, wherein the respondent had failed to prosecute its application to its logical conclusion.

It was submitted by the Plaintiff that the answer to my inquiry was to be found in Section 2 of the Civil Procedure Code, whereat the meaning of the word **"suit"** was given, as follows:

" **"Suit" means all civil proceedings commenced in any manner prescribed."**

Mr. Ashitiva submitted that by filing an application, the defendant had commenced proceedings.

However, in response thereto, Miss Mwanzia, advocate for the Defendant submitted that Order 16 Rule 5 does not apply to applications. In her view a "suit" does not include applications.

The Defendant also explained that the reasons for its failure to prosecute the application were the fact that the parties were negotiating, and did eventually arrive at an agreement in which the Defendant was paying the balance of the decretal amount, by way of instalments. In those circumstances, having achieved the very goal which the application was intended for, the Defendant felt that there was no need to prosecute the application.

In support of its application the Plaintiff cited the following authorities.

(1) HARBINDER SETHI V. THE STANDARD LTD & ANOTHER, HCCC NO. 314 of 2002

(2) KABANSORA FLOUR MILLS V. JAMBO BISCUITS LTD, HCCC No. 5418 of 1992

(3) DEPOSIT PROTECTION FUND BOARD V. PANACHAND JIVRAJ SHAH & 2 OTHERS, CIVIL APPLICATION No. NAI 47 of 2002.

(4) ENGEN KENYA LTD V. UNIVAC PETROLEUM LTD, HCCC No.

(5) BIRDS PARADISE TOURS & TRAVEL LTD V. HOTEL SECRETARIES, HCCC No. 841 of 1988.

A reading of the first two authorities listed above clearly indicates that they were in relation to applications for the dismissal of suits, as opposed to applications.

Therefore, the said authorities do not come to the aid of the applicant here.

The third authority (of **Deposit Protection Fund Board v. Panachand Jivraj Shah & 2 Others**) was also an application to the Court of Appeal, for a stay of execution. The said application arose after Mbaluto J. had dismissed a suit for want of prosecution. In effect, this authority does not support the Plaintiff's contention.

But then in **Engen Kenya Limited v. Univac Petroleum Limited, HCC No. 1661 of 2001,** Ombija J. held as follows:-

"There is no specific provision under the Civil Procedure Rules and Act for the amendment of an application.

On the face of such a lacuna, we fall back to Section 89 of the Civil Procedure Act. In MANDAVIA Vs. RATTAN SINGH (1966) page 146 it was held that:-

"The procedure relating to suits shall be followed so far as may be applicable in all proceedings in any court of civil proceedings."

The application herein is a civil proceeding in a court of civil proceedings in a court of civil jurisdiction and the procedure relating to amendment of pleadings applies mutatis mutandi to amendment of application."

As is clear from the foregoing holding, Ombija J. was dealing with an application for the amendment of an application. To that extent, the case he was handling is distinguishable from the matter before me, in which the Plaintiff is seeking to dismiss an application for want of prosecution. In an endeavour to have the application dismissed, the applicant did not invoke the provisions of Section 89 of the Civil Procedure Act. It also invoked the provisions of Order 16 rule 5, which specifically makes reference to the dismissal of suits.

Order 16 is headed **"PROSECUTION OF SUITS AND ADJOURNMENTS".**

The said heading sets the tone of the wording to be found in the whole of Order 16. The said tone is carried through, even to Rule 5, which inter alia, makes reference to the close of pleadings. To my mind, such reference can only be deemed to limit the meaning of the word "**suit"** to the whole case, as opposed to applications made within the existing case.

In my understanding of the decision of Ombija J. in the **Engen Kenya Ltd Vs. Univac Petroleum Limited** case, above, he did not purport to equate an application to a suit. If anything, he recognised that the two are different. He held that **"an application is a civil proceeding."** Of course, it is. There is no doubt about that. But that does not mean that an application can be equated to a pleading, by which the entire suit is either commenced or defended. Section 2 of the Civil Procedure Act defines the word pleading as follows:-

> **"Pleading includes a petition or summons, and the statements in writing of the claim or demand of any Plaintiff, and of the defence of any Defendant thereto, and of the reply of the Plaintiff to any defence on counterclaim of a defendant."**

It is for that reason that Order 8 rule 17(2) of the Civil Procedure Rules expressly provides that:

> **"No pleading subsequent to the reply shall be pleaded without leave of the court, and then shall be pleaded only upon such terms as the court thinks fit."**

In other words, by virtue of the provisions of Order 8 rule 17(2), pleadings are closed. However, there is nothing known as "a **closure to application**s." For all those reasons I hold the view that the provisions of Order 16 rule 5 of the Civil Procedure Rules are only applicable to suits, as opposed to applications.

But does that mean that once an application has been filed, its life can be perpetual if the applicant does not prosecute it? Cannot the respondent apply to strike it out?

The answer, as I see it, is that there is no legal provision to apply for the striking out of an application, on the grounds that the applicant was not prosecuting it. In the circumstances, I believe that the only recourse available to the respondent is to have the application listed for hearing. In that case, if the applicant did not then turn up to prosecute his application, the same could be dismissed.

