REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 448 OF 2013

RAMESHCHANDRA SOMCHAND SHAH .....1ST PLAINTIFF

SAVITA RAMESHCHANDRA SHAH .....2ND PLAINTIFF

VERSUS

PALM HEALTH CARE INTERNATIONAL LIMITED (In Receivership).....1ST DEFENDANT

BERNARD ROP.....2ND DEFENDANT

SANJEEV KUMAR SHASHIKANT GADHI.....3RD DEFENDANT

ANWAR MAJID HUSSEIN .....4TH DEFENDANT

RULING

Introduction

1. The Application before the Court is brought by the Third and Fourth Defendants by a Notice of Motion under Order 17, Rule 2(3) of the Civil Procedure Rules 2010.

2. The Application is dated 10 March 2015 and was filed on 12 March 2015 and served on the Plaintiffs on the same day. The Application seeks the following orders:

1. " THAT the suit herein be dismissed as no steps have been taken by the Plaintiff for over one year.

2. THAT the Plaintiffs bear the costs of this application and the suit."

3. The Application is based on the following grounds:

a. THAT the 1st and 2nd Defendants' List of Documents was filed and served on all parties on 26.10.2012 being the last action on record;

b. THAT the 3rd and 4th Defendants' and List of Documents and List of Witnesses were filed and served on 24.08.2012;

c. THAT the 3rd Defendants' statement was filed and served on 24.8.2012 whilst the 4th Defendant's statement was filed and served on 29.10.2012

d. THAT it is over two (2) years since the last action on 26.10.2012;

e. THAT the Plaintiffs' indolence is inexcusable;

f. THAT the Plaintiffs have gone to slumber is apparent."

Background

4. The Plaintiffs (a husband and wife) were at all material times the owners of the property known as LR No. 209/8929 (hereinafter referred to as the "Suit Property") which was leased to the First Defendant pursuant to a Lease dated 29th November 2015 for an initial period of 6 years. The First Defendant is and was at all material times a limited company. The Third and Fourth Defendants were at all material times directors of the First Defendant. The underlying dispute relates to the payment of rent of the Suit Property. It also relates to an issue as to whether any alterations were made to the Property. The Third and Fourth Defendants were, in addition to their duties as directors, guarantors for the payment of rent by the First Defendant. It is common ground between the Parties that vacant possession of the Suit Property was delivered up on or around 31st March 2012. The dispute resulted in litigation.

5. The factual background to the dispute (as appears from the Pleading is that the Plaintiffs, a husband and wife were the owners of the property LR No 209/8929. Road B off Enterprise Road and all the buildings thereon ("the Property'). The First Defendant entered into a Lease Agreement for a period of 6 years for the Property. The Third and Fourth Defendants were directors of the First Defendant. They were also parties to the Lease Agreement as guarantors with their express agreement signified by their signature on the Lease Agreement. In other words as distinct from any liability qua their role as directors. The Second Defendant did not come into the picture until around 6 April 2009. That was the day, he says, when he was appointed Receiver by the PTA Bank Eastern and Southern African Trade and Development Bank ("PTA Bank"). In fact the Notice of Appointment of Receiver or Manager in Form No 2333 is dated 14th April 2009. At that time the First Defendant was in occupation of the Suit Property. The Receiver's Witness Statement was filed on 14th December 2012. It is not clear from the pleadings when the Plaintiffs were informed of the appointment, but there seems to have been correspondence exchanged between them.

6. The background of the proceedings is relatively straightforward. The Plaint was filed on 12 July 2012, that is about 3 ½ months after vacant possession was delivered. The Summons was issued on 16th July 2012. The First and Second Defendants entered appearance by a Memorandum dated 5 August and filed on 7 August 2012. They are both represented by the Messrs Oraro & Co Advocates. The Third and Fourth Defendants entered appearance by a Memorandum dated 9 August and filed on 10 August 2012. They are both represented by Messrs S Gichuki Waigwa & Associates. The First and Second Defendants filed their Statement of Defence on 21 August 2012. ***That Defence was not accompanied by the documents required by Order 7 Rule 5 of the Civil Procedure Rules 2010 ("CPR***). The Third and Fourth Defendants also filed a Statement of Defence on 24th August 2012. In it they admit being guarantors, but they claim that was for "the term of the lease". Their Defence was accompanied by a List of Witnesses and a List of Documents. The Third Defendant's Witness Statement was filed on the same day. The Plaintiffs filed Replies to the Defences on 30th August 2012. Thereafter the First and Second Defendants filed their "List of Documents" with the documents attached (hereinafter referred to a List and Bundle of Documents) on 26th October 2012. They do not appear to have filed a List of Witnesses, even at that stage. The Third and Fourth Defendants filed their Defence on 24 August 2012 together with the Witness Statement of the Third Defendant only. The Fourth Defendant's Witness Statement was filed on 29 October 2012. Two months later, on 14 December 2012 the Second Defendant's Witness Statement was filed on behalf of the First and Second Plaintiffs. That Witness Statement by the Advocate with conduct of this litigation.

