REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1946 of 1994

EAST AFRICAN PORTLAND CEMENT COMPANY LTD.....PLAINTIFF

VERSUS

TAUSI ASSURANCE COMPANY LTD..... 1st DEFENDANT

NZAMA KUU CEMENT COMPANY LTD..... 2nd DEFENDANT

RULING

This Ruling relates to an old case of 1994. It has done itsrounds. It was transferred to this court by order of Aganyanga J on8.11.2000. Between the date of filing the case on 23.05.1994, andthe order of the Deputy Principal Registrar on 5.0.7.1999 forreconstruction thereof the court file borrowed legs and disappearedfor nearly 5 years. During that hiatus no party could move the courtuntil the file was reconstituted. And this occurred in July 1999.Since that time there were frequent eruptions as those of a dormantbut occasionally awakening volcano. One could figuratively say thatthese tremors occurred on a small scale after 5.07.1999 on 27.7.1999, 17.11.1999, 23.05.2000, 27.07.2000, 19.09.2000, 8.11.2000. Including the reconstruction of the file, there were 3tremors in 1999. The year 2000 had the most tremors 4 in total. Thevolcano was completely dormant in the years 2001 and 2002, and thefirst quarter of the year 2003, and even then it took the Defendant toactivate the smoldering inferno by its application of 29.04.2003, thesubject of this ruling. Even the application to strike out or dismiss thesuit for want of prosecution did not goad the Plaintiff to move theCourt and have the matter fixed for hearing.

The Defendant through its Counsel Mr. Rustam Hira, who ledMbugua & Mbugua Advocates in this matter, now says that this suit isover 9 years old, and all it does to the 1st Defendant in particular, aninsurance company, is to add a burden of keeping provision forcontingent liability on its books of accounts which at the end of theyear translates into lower profits for its shareholders. It is time thesecontingent liabilities were expunged from the Defendants' books ofaccount. The way to do this is to have the suit herein prosecuted bythe Plaintiff, if not have it dismissed for want of prosecution.

The record shows that this suit was instituted on 23.05.19994(the date of the Plaint) and filed on 26.05.1994 (the date of the Court stamp). The claim is for a large sum of money, Kshs.6, 921,889.00.The Plaintiff is a large parastatal, the East African Portland CementCo. Ltd., if it wanted this case prosecuted it would have done sowithin the first three months after the close pleadings or shortlythereafter. The Defences herein were filed on 22.07.1994, on behalfof the First Defendant and 03.08.1994 on behalf of the SecondDefendant, and should have closed 14 days after the service of theReply to the First

Defendant's Defence dated 7.09.1994 and filed12.09.1994. The pleadings would if service of the Reply to Defencewas effected after filing thereof, have closed by about 10.10.1994.There was, (even if allowance of five years for the loss of the courtfile, were given) adequate time to press for the determination of thesuit. There has since the reconstruction of the file from 5.07.1999,time enough to prosecute this suit. It is over 4 years since the filewas reconstructed, and no effort has been made to either makediscovery of documents, draw up issues or in any way prepare thesuit for hearing. The court is thus led to believe what Joseph NjorogeMbugua, Advocate says in paragraph 7 of his Affidavit in Support ofthe application that;

"7.*I verily believe the Plaintiff's conduct is not that of a litigant interested in prosecuting and finalizing this matter, and in the interest of justice it is only fair that the same be dismissed for want of prosecution."*

In his Further Affidavit sworn on 26.02.2004, the said Joseph Njoroge Mbugua depones that the suit herein last came up for hearing pm 27.11.2001, and since then no attempt has been made to have the case set down for hearing. I could find no date in March 2000 when this matter was before Onyango Otieno J as he then was and I am therefore unable to verify the order he was supposed to have made to stand this case as dismissed if it was not set down for hearing within 30 days of his order. There is also no copy of Notice issued by this court under the Order XVI Rule 2(1) to the Plaintiff to appear before the court on 7.04.2000 and show cause why the suit should not be dismissed for want of prosecution. The only copy of the Notice to Show Cause why the suit should not be dismissed is the one attached to the Affidavit of the deponent Joseph Njoroge Mbugua. He may well be correct. We are however, determining the formal application for dismissal of the suit for want of prosecution, and his averment may be regarded as tending to support the causeor reason for dismissal of the suit.

From the averments of the deponent Joseph Njoroge Mbuguaaforesaid in the Further Affidavit the conclusion reached at paragraph17 thereof is fully justified - the conduct of the Plaintiff in his suit is not one of a litigant desirous of prosecuting this suit to its logicalconclusion and it is meet and proper that the suit be dismissed forwant of prosecution.

This application is brought under Order XVI rule 5 which provides -*"5. If within 3 months after*

(a) the close of pleadings

(b) *deleted*

(c) *the removal of the suit from the hearing list, or*

(d) *The adjournment of the suit generally, thePlaintiff or the court of its own motion on notice to the parties, does not set down the suit for hearingthe Defendant may either set down the suit forhearing or apply for its dismissal.*It is not easy to comprehend what is intended by the avermentof Job Mwangi Thiga Advocate that he has always been ready to prosecute this matter when according to the Court record, the lasttime this matter was listed for hearing was not even 27.11.2001 asdeponed by Mr. Mbugua but 8.11.2000 when Aganganya J made anorder that this matter be transferred to Milimani Commercial Courtsfrom Central Division, Nairobi Law Courts some 4 years ago.

Under the rules cited above an applicant Defendant, seeking todismiss a matter for want of prosecution has only to establish thatthree months have elapsed since either:

(1) the pleadings were closed, or

(2) *the removal of the case from the hearing list,*

(3) *Adjournment of the case.*

In addition to these three important ingredients, theapplicant/defendant will also show that:

(1) The Plaintiff has since the occurrence of the three ingredients not set the case down for hearing or

(2) *The court has not of its own motion on notice to the parties, set down the case for hearing.*

If the above described ingredients are present, the Defendantmay elect to set down the case for hearing, or he has the other optionof applying, like in this case, to have the case dismissed for want ofprosecution.

At some stage I thought that once these five ingredients arepresent, no authority was needed for stating that this case is a propercandidate for dismissal on the primary ground that the delay in theprosecution of it has been prolonged for so long that the delay is nolonger merely inordinate but has become inexcusable for a case filedin May, 1994, a period of close to ten years ago. The vital documentsmay have been lost or destroyed on either side, and moreimportantly, in the ordinary cause the prejudice suffered by adefendant caused by the Plaintiffs delay is not only the dimming ofwitnesses' memories but also some witnesses may have translatedthemselves to after lives, changed occupations, or even emigrated toother climes, and their evidence would be procured at great cost andexpense to the defendants. Let us however see what the fathersbefore us have said about this subject.

In SAMUEL CHIRA NGURE VS CHARLES MWANIKINDEGWA HCCC 3049 of 1987 - unreported) A. B. Shah J as he then was after distinguishing the Court of Appeal Case No. 17 of 1984Erastus and another Vs Sokhi. in which that court appeared to laydown a principle that in the absence of a Summons for Directionsbeing taken out, no application can be made for dismissal of a case for want of prosecution under Order XVI rule 5, went on to hold, quitecorrectly, if I may say so, that the Court has inherent power to dismissa suit for want of prosecution and the Order XVI procedure is neitherexhaustive nor exclusive. In *Mukisa Biscuit Manufacturing Co. LtdVs West End Distributors Ltd. [1969] EA 696, Law J.A. at page 699 said:-*

"*Dalton J, held in Saldhana's case [1968] E.A. 2)that there was no inherent power in a court todismiss a suit for want of prosecution in casesfalling outside the specific provisions quotedabove. Farrel J adopted this view. Dalton J inSaldana's case purported to follow the decisionof Windham C.J. in Mulji vs Jadavji [1963] E.A. -217 but all that case decided was that the court'sinherent jurisdiction could not be invoked whenan alternative remedy had been available. In the instant case it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the court's inherent jurisdiction can be said to be fettered, as no alternative remedy existed."*

And in the same case, Sir Charles Newbold P. said at page 701:

"I wish however to make it clear that in future a Plaintiff who, for whatever reason, delays for over six years, before bringing his suit for trial can expect little sympathy."

The reference to six years was a reflection of the subject matter a contract. In a running down matter it would be three years or as the case may be. If as in the Erastus and Another Vs Sohki, which was apparently influenced by the provisions of the old rule 5 (b) of Order XVI which provided for taking out of Summons for Directions a person determined upon misusing the provisions of that order as it then existed would wait for three years, take out Summons for Directions, fix a case for hearing, and take it, and keep repeating the exercise.