But, assuming that I am wrong in that regard, and that a respondent to an application is entitled to move the court under Order 16 rule 5, for the dismissal of an application, should I have dismissed the application dated 8th April 2003?

Earlier, in this Ruling, I had set out the history of the case. It is evident from the said history that from about 10th December 2003, to 19th January 2005 (when the present application was filed), the Defendant had not taken any steps in the proceedings. So what explanation has been tendered by the Defendant for failing to prosecute the application?

The Defendant has basically said that there had been no need to prosecute the application as the parties were involved in negotiations, on the very issues which were the subject matter of the application. Following the said negotiations, the Defendant made payment to the Plaintiff. And according to the Defendant, the entire decretal amount was paid. If anything, it is the Defendant's contention that it had overpaid the money due to the Plaintiff.

If the Defendant was making payments by instalments, and the Plaintiff was accepting the said payments, it is my view that the Defendant did not actually need to prosecute the application. In those circumstances, the most appropriate action would have been for the Defendant to persuade the Plaintiff to have a consent letter filed in court, to embody the agreed terms. But that did not happen. That means that the application dated 8th April 2003 is still not yet determined.

The Defendant feels that the application should not be dismissed, because by so doing, the Plaintiff would become entitled to an order for costs. In that respect, two things need to be said. Ordinarily, costs of any action, cause or other matter or issue would follow the event unless the court shall, for good reason, otherwise order. That legal position is spelt out in the proviso to Section 27(1) of the Civil Procedure Act.Therefore, the mere fact that the Defendant would be obliged to pay costs is not reason enough for the court to decline to dismiss the application.

In the same vein, Section 27(1) makes it clear that the court has a discretion on the issue of costs. Thus, if the court had good reason for not ordering the Defendant to pay the costs, the court would be entitled to give such order as may be deemed appropriate, on the question of costs. For that reason, it is not available to the Defendant to argue that the application should not be dismissed, so that it does not pay the costs therefor. Then, the Defendant put forward a submission which I deemed to be quite curious. It contended that when a party filed an application to pay the decretal amount by instalments, interest stopped accruing from the date when the first instalment is paid. It was explained that by the date when the 1st instalment became payable, the parties would have agreed on the total sum payable.

In response to that line of submissions, the Plaintiff said that even if the parties had agreed on the instalments which were payable, such an agreement would not vary the Decree.

In my considered view, the Plaintiff's perception of the law in that regard is valid. Section 26(1) of the Civil Procedure Act stipulates that:-

> **"where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."**

From the foregoing wording, it is evident that the court has a discretion to order for the payment of interest at such rate as it deems reasonable. The said discretion of the court enables it to order that interest be payable:-

(a) from a date before the institution of the suit, and

(b) from the date of the suit, and

(c) from the date of the decree

The interest that is ordered to be paid, may be directed to be payable either to the date of payment or until such earlier date as the court thinks fit.

And both the rate of interest payable, as well as the date(s) from when it commences upto the date when the interest is payable, is to be embodied in the Decree. In this case the Decree was issued by the court on 19th November 2001. The relevant part of the Decree was worded in the manner following:-

" **IT IS ORDERED BY CONSENT:-**

1. THAT the Defendant do pay the Plaintiff the sum of Kshs. 4,526,292.85 as more particularly set

forth hereunder together with interest at 12% p.a. from 28th September 2001 until payment in full.

2. THAT the Defendant do pay the Plaintiff the costs of this suit to be taxed and certified by the taxing officer of this court.

3. THAT there be a stay of execution for sixty days from the date hereof.

PARTICULARS

Principal amount Kshs. 3,965,933.40

Interest thereon at 12% p.a. from 25.7.2000 to 27.9.2001 being date of judgement ……. Kshs. 559,359.45

Total Kshs. 4,526,292.85"

The Decree directed that interest be paid at the rate of 12% per annum, from 28th September 2001, until payment in full.

A perusal of the record of the proceedings herein reveals that that Decree has not been varied or reviewed in any manner whatsoever.

And, by virtue of the provisions of Order 20 rule 11 (2) of the Civil Procedure Rules:-

> **"After the passing of any such decree, the court may on the application of the judgement-debtor and with the consent of the decree-holder for sufficient cause shown order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgement-debtor, or the taking of security from him, or otherwise, as it thinks fit."**

That rule, which the Defendant had invoked when applying to court for leave to pay by instalments, recognises that the sum payable is the **"amount decreed**". In effect, even assuming that there had been an agreement between the parties on the instalments payable periodically, that agreement could not purport to vary the decree, by implication.

I therefore hold that the Defendant cannot be right to assume that interest ceased being payable. In any event, the said assumption is not backed by any document to, as much as, show that the parties did agree on any instalments.

The position therefore is this, this application, to dismiss the Defendant's application dated 8th April 2003, does not lie. It is therefore dismissed. However, I order that each party will pay its costs.

If the Plaintiff feels that the said application should be disposed of, it may list it for hearing. On the other hand if the Defendant feels that the application had served its purpose, it may discontinue the said application, with the attendant consequences as to costs.

However, the parties are not obliged to take up any of the suggested routes. They would be perfectly in order to take such action as they feel would best serve their legal interests in the case.

Dated and Delivered at Nairobi this 18th day of July 2005.

FRED A. OCHIENG

JUDGE