



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1529 OF 2001

DEPOSIT PROTECTION  
BOARD

(Suing as the Liquidator of Reliance Bank Ltd.) ..... PLAINTIFF

VERSUS

PANACHAD JIVRAJ SHAH ..... 1ST DEFENDANT

DIPAK PANACHAD SHAH ..... 2ND DEFENDANT

MRS. DIPAK SHAH ..... 3RD DEFENDANT

**RULING**

The three defendants herein have brought this application for an order that the suit filed against them by the defendant be dismissed for want of prosecution. The application is based on the ground that:-

*(a) the plaintiff has taken no further steps in the matter since the close of pleadings; and*

*(b) the plaintiff has failed to comply with the order of Mulwa, J. dated 6.3.2001 wherein he ordered the plaintiff to take such action as is necessary to prosecute the suit within a period of three months from the date of the ruling.*

The application is supported by an affidavit sworn on 11.7.2001 by Dipak Panachand Shah the 2nd defendant, which sets out the facts on which the applicants rely.

In a replying affidavit sworn on 20.11.2001 by Eunice Kagane, the Deputy Director of the Deposit Protection Fund Board, the Liquidator of the plaintiff bank (in liquidation) details are given of the steps that have purportedly been taken.

Although there was some argument between learned counsel as to what steps have or have not been taken in this matter, in my view the facts of the matter are nonetheless clear. They are that the suit was filed way back on 27.9.1999 and a written statement of defence thereto lodged on 27.10.1999. There being no reply to defence, the pleadings are deemed to have been closed on or about 10.11.1999. From then onwards up to 11.4.2000, the plaintiff took no step whatsoever to prosecute the suit. As a result of the plaintiff's inaction, the defendants applied to have the suit dismissed pursuant to O. XVI Rule 5 of the Civil Procedure Rules, on the ground that the plaintiff had since the close of the pleadings taken no steps

in the matter to set down the suit for hearing.

The application came up for hearing on 12.2.2001 before Mulwa, J. who in a ruling dated 6.3.2001 found as a fact that 'no action' had been taken by the plaintiff for more than three months after close of pleadings and that it would have been quite in order to dismiss the suit as prayed by the defendants. However, in exercise of his discretion to do justice in the matter, he decided that it would occasion a grave injustice to do so particularly in view of the fact that thousands of depositors would thereby be affected. Consequently, he declined to dismiss the suit but instead ordered the plaintiff to take such action as was necessary to prosecute the suit within a period of three months from that day. That was on 6.3.2001. What has the plaintiff done since that day?

The plaintiff has through the Deputy Director of the Deposit Protection Fund Board stated that it is not true that the plaintiff has taken no action in the matter since the date of the ruling by Mulwa, J. That statement may or may not be correct but in my view it is irrelevant. The complaint in terms of O. XVI Rule 5 is not that the plaintiff '*has not taken any action in the matter*' but rather that it '*has taken no action to prosecute the suit*', which is altogether a different matter. In that regard, the matters deponed to in Eunice Kagane's affidavit such as:-

1. *Forwarding 5 draft orders for approval (paragraph 6 of the affidavit).*
2. *Writing to the Deputy Registrar for approval of the draft orders (paragraph 7 of the affidavit)*
3. *Return ing the draft orders duly approved (paragraph 9 of the affidavit)*
4. *Applying to have the suit transferred from the High Court (Central Registry/Civil Division) to Milimani Commercial Court (paragraph 10 of the affidavit); and*
5. *The transfer of the suit as a co nsequence of (4) above (paragraph 11 and 12 of the affidavit).*

are all not the type of steps that the order made by Mulwa, J. required be taken. They are in other words irrelevant. It may help to clarify the matter if the words of O. XVI Rule 5 are restated:-

*"If within three months after: -*

*(a) the close of the pleadings ... the plaintiff does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal."*

The key word in this matter is '*the plaintiff does not set down the suit for hearing*'; I emphasis that what is required.

In my view what Eunice Kagame depones to as actions taken to prosecute the suit are not what Rule 5 or for that matter the order made by Mulwa, J. contemplated. In that regard the intended appeal to the Court of Appeal by the applicant cannot operate as a stay. And so the position is that no action has been taken to prosecute the suit since Mulwa, J. made his order on 6.3.2001 and the applicants are clearly entitled to the orders they seek. Given that position the question arises whether the court should now proceed to grant the order sought in the application given the other circumstances of the matter.

When he was faced with the same situation in the first application for dismissal for want of prosecution, Mulwa, J. declined to do so in the interests of justice because as he put it the dismissal would have affected numerous depositors. He went on to state that the dismissal of the suit on a technicality would occasion grave injustice.

The concept of justice is however a two way traffic. While I agree with what Mulwa, J. said, I must also point out that it would also be unfair and unjust to burden a defendant with a suit which a plaintiff is

not prosecuting as diligently as the law requires. The plaintiff in this suit when faced with a similar situation in the previous application was given protection by the court. That was done by the court in exercise of its powers to do justice. The court cannot however continue to protect a party which has taken no steps to help itself, particularly when its inaction is occasioning prejudice to the other side.

In my view, by reason of the plaintiff's failure to comply with the order made by Mulwa, J. is undeserving of the courts discretion and this suit should to be dismissed with costs. It is so ordered. The plaintiff will bear the defendant's costs of the suit.

**Dated at Nairobi this 18th day of December, 2001.**

**T. MBALUTO**

**JUDGE**