In such circumstances, the court should use its inherent power to dismiss the case where a Plaintiff did not take out Summons forDirections. Fortunately, the old Rule 5 (b) by Order XVI was deleted(i) by Legal Notice N.36 of 2000 and that potential for abuse wasremoved from the law.

Finally there are two issues concerning the conduct of theDefendants. Firstly, whether rule 5 of Order XVI binds the Defendantto bring his motion within three months of the close of pleadings onthe matter being taken out of the hearing list or adjournmentgenerally. Secondly whether the Defendant has by his own conductcaused a delay in the timely prosecution of the suit, and that thereforeis estopped from taking out proceedings for dismissal of a suit forwant of prosecution.

The first issue were answered by Chesoni J as he then was, inthe case of IVITA VS KYUMBU [1981] KLR 441 where he held thatthe three months limitation in the Civil Procedure Rules Order XVIrule 5 does not apply to a Defendant's application to dismiss the suitand the Defendant may take out a Notice of Motion to dismiss the suitfor want of prosecution at any time after three months limitation. Afailure to take out such notice early does not prejudice the success ofthe Defendant's application. The second issue, whether the Defendant has by his conduct contributed to the delay in theprosecution of a suit is a question of fact and the circumstances ofeach case have to be taken into account. The onus to prosecute hissuit lies squarely upon the Plaintiff and that burden cannot be visitedupon the Defendant however reprehensible his conduct may be ormay have been in delaying the prosecution of the suit. In the Englishcase of ROEBUCK VS MUNGOVIN [1994] 1 ALL ER 568, theHouse of Lords held:-

"Where a Plaintiff was guilty of inordinate andinexcusable delay which prejudiced the Defendant subsequent conduct by the Defendantwhich induced the Plaintiff to incur further expenses in pursuing the action did notconstitute an absolute bar preventing the Defendant from obtaining an order striking outthe claim. Such conduct on the part of the Defendant was a relevant factor to be taken intoaccount by the judge in exercising his discretionwhether to strike out the claim but the weight tobe attached to it depended on all the circumstances of the particular case. Applying that principle, the Plaintiff's inordinate and inexcusable delay coupled with the prejudice caused to the Defendant had been such that the Plaintiff's action should be struck out notwithstanding the correspondence between the parties after the delay had occurred. The appeal should therefore be allowed."

The facts in that case were briefly outlined in the leading speech prepared by Lord Browne Wilkinson at page 571. "The Plaintiff was injured in a road accident on 3.08.1984. He issued a writ against the Defendant on 2.04.1986 and served a statement of claim on 23.4.1986. On 24.7.1986 the Defendant served a defence admitting liability but putting damages in issue. On the same day the defendant asked for further and better particulars, discovery and information as to the quantum of the Plaintiffs claim. Although the matter was in issue before the judge and the Court of Appeal, it is now accepted that during this period of nearly four years the Plaintiff was guilty of inordinate and inexcusable delay which had prejudiced the Defendant. During that period the Defendant had on four occasions applied to strike out the claim for failure to comply with thePlaintiff's procedural obligations. The court opined that there was nodoubt if the Defendant had in April 1990 applied to strike out for wantof prosecution, the application would have succeeded."

The principle to be adduced from this case is that the conductof a Defendant is a factor to be considered by the court in exercisingits discretion to dismiss a case for want of production. The conduct ofthe Defendant is not a bar or an estoppel to the dismissal of a suit forwant of prosecution. Taking therefore the ingredients I have referredto in rule 5 of Order XVI, the words of the fathers as set out in thecases cited, further noting that Plaintiff is an enterprise of substantialmeans whose books of account are audited annually it is a marvelthat the auditors have not cited the lack of prosecution of this suit fora period of ten years as an embarrassment to the Plaintiff. In all thecircumstances, I find the delay in the prosecution to be inordinatelyprolonged and inexcusable, and no purpose will be served by anorder that it should be set down for hearing at the next availableopportunity. Such an order would merely prolong further prejudiceand injustice to the Defendants.

The Defendant's application therefore succeeds, and this suit isdismissed with costs.

Delivered and dated at Nairobi this 26th day of April, 2004.In the presence of;

..... For the Plaintiff

..... For First Defendant

..... For Second Defendant

M. J. ANYARA EMUKULEJUDGE