REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 898 of 1999

JORAM THUO WAIREGI……………..………..................………..……PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD………….......................…………. DEFENDANT

RULING

On 5.11.2004 this Court dismissed the suit herein pursuant to an application brought by the Defendant under the provisions of Order L, rules 1 and 2 and Order XVI rule 5 of the Civil Procedure Rules. The grounds for dismissal set out on the face of the application were that: -

(a) the hearing of the application was adjourned generally on 5.06.2003 at the insistence of the Plaintiff/Respondent,

(b) a period of more than one (1) year has lapsed and the Respondent has not taken any steps towards fixing the suit for hearing contrary to the requirements of Order XVI rule 5 of the Civil Procedure Rules,

(c) the delay is both inexcusable and inordinate,

(d) equity does not aid the indolent,

(e) the respondent is guilty of latches.

The application had been supported by the Affidavit of Andrew Muchigi Karani an Advocate of this Court who in essence reiterated on oath the grounds of the Application, apart from adding that the suit had been instituted in 1999 a period of nearly four years, and that a year had elapsed since the matter was taken out and stood over generally.

When this application came for hearing on 05.11.2004 Miss Njuguna who held brief for Amuga, Counsel for the Plaintiff urged the Court to stand over the matter to the afternoon as he was held up in the Central Registry, Nairobi Law Courts in HCCC No. 429 of 2003 as the date had been taken ex parte and was therefore not convenient for him.

Miss Njuguna's to stand over the matter to the afternoon of 5.11.04 was opposed by Mr. Munyu, Counsel for the Defendant. It was not the practice of the Court to sit in the afternoon on Fridays. Mr. Munyu explained to the Court that the date was not taken ex parte. Mr. Amuga had been united to take a date per the Applicant/Defendant's letter of 5.10.2004 served and acknowledged by Mr. Amuga on 6.10.2004 Mr. Amuga did not attend Court nor did he send a representative at the time of fixing a hearing date, he was

however served with a Hearing Notice on 18.10.2004. An Affidavit of Service of said hearing date sworn by the Process Server (Dominic Ngoka) on 26.07.2004 was filed on 30.07.2004. Mr. Munyu told the court that he would in any event have opposed Mr. Amuga's right of audience on the application. Mr. Amuga had been condemned to pay Court Adjournment Fees, had been granted leave to file a Replying Affidavit within 3 weeks. He had flouted both orders. He had neither paid the Court Adjournment Fees, nor filed the Replying Affidavit within the specified time under the order. He had not refunded the Defendant's the amount of the Court Adjournment Fees, and neither had he sought the Court's leave to file the Replying Affidavit out of time. For these reasons, Mr. Munyu urged the Court to grant the Defendant/Applicant application dated 12.07.2004 and filed on 15.07.2004.

I therefore proceeded to hear the Defendant's application ex parte and made an order dismissing the plaintiff's suit for want of prosecution under rule 5 of Order XVI of the Civil Procedure Rules. The said rule provides ***inter alia*** that if within three months after the adjournment of the suit generally, the Plaintiff, or the Court of its own motion on notice to the parties does not set down the suit for hearing the defendant may neither set the suit down for hearing or apply for its dismissal.

It is upon my order upon which the Plaintiff now seeks two orders, a stay of execution, and leave to appeal against the order declining the adjournment of the hearing of the Defendant's application of 12.07.2004 and filed on 15.07.2004.

I must say at the outset that Counsel for the Defendant/Applicant had not brought to my attention the existence of the Ruling by the Court of Appeal made on 14th July 2000. However, even if the said Ruling had been brought to this Court's attention, it is doubtful that this Court would have come to a different decision. It is an abuse of the process of Court to obtain and act on an interlocutory injunction for a period of over four (4) years (an inordinate period) without either prosecuting the appeal or indeed setting aside the suit for hearing.

The excuse for not prosecuting the appeal is that the Court of Appeal sets its own diary on these matters. I accept his excuse. The excuse for not prosecuting the suit is solely based upon the nearly fatal accident the plaintiff suffered on 21.08.1999, about 5 weeks after filing the current suit on 13.07.1999.

According to the medical report dated 23.09.2004, by Dr. C. K. Kamau, Consultant Neurosurgeon, attending to the Plaintiff, the Plaintiff suffered 100% disability as a result of the accident, and his chances of any further improvement are about nil, and that he would require assistance for the rest of his life.

I observe that the Defendants had no objection to the Plaintiff's application to appeal against my Ruling refusing the Plaintiff's application for adjournment to an afternoon so that Mr. Amuga, the Plaintiff's Counsel would have had an opportunity to be heard. That leg of the application was granted, and there shall therefore an order to that effect.

The second legal of the application seeks an order for stay of execution. For the grant of such order the requisite requirements are set out in rule 4 of Order XLIV of the Civil Procedure Rules sub-rule 2 of which provides -

"4 (1) …

(2) No order for stay of execution shall be made under the sub-rule (1) unless -

(a) the Court is satisfied that loss may result to the application unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

The application is predicated on the above-captioned rule, and also Section 63 (c) of the Civil Procedure Act which empowers the Court to make such interlocutory orders as may appear to the Court to be just

and convenient.

An order staying execution would certainly be convenient to the Plaintiff/Applicant. It is doubtful that it would be convenient upon the Defendant which has been kept away from realising its security over the last four years during which period the Plaintiff has refused to prosecute either its appeal to the Court of Appeal, or to set down the suit for hearing.

Under sub-rule 2 of Rule 4 of Order XLIV aforesaid, the Court may grant a stay upon being satisfied of the following -

(a) that loss may result upon the applicant unless an order for stay is made.

(b) that the application has been made without undue delay,

(c) such security as the Court orders for the due performance of such decree or order as may ultimately be binding upon the applicant.

The application herein was made on 10.11.2004, that is on the 5th day following the orders of Court of 5.11.2004. The application was thus made without unreasonable delay. The applicant however, totally failed to show what loss it would suffer if stay of execution is not granted. The applicant also failed to give any security for the performance of any decree or order which may ultimately be binding upon the Plaintiff/Applicant. The above provisions are mandatory in nature, and unless the requirements are met, **no order for stay of execution shall be made.** In the result, I am not satisfied that the Plaintiff/Applicant has fulfilled all the requirements of the said sub-rule. It is not enough to satisfy only one condition, the requirements are **conjunctive,** and not **disjunctive.**

In the result therefore, the Plaintiff/Applicant's application for stay of execution is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 8th day of December 2004.

ANYARA EMUKULE

Ag. JUDGE