REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 205 OF 1999

MOBILE KITALE SERVICE STATION ..... PLAINTIFF

VERSUS

MOBIL OIL KENYA LIMITED & ANOTHER ..... DEFENDANTS

RULING

This is a Notice of Motion dated 22.6.2002 brought under section 3A of the Civil Procedure Act, order 4 rule 3, order 6 rule 13 (d), order 16 rule 5 (d), order 39 rule 4 and order 50 rule 1 of the Civil Procedure Rules. It seeks two major orders namely:-

1) That the order of injunction issued against the 1st defendant by the Hon Commissioner of Assize Mr P K Arap Birech on 8th October 1999 be set aside or discharged.

2) The plaint dated 8th June 1999 and filed in court on 10th June 1999 be struck and the suit against the defendants be dismissed.

3) The costs of this application and of the suit be borne by the plaintiff and be paid forthwith. The application supported by the affidavit of Mercy Nderitu and several grounds. It was the submission of Mr Ohaga learned counsel for the first defendant that the plaintiff is using the orders of the Court unlawfully. The applicant's main contention is that the plaintiff is using the orders of the Court as an extortion and unfair purposes. The orders as granted to the plaintiff on 8th October 1999 were for:

"a) The defendants or any of them, whether by themselves, servants, agents or otherwise howsoever, be restrained from entering remaining or in any way interfering with the plaintiff 's possession, management and running of Mobil Service Station situate at Kitale.

b) The defendants do forthwith sell to the plaintiff's petroleum products and lubricants in the course of trade and in default the plaintiff be at liberty to purchase from such product from any oil company"

The order was prompted by the 1st defendant serving a notice of termination. Issued to the plaintiff terminating, its dealership in the said Kitale Mobil Service Station. The order was to last until the hearing and determination of the suit. However to date the plaintiff has not even affected service of summons on the 1st defendant. It was the contention of Mr Ohaga, advocate that it has not been possible to enter appearance, leave alone filing for any defence. He complains that it is now five (5) years since the suit was filed and the plaintiff has not taken any steps to finalize the suit. He submitted that order 4 of the Civil Procedure Rules contemplates that summons will be issued and served contemporaneously with the plaints. It is the responsibility of the plaintiff and/or his advocate to prepare the summons and the Court is

merely required to sign to give it validity, the failure, and/or neglect to issue and serve the summons is in contravention of the order of injunction granted to the plaintiff, hence the defendant cannot file its defense and the suit cannot be heard, complains Mr Ohaga, advocate.

Further it was the submission of Mr Ohaga even if the plaintiff asserts that summons was taken out and served, then still it was their responsibility under order 9 A rule 8 to set down the suit for hearing and prosecute the suit as an undefended suit.

The onus to set down the suit for hearing is on the plaintiff and the defendant even tried to assume that responsibility but was frustrated by the plaintiff. The only time on 7.12.2000, the suit was set down for hearing it was at the instances of the defendant submitted by Mr Ohaga, advocate. The fact that we made *bona fide* efforts to set down the suit for hearing even though the plaintiff has not even taken out summons is a clear manifestation that the defendant was desirous of concluding the matter hence, he urged me to dismiss the suit for want of prosecution or alternatively discharge the injunction.

The application was resisted Mr Wasilwa, advocate for the plaintiff, who urged me to find that the default in issuance of summons is a defect of the process and does not impair the cause of action, neither does it abridge the right of the defendant to appropriate the procedural position of responding to the plaint. He submitted that the rules of trial are directory and breach of such rules should not lead to dismissal of the suit. He urged me to explore a liberal interpretation of the said rules rather than adopting a positivist position. He submitted that though the delay in service of summons is inordinate and/or inexcusable. However such delay does not abridge the discretion of the Court to continue to give the suit life. It is the case of the plaintiff that the defendant had an active and/or express knowledge and possession of the plaint and hence there is nothing which prevented the defendant from responding to the plaintiff's cause of action through filing of defence. He further submitted summons which accompanies the plaint is not a judicial act and it conveys no rights and takes away no right from the defendant. He stated that order 4 rule 3 is directory and a default would not necessarily result in a futility in the cause of the action. Mr Wasilwa, advocate was honest enough to concede that no summons were issued although payments were made in that respect.

With regard to the business hardship, in which the 1st defendant complains to have suffered as a result of the action or omission of the plaintiff, Mr Wasilwa, advocate contended that the said hardship was not attributed to the plaintiff and infact even his client tremedously suffered excessive hardship due to the defendant's inability to maintain the equipment at the Petrol Station, hence the plaintiff is not to blame for the business hardship.

