



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

**CIVIL CASE NO. 1037 OF 2000**

**P.G. NGANGA ::**  
**PLAINTIFF**

**VERSUS**

**THE STANDARD CHARTERED**

**BANK OF KENYA LTD & ANOTHER ::::::::::::::::::::::::::::::::::::::: DEFENDANT**

**RULING**

Two applications came up for hearing before me on 31st May 2004. The first application is dated 27th October, 2003 and was brought under the provisions of Section 3A of the Civil Procedure Act Order VI Rules 13(1) (b) (c) and (d) and Order XVI Rules 5 and 6 of the Civil Procedure Rules. The second application is dated 1st December, 2003 and was brought under the same provisions. The applicants are the Defendants. One main prayer is sought and that is that the Plaintiff’s claim or counter claim against the Defendants be struck out or dismissed with costs. The reasons for both applications are the same and they are that:-

***(a) The Plaintiff’s Counterclaim is frivolous a sham vexatious and is otherwise an abuse of the process of the Court. (b) The Plaintiff’s Counterclaim against the Defendants is belated and the Plaintiff is guilty of laches the Counterclaim having been filed outside the time limited by the Limitation of Actions Act.***

***(c) The Plaintiff did not obtain an order to extend or enlarge the time limited by the Limitation of Actions Act before filing the Counterclaim herein.***

***(d) The alleged overdraft facility granted to Olympic Fruit Processors Ltd by the Plaintiff was ultra vires object “M” of the Memorandum of Association of Olympic Fruit Processors Ltd and therefore null and void and of no legal and equitable effect and in Law should not form the basis of the Plaintiff’s claim against the 2 nd Defendant.***

***(e) The Plaintiff on the Counterclaim has more than 3 years failed to prosecute its Counterclaim and is guilty of inordinate delay.***

The applications are supported by the affidavits of the Defendants. The applications were opposed. The Plaintiff filed Grounds of Opposition and a Replying Affidavit by one Grace Mukulu, the Plaintiff’s Account Manager.

Mr. Ngoge in support of the said application restated what is contained in the said applications. He emphasized that, the basis of the Plaintiff's claim is a guarantee which was executed on 19th June 1992. The claim was filed on 10th July, 2000 after the six years provided under the Limitation of Actions Act. In Counsel's view, the cause of action arose on 10th February, 1994 when Olympic Fruit Processors Ltd was put under receivership. The plaintiff was notified of this fact and slept on its rights until 10th July, 2000 when the Counterclaim was filed.

Counsel further submitted that, the Counterclaim has not been prosecuted contrary to the provisions of Order 16 Rules 5 and 6. The Original claim was withdrawn on 7th September, 2001 and the Counterclaim has not been prosecuted since.

In Reply Mr. Chege for the Plaintiff relied on the Replying Affidavits of Grace Mukulu sworn on 22nd December, 2002 and 18th November, 2003. In Counsel's view the Counterclaim was filed in time. The guarantees were continuing guarantees and the fact that Olympic Fruit Processors Ltd was placed under receivership is not relevant in determining when the cause of action arose. Counsel further submitted that the property offered as security to the Plaintiff was realized on 4th April 2000 and as the proceeds of sale did not settle the debt demand was made against the Defendants as guarantors to settle the same. The demand was made on 31st May 2000. This date marked the commencement of the Limitation period. Six years had not elapsed since. Therefore the Counter claim was filed in time.

Responding to the prayer for dismissal for want of prosecution Counsel submitted that on 12th April, 2003 an amended defence was filed and on 9th May 2003 a reply to the amended defence and defence to Counterclaim were filed. In Counsel's view the Plaintiff in the Counterclaim is not guilty of inordinate delay and is prepared to expedite disposal of this claim and costs will compensate the Defendant in the Counterclaim.

In a brief reply Counsel for the Defendant in the Counterclaim, maintained that the Plaintiff's cause of action arose when the Plaintiff in the counterclaim was informed that Olympic Fruit Processors Ltd had gone in receivership and not from the day the security was sold. Reliance was placed on various authorities in support of the position taken by the Defendant in the Counterclaim.

The above are the rival submissions for and against the application. I have considered them. I have also perused the Court record. I will deal first with the prayer for dismissal of the Counterclaim for want of prosecution. The test is whether the delay is prolonged and inexcusable and if it is whether or not justice can be done despite such delay. The record shows that the Plaintiff's reply to the Defendant's amended defence to the counterclaim was filed on 9th May 2003. This marked the close of pleadings. However, the Defendant in the counterclaim had on 13th February, 2002 filed a Notice of Motion seeking a temporary order of stay of execution of orders pursuant to a consent filed on 7th February, 2002. The consent was in respect of costs. This application came up for hearing on 20th May 2003 when it was adjourned as the matter was being discussed. After several adjournments the application was on 22nd July 2003 stood over generally. The record further shows that somehow this file was on 24th September, 2003 placed before Mwera J. when at the request of Counsel for the Defendant in the Counterclaim was fixed for mention on 13th October, 2003. This time it was alleged that an application was before the Court of Appeal. Mwera J. fixed the matter for further mention on 13th October, 2003. Ibrahim J. handled the matter and he recorded that the matter be stood over generally pending the conclusion of the application in the Court of Appeal. The application of 13th February, 2002 does not seem to have been disposed of.

On 27th October, 2003, the present application was filed and when it came up for hearing before Ringera J. as he then was on 24th November, 2003 Counsel for the Plaintiff/Applicant failed to attend and the application was stood over generally.

On 1st December, 2003, the 2nd application was filed in the same term as the application dated 27th October, 2003.

I have given the above details to show that in the circumstances of this case, it is not obvious that the Plaintiff in the Counterclaim is guilty of inordinate delay or that the delay is prolonged and inexcusable.

In my view despite the delay alleged which is not inordinate the Defendants in the Counterclaim have not shown that the delay has caused them prejudice which cannot be compensated by an award of costs. I accordingly decline to dismiss the Counterclaim for want of prosecution.

Turning now to the prayer that the Counterclaim is statute barred. I have noted the following:

The Plaintiff in the Counterclaim alleges that the Counterclaim has been admitted by the Defendants in the Counterclaim. This allegation is in the defence filed and in the response to the present applications by the plaintiff in the Counterclaim. In the light of the pleadings as they stand therefore a determination as to whether or not the Counterclaim is statute barred cannot be made without considering evidence. On the material available to me I am unable to find that the Counterclaim has been filed outside the time limited by the Limitation of Actions Act.

The applicants have not shown that the Counterclaim is frivolous vexatious or otherwise an abuse of the process of the Court.

In the result I dismiss the two applications by the Defendants in the Counterclaim dated 27th October, 2003 and 1st December, 2003. The applications were however not completely without basis. Costs shall therefore be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JULY, 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of: