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

Civil Case 1550 of 2001

NAFTALI OPONDO ONYANGO …… PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD ……. DEFENDANT

RULING

This is an Application by the Defendant for an order that the Plaintiff's suit be dismissed for want of prosecution. The Application is brought under Order XVI Rule 5 of the Civil Procedure Rules. The reasons given by the Defendant for seeking dismissal are that although the Plaintiff filed the suit on 11.10.2001 together with an Application for injunction under a Certificate of Urgency, the Application has to date not been heard and the Plaintiff has further taken no step to prosecute the said application or the suit.

This suit was indeed instituted on 11.10.2001 by the Plaintiff who sought various reliefs including injunction to restrain the Defendant from further advertising for sale, selling by public auction or private treaty or otherwise howsoever or completing by conveyance or transfer of any sale concluded by auction or otherwise LR. Numbers Bukhayo/Mudika/373, 5657, 2257 and 3489.

The Defendant entered appearance on 13.11.2001 and delivered its defence on 23.11.2001.

The Application for an interim injunction which the Plaintiff had simultaneously filed with the Plaint came up for hearing inter partes on 27.11.2001 but was not heard. The same was fixed for hearing on 20.12.2001 and an interim injunction was granted until the said date. On that date the said Application was stood over generally and in the meantime the status quo was to be maintained. The Application was subsequently fixed for hearing on 14.3.2002. On that date when the Plaintiff's Counsel applied for adjournment, the Court granted the Application but vacated the temporary orders that had been issued on 20.12.001.

On 26.3.2002 the suit was by consent fixed for hearing on 8.7.2002. Come that date, the suit was removed from the day's hearing list and was stood over generally.

On 9.12.2003, the Application for injunction came up for hearing but was not heard on the ground that the parties were negotiating a settlement. Negotiations appear to have collapsed and the Application for injunction was fixed for hearing on 23rd July 2004. On that date Counsel for the Plaintiff was not sure whether or not he could proceed with the Application and was granted a last adjournment and the Application was fixed for hearing on 20th September, 2004. Before that date, the Plaintiff's former Advocates applied by their Application dated 20th August 2004 to withdraw from acting for the Plaintiff. That Application was granted on 22nd October 2004.

On 7th February, 2005 the Plaintiff appointed the present Advocate to represent him.

From the record as detailed above, I am of the view that the delay the Plaintiff has to explain is between 22nd October, 2004 when his former Advocates withdrew from acting and 25th May 2005 when the Defendant filed the present Application. In his replying affidavit the Plaintiff attributes the delay in prosecuting his case on direct negations he had with the Defendant's Busia branch and is of the view that in the interests of justice he should be allowed to prosecute his claim. He further attributes the delay to prosecuting his case on apparent lack of communication between himself and his former advocates and has sworn to urgently proceed with the suit now that he has new Advocates.

Under these circumstances, should I grant the order sought? The Defendant relied upon the case of **Et Monks & Co. Ltd –v- Evans (1985) 584** for the proposition that public policy demands that the business of the Courts should be conducted with expedition. The Defendant further placed reliance upon the case of **Victory construction Co. –v- A.N. Duggal (1962) E.A. 897** for the proposition that not every step taken in a suit counts, the step taken must be with a view to proceeding with the suit.

Lastly, the Defendant placed reliance upon the case of **Sagoo –v- Bharji (1990) KLR 459** for the proposition that where there has been intentional inordinate or inexcusable delay on the part of the Plaintiff the suit will be dismissed.

In **Salkas Contractors Ltd –v- Kenya Petroleum Refineries: Mombasa C.A. No.250 of 2003 (UR)** the Court of Appeal quoted Salmon in **Allan –v- Sir Alfred McAlpine and Sons Ltd (1968) 1 ALL E.R. 543** as follows:

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 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 third parties. In addition to any inference that may properly be drawn form the delay itself, prejudice can sometimes be directly proved. As a rule the longer the delay the greater the likelihood of prejudice at the trial."***

The Court of Appeal stated that the above principles apply in Kenya and had been followed consistently by Kenyan Courts. Cheson J. as he then was applied the principles in the case of Ivita –v- Kyumbu (l984) KLR 441 When he observed that:-

> ***"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 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."***

Cheson 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 suit 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. Under those circumstances the Learned Judge dismissed the suit for want of prosecution.

The case of **Et. Monks & Co. Ltd –v- Evans (supra)** the Court was concerned that witnesses would not be traced. The Court also found that the delay was inordinate and in excusable and would prejudice the Defendant. That case is therefore distinguishable form the case at hand.

The cases of **Victory Construction Co. –v- A.N. Duggal (supra)** and **Sagoo –v- Bharji (supra)** the suits were not dismissed although the Learned judges correctly stated the Law applicable.

Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate. The explanation proffered by Plaintiff is to my mind not completely unbelievable. The delay is therefore not inexcusable.

The Defendant in its supporting affidavit avers that the delay is prejudicial to it. The nature of the prejudice is not demonstrated. On his part the Plaintiff argues that the Defendant will suffer no prejudice if this suit is not dismissed because it is sufficiently secured and there is no impediment to the realization of the securities.

In **Sheikh –v- Gupta and others (1969) E.A. 140** Travelyan J. as he then was said at page 141 (quoting Edmonds J. in **Victory Construction Co. –v- Dugal (supra)**.

> ***"The purpose of rule 6 in my view is to provide the Court with administrative machinery whereby to disencumber itself of case records in which the parties appear to have lost interest."***

However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.

In the case at hand the Plaintiff has shown that he has instructed his current lawyers to urgently fix the suit for hearing on merit. I am persuaded that he has not lost interest in this case and that the suit can now be prosecuted expeditiously.

In the result I decline to grant the orders sought in the Defendant's Application dated 16th May 2005. However, as the Defendant's application was not altogether absolutely without some merit there will be no order as to costs.

The Plaintiff is ordered to take concrete steps towards setting down the suit for hearing. Such steps to be taken within the next 30 days failing which the Defendant will be at liberty to move the Court as it deems appropriate.

Orders accordingly.

DATED AND DILVERED AT NAIROBI THIS 11TH DAY OF JULY 2005.

F. AZANGALALA
JUDGE

Read in the presence of :-