It is the case of the plaintiff that the delay was partly contributed to by the first defendant, they engaged the plaintiff in a negotiation process with a hope that the suit would be settled out of court. That one of the employees of the 1st defendant made several oral representations to the plaintiff to settle the suit on terms as per paragraph 4 of their affidavits.

Lastly it was the submission of Mr Wasilwa, advocate that the filing of the affidavit by the plaintiff, signifies that the plaintiff is tremendously interested in the just disposal of the suit. He urged me to weigh the cause of action as it is able to stand judicial scrutiny, with a view to consider its strength and weakness.

And on that line, he contended that there is already a funding as to the strength of the plaintiff's case, which is the interlocutory injunction in place until the determination of the suit. In totality he submitted that the conduct of the 1st defendant is also wanting, as they engaged the plaintiff in a negotiation, had the knowledge of the suit and lastly they filed a Notice of Appeal which put the plaintiff in an expectancy position, therefore all these factors militates against the defendant.

Now the issues that fall for my determination are whether to discharge the injunction granted to the plaintiff on 8th October 1999 and whether to dismiss the suit for want of prosecution. I must immediately state that the dismissal of the suit would definitely lead to dissipation of prayer No 1. However I must consider the issue of the injunction before I proceed to deal with prayer No 2 in the application. The

orders of injunction granted to the plaintiff were two fold: -

“1) An order restraining the defendants form entering remaining or in any way interfering with the plaintiff’s possession, management and running of Mobil Service Station situate at Kitale.

2) That the defendant do forthwith sell to the plaintiff’s petroleum products and lubricants in the course of trade and in default the plaintiff be at liberty to purchase from such product from any oil company”

The orders granted to the plaintiff was in essence of prohibiting and one of commanding the defendant to do certain things. The orders were telling the defendants that you are restrained from interfering in the said petrol station and you ought supply fuels and other products, failure of which the plaintiff shall be at liberty to purchase from elsewhere. It is important to appreciate the plaintiff as a dealer of a petrol station owned exclusively by the 1st defendant. And the Court was telling the owner that you cannot and should not interfere with the said property and further you are commanded to sell petroleum products to the said station failure of which the dealer would be permitted to source from other competing oil companies.

In my understanding the said order was meant to protect the interest of the plaintiff against the defendant and the Court was alive to the fact that the 1st defendant was trampling on the rights of the plaintiff, therefore the Court intervened and gave a helping hand to the plaintiff whose rights was and/or were about, to be contravened. It was as a result of the Court’s intervention, that the plaintiff was able to retain and continue with the dealership, despite the same having been terminated by the first defendant. It is the case of the 1st defendant the said order has been used by the plaintiff as an instrument of commercial oppression and has unreasonably and illegally demanded to be treated in a special manner. He even threatened to purchase fuel products from the 1st defendant’s competitors and certain ingredients of the complaint has been stated in paragraph 12 of the affidavit of Mrs Mercy Nderitu, wherein the plaintiff sought as a precondition to the resolution of the suit as: -

“1) Unconditional withdrawal of charges in Kitale Criminal Case No 3376/1999, *Republic Vs Jessan Maru.*

2) Payment by the first defendant to the plaintiff of the sum of five million (5,000,000/-).

3) Withdrawal no order as to costs of Kakamega Civil Application – No 201/1999 and Civil Application – No 18/1999 (both) filed by the plaintiff).

It is the case of the 1st defendant that the above sentiments or conditions were borne out of the plaintiff obtaining the Court order, hence he is using the Court orders as oppressive instruments against the 1st defendant. It is to be noted that the injunction granted to the plaintiff was in the nature of prohibitory and mandatory. Further the plaintiff was not even required to make an undertaking as to damages, in short the Court was satisfied that the plaintiff had established a *prima facie* case, which entitled him to be given two orders.

In my view the object of granting an interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable. While an interlocutory injunction being an equitable remedy would be taken away (discharged) where it is shown the person’s conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter. The orders of injunction cannot be used to intimidate and oppress another party. It is meant to protect the fence of the person who obtained the said orders. It is a weapon only meant for a specific purpose – to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking.

The moment an order of the Court has been exercised for an authorized purpose it is generally immaterial the person doing so was acting in good faith or in bad faith. The applicant was in essence kept away from his property while the applicant was milking it dry. The plaintiff is not the owner of that property and by asking for Kshs 5 million, he was in essence telling the defendant that you either buy your property from me or otherwise would keep it perpetually, for I have court protection. In short he was using the Court

order for attack and protection, while actually it was meant only to protect him, by doing so the plaintiff was trampling on the rights of the 1st defendant to enjoy exclusively its propriety rights. He was making the right to own property obsolete and useless. That is what the applicant calls commercial oppression but to me that is not commercial oppression but nationalization of the 1st defendant's property (for lack of better term). I would never allow the respondent or his ilk to derive an advantage from his own wrong and in my assessment an injunction would be discharged where the right protected and which the Court of equity is asked to protect and assist itself to a certain extent brought or induced by the person who sought the orders.

