REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL CASE 594 OF 2002

ERI LIMITED……PLAINTIFF

VERSUS

SOUTHERN CREDIT BANIING CORPORATION

(Formerly known as BULLION BANK……DEFENDANT

R U L I N G

This is an application by the Defendant, who is seeking the dismissal of the Plaintiff's suit, for want of prosecution.

The record shows that the suit was filed on 16th May 2002. Alongside the Plaint, there was filed an application for an injunction to restrain the Defendant from selling the suit properties, **KISUMU MUNICIPALITY/BLOCK 3/92 and KISUMU MUNICIPALITY/BLOCK 12/265.**

On 25th June 2002, the Hon. J.L.A. Osiemo J. dismissed the Plaintiff's application for an injunction. In his considered view, it was not available to the Plaintiff to invoke the change in the Defendant's name, as sufficient reason to warrant the grant of an injunction. Osiemo J. held that, "**the Plaintiff intends to rely on a technicality which will not withstand the force of justice."**

Following the dismissal of the Plaintiff's application, it applied to the Court of Appeal for stay of execution. That application, which was under Rule 5 (2) (b) of the Court of Appeal Rules was dismissed with costs on 19th December 2003.

Meanwhile, following the court's refusal to stop the sale of the suit property, the Defendant went ahead to dispose of it.

In the circumstances, the Defendant feels that the suit should be dismissed, on the grounds that the Plaintiff has not taken any steps to prosecute it for over two years. As far as the Defendant is concerned, the fact that the Plaintiff may have filed a Memorandum of Appeal was not reason enough to delay the hearing of this suit. And, as if that were not enough, the Defendant points out that the subject matter of the suit had been sold, so that the suit does not lie, in any event.

But, the Plaintiff views the issues very differently. Although it concedes that its application for an injunction was dismissed, as was its application to the Court of Appeal for stay of execution, the Plaintiff nonetheless insists that the Court of Appeal had expressed the view that the appeal itself was arguable. It is contended that the Court of Appeal only dismissed the application for stay of execution on a technicality, as the said appellate court was of the view that the failure to grant an injunction would not render the appeal nugatory.

Meanwhile, the Plaintiff expresses the view that it cannot be blamed for the delay in prosecuting the appeal. It explains that whereas the said court did invite the parties to attend at its registry on 26th February 2004, with a view to fixing hearing dates, the court was unable to allocate any dates, as its diary for 2004 was already full.

The Defendant did not challenge the averments regarding the practice of the Court of Appeal, in the fixing of dates. In other words, it is not disputed that the said appellate court does not leave it to the parties to determine when to attend at its registry, with a view to fixing hearing dates. Instead, the Court of Appeal sends out invitations to parties to attend at its registry to fix hearing dates.

Having been in private practice for many years prior to my appointment as a judge, I am aware of the said practice of the Court of Appeal. Therefore, the Plaintiff cannot be blamed for not having taken steps to prosecute the appeal. However, nobody is blaming the Plaintiff in that regard. The only thing that the Defendant is saying is that the Plaintiff had not taken steps to prosecute the suit.

By virtue of the provisions of Order 41 rule 4 (1), no appeal or second appeal shall operate as a stay of execution or proceedings except in so far as the court appealed from may order. Therefore, as this court did not grant any order for stay of proceedings, the mere fact that an appeal had been lodged before the Court of Appeal would not, by itself, serve to stay the proceedings in this case.

Furthermore, the fact that the Court of Appeal may have invited the parties herein to attend at its registry in February 2004, would not be deemed to be a step in the prosecution of this suit. Had a date been fixed for the hearing of the appeal or should there have been the hearing of the said appeal, such development would still not be deemed to be steps in this suit. The fact therefore remains that the Plaintiff has failed to take steps to prosecute this suit for over two years.

But even in the event that the invitation by the Court of Appeal to the parties, to attend at its registry to fix hearing dates for the appeal, counted for something, the said action took place in February 2004. In other words, the Plaintiff would still have been guilty of a long period on inaction.

By virtue of Order 16 rule 5, the Defendant is entitled to move the court for the dismissal of a suit, if within three months of the close of pleadings; or the removal of the suit from the hearing list; or of the adjournment of the suit generally, the said suit is not set down for hearing. Of course, in reality, the defendant is only more likely than not to have the suit dismissed if he makes his application long after the expiry of the three months period.

In this case, the suit has never been set down for hearing. Therefore, in order to establish the period in issue, one has to look at the date when the pleadings closed.

By virtue of the provisions of Order 6 rule 11 of the Civil Procedure Rules, pleadings in a suit would close fourteen days after service of the Reply or Defence to counterclaim, or if neither is served, fourteen days after service of the Defence.

The Defence was filed on 4th June 2002; however there is no evidence of the date of service. In the circumstances, the court can only presume that the Defence was served promptly. But, in any event, there is no basis for thinking that there was any delay in the service of the Defence upon the Plaintiff. I therefore presume that the Defence was served in June 2002.

The amount of time which has lapsed since the close of pleadings would still be more than two years, as indicated by the Defendant on the Grounds cited on the face of the application.

In **SHEIKH V GUPTA & OTHERS [1969] E. A. 140** at 143, Trevelyan J. held as follows:-

"I do not think one ought to, or can, say that any fixed period of time is or is not inordinate delay for each case depends on its own facts and circumstances, but the judges on what was before them, thought that two years was such delay."

I fully appreciate the sentiments of Trevelyan J, above. First, it is not right to make a hard and fast rule as to what does or does not constitute inordinate delay. Secondly, I consider the fact that as years have gone by, people in Kenya have become more litigious, whilst the number of judges has remained constant, at least as of now. The nett effect has been the undesirable longer periods of time which lapse between the close of pleadings, and trials, or even the period between the date when a hearing is taken out of the list and when it is next listed. It is an unwelcome development, but a fact nonetheless. Therefore, much as delays are not to be encouraged, I think that for now, parties might just be able to escape dismissal if the delay in prosecuting suits is not prolonged.

In **IVITA V. KYUMBU [1984] KLR 441 at 449,** Chesoni J. (as he then was) held as follows:-

"So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task, for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced."

In this case, the Plaintiff's delay was for over two years. That period of time is undoubtedly long. And the suit property has already been sold off. In the circumstances, I cannot understand how the prayers in the plaint could be awarded to the Plaintiff. The Defendant cannot now be stopped from selling the suit properties. A declaration that the Defendant is not entitled to exercise the statutory powers of sale would be of no consequence, as the said powers had already been exercised. The Defendant could not discharge the legal charges as no such charges over the suit properties are in existence, following the sale of the properties. Similarly, the Defendant could not be ordered to surrender the title documents for the suit properties, because it no longer had them.

Given the foregoing circumstances, I hold the view that justice can only be done in this case, if the application was allowed. The delay on the plaintiff's part is not only prolonged; there is no reasonable explanation which the plaintiff has tendered for it. Therefore, although I am well aware that courts should normally strive to retain suits rather than dismiss them through summary procedures, I am well satisfied that the Defendant has made out a compelling case. Accordingly, the plaintiff's suit is dismissed, for want of prosecution. The Defendant is awarded the costs of this application as well as of the suit.

Dated and Delivered at Nairobi this 12th day of October 2005.

FRED A. OCHIENG

JUDGE