REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 1883 OF 2001

HON. MAINA WANJIGI …………………………….……….. PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED ……….…… DEFENDANT

RULING

The defendant's application filed on 14th March, 2003 seeks an order to strike out the Plaintiff's application dated 11th December, 2001 for the reason that the Plaintiff has taken no steps to prosecute that application since the adjournment of the first hearing on 20th December, 2001. The application is brought under the provisions of Order XVI Rule 5 and Order VI Rule 13 (1) (d) of the Civil Procedure Rules. It is also brought under Section 3 A of the Civil Procedure Act, hereinafter referred to as, the Act. It is supported by the annexed affidavit of one Charles Mboga who is the Corporate Recoveries Manager in the Risk Management Division of the Debt Recovery Unit of the Defendant Bank. Order XVI Rule 5 is in the following terms:-

> ***Rule 5. If within three months after _________***
>
> ***(a) __________***
>
> ***(c) the removal of the suit from the hearing list; or***
>
> ***(d) 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 either set the suit down for hearing or apply for its dismissal."***

The Plaintiff's application was filed on 11th December, 2001, seeking an injunction against the defendant to restrain it from discontinuing the banking facilities agreed upon between the parties on 26th April, 2001 and/or breaching the terms of the Banking facilities agreement dated 26th April, 2001 pending the hearing and determination of the suit. Another injunction was sought to restrain the defendant from effecting the threats contained in its formal letter of demand, dated 12th November, 2001 which inter alia demanded that the Plaintiff repays immediately Kshs.3,344,067/20, failing which legal action would be taken against the Plaintiff.

From the affidavits filed together with the annexures thereto, it is clear that the Plaintiff's application was fixed for hearing on 27th June, 2002. This date was fixed exparte after the defendants having been invited to attend the registry for the purpose of taking a date for the hearing of the said application, failed to so

attend. Before the hearing date, there is a consent order dated 24th June, 2002 and filed in court on 25th June, 2002 requesting the Deputy Registrar to remove the application from the hearing list of 27th June, 2002 and to extend the interim orders which had been granted in favour of the applicant, to the next hearing date. That order was recorded by the Deputy Registrar on 25th June, 2002.

According to counsel for the Plaintiff, it was counsel for the defendant, who, knowing of the fact that the Plaintiff's application had been fixed for hearing on 27th June, 2003, asked counsel for the Plaintiff to have the application removed from the hearing list of 27th June, 2002 as he was unable to attend court on that particular date. That must be true, taking into account the fact that, the consent order addressed to the Deputy Registrar, annexure "HRN 3" is on a paper bearing the letter heads of counsel for the defendant. Since 25th June, 2002 when an order was made removing the application from the hearing list of 27th June, 2002, the Plaintiff's application has been pending. I do not understand why the Plaintiff has taken no steps to fix the suit itself for hearing.

Counsel for the Plaintiff has urged the court to find that, since the injunction was granted by consent, the present application is misconceived in so far as the applicant/defendant, wants to set aside orders recorded by consent. True, the orders of 25th June, 2002 were by consent, but the Plaintiff cannot argue that, being orders made by consent, he was supposed to enjoy them forever and not to fix the application for hearing. I have earlier said that I do not know why the suit itself has not been fixed for hearing. One cannot help but conclude that as the Plaintiff is enjoying the benefit of an interim injunction granted by consent, he is not in a hurry to fix the application for hearing inter parties, or to fix the suit itself for hearing once and for all.

Irrespective of what transpired previously, the starting point is the consent order recorded by the parties on 25th June, 2002 which removed the Plaintiff's application from the hearing list of 27th June, 2002 and extended the interim injunction to the next date of the hearing of the said application.

It was the duty of the Plaintiff to ensure that this very old application is fixed for hearing and is disposed of by the court. That he did not do and, although the Plaintiff's counsel in his submissions said that he has again invited the defence counsel to attend the registry and take a date for the hearing of the application interparties, I see no such letter on this file, and if he has actually written such a letter to counsel for the defendant it must have been written after the Plaintiff was served with the present application, to give the court the impression that the Plaintiff is interested in the prosecution of this application.

The Plaintiff's application having been removed from the hearing list by an order made on 25th June, 2002, the defendant's application was not filed until 14th March, 2003 some eight and a half months later. There is no evidence that during those eight and a half months, the Plaintiff has taken steps to fix that application for hearing and he cannot say that as the order was made by consent, the defendant cannot complain. It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation [See ***Flora N Wasike vs Destino Wamboko (1982 – 88) 1KAR 625***]. However, in the present case, the Defendant does not seek the setting aside of any consent order or judgment. The defendant's application is brought under Order XVI Rule 5 of the Rules, which I have reproduced elsewhere in this ruling. As the Plaintiff's application has not been fixed for hearing for some 8½ months after it was removed from the hearing list of 27th June, 2002, I find that the defendant is properly before court with its application and as there is no evidence that for the last 8½ months, the defendant has frustrated the Plaintiff's efforts to fix the Plaintiff's application for hearing, or that the defendant has been in some way responsible for the 8½ months delay in the determination of the Plaintiff's said application, I find that what transpired prior to 25th June, 2002 is irrelevant to this application. I decline to strike out the Plaintiff's application under the provisions of Order VI Rule 13 (1) (d) of the Rules, but I dismiss the said application under the provisions of Order XVI Rule 5 of the Rules, with costs to the defendant/applicant. The Plaintiff shall also pay the costs of the application dated 13th March, 2003 to the Defendant/applicant.

Dated and delivered at Nairobi this 12th day of May, 2003

S. C. ONDEYO

JUDGE

12.5.2003