REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 737 OF 2002

CONCORDE CONTAINER SERVICES LTD …….…… APPELLANT

VERSUS

JOSEPH MUTHIKA KAGO ……. 1ST RESPONDENT

KRISHAN BEHAL LIMITED …….……. 2ND RESPONDENT

JUDGMENT

In a brief nine-line ruling, the Lower Court (Hon. Mrs. T. W. C. Wamae) dismissed this suit for want of prosecution, citing the Plaintiff guilty of "flagrant and culpable inactivity" for not taking any steps to prosecute the case for 3.5 years.

What gave rise to this decision is the Plaintiff's apparent inaction after the suit that had been set down for hearing on April 20, 2000 failed to proceed because the Court was not available. The Plaintiff had attempted to explain this "inaction" in a Replying Affidavit to the application for dismissal for want of prosecution. The explanation was that after the suit had been taken out of the hearing list of April 20, 2000, the Counsels were in communication about the quantification of the claim, leading the Appellant's Counsel to believe that the matter might be settled out of Court. However, this was not to be, and in March 2002 the Appellant's Counsel was served with an application for dismissal of the suit for want of prosecution.

The actual delay, according to the Appellant's Counsel, was nine months, not 3.5 years. Mr Ngatia, Counsel for the Appellant, submitted that in the circumstances, the Hon. Magistrate's Ruling that the Plaintiff was guilty of "flagrant and culpable inactivity" was harsh and unfair, and has appealed to this Court asking that the same be set aside, and that the Appellant/Plaintiff be given the opportunity to prosecute his case in the Lower Court. Let us examine the principles that might be applied in deciding whether or not a suit ought to be dismissed for want of prosecution.

The Court of Appeal of England in **Allen vs Sir Alfred McAlpine & Sons (1968) AII E.R** established the following as the principles governing applications for dismissal for want of prosecution. It must be shown that:

(a) the delay is inordinate;

(b) the inordinate delay is inexcusable; or

(c) the defendant is likely to be prejudiced by the delay.

Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. Finally the court must consider whether the Defendant has been prejudiced by the delay. To achieve justice, the Court must also consider the possible loss likely to be sustained by the Plaintiff if his case is terminated summarily for a procedural default. Where a Plaintiff has a prima facie case, to determine his rights by the summary procedure under Order XVI Rule 5 would result in great hardship to a Plaintiff who has reasonable excuse for his delay. In respect of these matters, Chesoni, J. (as he then was) said as follows in ***Ngwambu Ivita vs Akton Mutua Kyumbu (1984) KLR 441:***

> ***"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***
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> ***and the position of the judge too … The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before th e court will exercise its***
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> ***discretion in his favour and dismiss the action for want of prosecution. Thus, even if 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 notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has beenprolonged delay and the Plaintiff does not give suffi cient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed."***

I agree with that statement fully. It has already been seen that there was a delay of nine months here, not 3.5 years that the Lower Court seemed to believe. The delay had been explained. It was credible, and in any event it was not so inordinate as to remove a litigant from the seat of justice. The aim of the Court ought to be in sustaining suits rather than throwing them out on procedural defaults.

The Counsel for the Respondent, Mr Shah, has not demonstrated what prejudice, if any, will be occasioned to the Respondent if this appeal were allowed. I do not think there is any which cannot be compensated for by an award of costs.

Accordingly, and for reasons outlined, I will allow this appeal, set aside the Ruling of the Lower Court and order that the Notice of Motion dated March 14, 2002 in the Lower Court be dismissed. All costs, in the Lower Court, and on appeal, shall be in the cause.

Dated and delivered at Nairobi this 26th day of May, 2004.

ALNASHIR VISRAM

JUDGE