By giving mandatory injunction against the 1st defendant, the Court was in essence telling the 1st defendant that you cannot interfere in the management and running of the cow (Petrol Station) but you ought to supply the grass for the cow, for the plaintiff to enjoy the milk. And the plaintiff mistook the good gesture of the Court by attacking the 1st defendant with a view may be even take away the cow by demanding Kshs 5 million. In short he was misusing and abusing the process of the Court to the detriment of the applicant. He has taken advantage of the Court's generosity and the 1st defendant's silence by making unreasonable and illegal demands. To me that is unprecedented abuse of the court process, which I am reluctant to accommodate. In my judgment no court would accommodate a person who abused the authority of the Court through intimidation and blackmail meant to trample on the rights of another by use of the process of the Court, definitely not in our present judicial set up. To me the acts of using the Court order to intimidate and harass the applicant is an assault on our judicial system, which I am bound to protect. I cannot extend my hand to a person who has assaulted my authority and dignity, for he is undeserving. The plaintiff does not need the orders of the Court, they have served him well, the orders have kept the 1st defendant away from its property for 5 years and definitely the orders were not sought in good faith. It was sought to frustrate, intimidate and above all to blackmail the 1st defendant. How shall we attract investors, when we use the Courts' orders to frustrate, intimidate and erode the confidence of the said investors. The conduct of he plaintiff negatively impacts on our economy. He does not deserve the intervention of the Court whether by use of discretion or otherwise. It is my judicial duty to take the orders, the same is discharged and set aside.

I must now embark on the second limb of the application, which is whether to struck out and/or dismiss the suit for want of prosecution "In this limb I am bound to consider two issues, namely: -

"1) Whether the non-issuance of the summons to enter appearance is fatal.

2) Whether the delay in the prosecution of the suit would entitle the dismissal of the suit.

The plaint was filed in court on 10.6.1999 and it is not in dispute that to date the plaintiff, has not taken out summons and no service of the said summons was affected on the defendants. It has been contended by the 1st defendant that it has not been possible to enter appearance and file its defence. In my calculation its now 4 years and 10 months since the suit was filed in court and in my understanding order 4 of the Civil Procedure contemplates that summons will be issued and served at the same time with the plaint. That duty according to order 4 rule 3 (5) is placed on the plaintiff. It is the responsibility of the plaintiff or his advocate to prepare the summons so that the Court may sign the document to give it validity. See order 4 rule 3 (1)

"When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein"

Order 4 rule 3 (3) "Every summons shall be accompanied by a copy of the plaint"

According to order 5 rule 1 (7), the life span of summons is 24 months and after the expiry 24 months, if no application has been made to extend, then the Court without notice would dismiss the suit. In the present matter no summons was issued, leave alone seeking extension of time. If there is no summons which was issued in the first instance then there is nothing capable of being extended. I agree with Mr Ohaga that the failure of the plaintiff to issue and give summons is in clear contravention of the order of injunction granted to the plaintiff. And it would be impossible for the defendant to respond to the suit. We

ought to respect the rules of engagement for they are promulgated to achieve justice to the rival parties: Summons is a judicial document calling a party to submit to the jurisdiction of the Court and if the party is not given that opportunity how else would he submit to the jurisdiction of the Court. In my understanding, order 4 and 5 of the Civil Procedure Rules are designed to enable the parties to follow certain procedures. The word used is "shall" which makes it mandatory to comply with the direction. And if there is no explanation as to why the summons were not taken out then the Court has no discretion but a judicial duty to ensure the Rules of Procedure are followed and failure to observe would be fatal.

I now come to the backbone of the application which is whether to dismiss the suit for want of prosecution. In my view dismissal of suit for want of prosecution is meant to prevent injustice and/or abuse of the process of the Court. See *More vs Lawson* 31 TLR at page 419:

"It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved."

The law permits before the Court exercise its discretion it has to differentiate what is shadow and what is substance in order to exercise the discretion judicially. However a court can only revert to the discretion when there is valid reasons, excuses, mistakes, errors which are excusable but when there is no proper explanation then the Court's powers are limited. It becomes a judicial obligation to do what is expected under the situation. In my view there must be sufficient explanation for the delay so that the Court may exercise its discretion to excuse the delay and not to dismiss the suit. As I held in HCCC No 270/2001 *Bernard Ochola Ngani & Others vs Mathayo Ndo & 2 Others:-*

"The plaintiff ought to show sufficient and/or credible excuse if they want to resit an application for dismissal of their suit by the defendant and/or court. It is my opinion that the plaintiff must avail genuine reasons to enable the Court to exercise its discretion in their favour. It is the duty of the plaintiff and his advocate to bring the suit for trial and they cannot shift that primary burden to the defendant by saying the plaintiff has no lesser burden. Usually the burden is on their shoulders and failure to discharge that onus would be detrimental to their case."

In *Fitzpatrick Case* [1969] 2 All ER 657 Lord Denning held:-

"It is the duty of the plaintiff's adviser to get on with the case: Public policy demands that the business of the Courts should be conducted with expedition"

In *Nilani vs Patel & Others* [1969] EA page 341, Dickson J held:

"It is only too trite to say that as in every civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of latches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the Court towards that end as soon as it is convenient by either applying for its dismissal or settling down the suit for hearing - - - - - - - Delay in these cases is much to be deplored. It is the duty of the plaintiff's advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died where a period of over nine years have elapsed. - - - documents may have been mislaid, lost or destroyed and the memory tends to fade."

It is not contested that since the suit was filed way back in 1999,it was fixed for a hearing once on 7.12.2000, at the instances of the defendant and the defendant alleges that is a clear demonstration that we made *bona fide* efforts to proceed with the matter. It was the submission of Mr Wasilwa, advocate that the plaintiff was mislead by the 1st defendant by engaging in negotiation but according to the material on record the said negotiation never materialized as the defendant immediately turned down the offer. I have closely scrutinized the reasons for the delay and whichever way I looked at the matter, the reasons could

not meet judicial scrutiny. They are below judicial expectation and would not aid the plaintiff. The reasons advanced for this somewhat inordinate and gross inexcusable delay is insufficient to warrant the exercise of judicial discretion further I was argued by Mr Wasilwa, advocate to consider the merit of this case with a view to give the plaintiff a chance to proceed with the matter. There are four main prayers in the plaint namely: -

a) A permanent injunction restraining the defendants.

b) A declaration that the alleged termination of agreement by the 1st defendant is illegal and void *abinitio*.

c) An order that the first defendant to sell to the plaintiff petroleum products and in default the plaintiff be at liberty to purchase such products from any oil company.

d) A declaration that the purported installation of the second defendants as the proprietor or lessee is void *ab initio*.

It must be noted, prayer a, c, and d, have already been expended by the issuance of the orders of the Court. The only thing that is of interest is the issue of the termination of the contract. I have considered the reasons for the termination, the dealership of the plaintiff, my answer is that the 1st defendant was justified. The reasons for the termination was that the plaintiff bought fuel meant for export, which means he evaded duty, thereby jeopardizing the interest and reputation of the 1st defendant in a manner likely to bring conflict between the 1st defendant and Kenya Revenue Authority. The said discovery of the export fuel was made by S G S and the 1st defendant had nothing to do with it. By terminating the dealership the 1st defendant was in essence protecting its interest and reputation.

Therefore having considered the above facts, it is my opinion that the quality, merit and chance of success of the plaintiff's cause of action is nil. The plaint as it stands has served its intended purpose and now having discharged the orders, it stands no chance of success. There is nothing more to await trial. It would be a waste of resources and judicial time.

I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.

In my judgment the plaintiff is disinterested in the suit for that is why no summons were taken out 5 years down the line and no efforts were made to ever list the suit for hearing.

The plaintiff has been in deep slumber and continues to enjoy the fruits of the delay. The man has been too good for the Court and too smart for the defendant for he has out maneuvered both the Court and the defendant and I cannot allow him to be in that position anymore, the day of reckoning has come, as the plaintiff has no possible excuse for the manner in which he handled this litigation. There is enough material to persuade me and I have been persuaded that the delay is not only inordinate but by all imagination inexcusable. Under such circumstances I have no discretion but a judicial duty to say that you do not deserve the eyes and ears of the Court. By any standard the action of the plaintiff is not explainable of a likely happening and a court of justice cannot sustain a delay of 4 years and 10 months, such is not normal, such is not excusable, it is beyond redemption and a total abuse of the Court process.

Now: for Mr Ohaga and Mr Wasilwa, advocates thank you for your research and industry. If I did not site the many authorities you submitted, it is not out of disrespect or because I did not consider them.

For the first defendant, the delay is over, the blackmail is no more, the commercial oppression and intimidation is gone, your application is allowed, the injunction is discharged and the suit is dismissed.

For the plaintiff sorry for waking up from the deep sleep at great expense, which is you shall pay the costs of this application and the suit to the 1st defendant.

Dated and Delivered at Kisumu this 18th day of March 2002.

M.WARSAME

JUDGE