The Application

7. The Application was served on the Plaintiff's through their Advocates on 12th March 2015, at around 3.30pm. It was served on the First and Second Defendants about one hour earlier. The Application was listed for hearing on 24th March 2015 which was less than 14 days after filing. It was listed by the Registry without the benefit of the Affidavit of Service which was not filed until 23rd March 2015.

8. The Application is brought on the grounds that there have been no steps taken in the proceedings for more than one year since the close of proceedings. The Application states the last act in the proceedings to be the filing of the First and Second Defendant's List on 26th October 2012. In fact, and the Applicants should be fully aware there were two actions that followed that date. Firstly, the filing of the Fourth Defendant's Statement (he is an Applicant) in which he argues points of law and the filing of the Second Defendant's Witness Statement. That raises the question of whether the Statement is inadvertent or a deliberate intention to mislead. The applicants do not explain why their own compliance with the ***CPR 2010*** does not comprise a set in the proceedings. The Defendant/Applicant argue that the Suit should be dismissed for want of prosecution because there has been an inordinate and inexcusable delay. Although the Court gave directions for the filing of a Replying Affidavit, there is no copy on the file. The Applicants are assuming it was filed on 7th April 2015 as that is its date. It is clear therefore that it was served.

9. The Court directed the Parties to file written submissions. The Applicants was filed on 19th May 2015 which was two days before the date on which the matter was due to be heard. That denied the Respondents the opportunity to comply with the directions of 28th April 2015 before the hearing. Mr Waigwa explained that his written Submissions were filed on 18th May and served on 19th May. The Respondents Submissions were filed on 21st May 2015, the morning of the Hearing. The First and Second Defendants have completely aligned themselves with the Applicant Defendants. That is an interesting development as in the suit their interests are in conflict. Mr Owiti holding brief, informed the Court that Mr Odera was unable to respond due to late filing. He supports the application and fully aligns himself with the application to strike out and to dispense with highlighting. In the event Highlighting was dispensed with as none of the Counsel present wished to avail themselves of the opportunity.

10. The Applicants rely on **CPR Order 17 Rule 2** which provides;

> "*2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.*
>
> *(2) If cause is shown to the satisfaction of the court it may make such Orders as it thinks fit to obtain expeditious hearing of the suit.*
>
> *(3) Any party to the suit may apply for its dismissal as provided in Sub-rule 1.*

(4) The court may dismiss the suit for non-compliance with any Direction under this Order"

11. The Written Submissions filed on behalf of the Applicants repeat that the last action on the record was the filing of the 1st and 2nd Defendants List of Documents. It does not explain why the filing of a Witness Statement three days later should not be taken as a step in the proceedings. Therefore it is extrapolated that since then over two years have elapsed. It is said that the Plaintiff's indolence is inexcusable and that it is apparent the Plaintiffs have gone to slumber. The argument is also put forward that the failure to file a Replying Affidavit before the appropriate direction has been given confirms indolence. The Applicants rely in the maxim that "justice delayed is justice denied". They assert that there has been delay and it has been caused by the Plaintiffs. The Applicants also argue that the matter should have proceeded to a pre-trial conference and it did not. That failing is attributed to the Court. It is argued that the "Court could NOT honour the provisions of Rule 3 as it was inhibited by the indolence of the Respondents. The last paragraph of the Submissions states; "At this stage of the suit, what is required of the Respondents is to explain, satisfactorily why they had gone to sleep. The substance and issues of the suit are not matters/reasons for indolence". The Applicants rely on the authority of ***E.T. Monks & Co Ltd v Evans (1985)*** KLR 584. The author of the submissions has very helpfully attached a copy of the Ruling of the Court. It is a 1971 case. Parts of the headnote are highlighted. They makes two propositions.

(1) Public policy demands that the business of the courts should be conducted with expedition.

(2) "Whether an application for dismissal of a suit for want of prosecution should be allowed or not is a matter for discretion of the judge who must exercise it judicially. The court must consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was inexcusable. However, each case will turn on its own fact and circumstances."

12. The Plaintiff's in the Replying Affidavit and Written Submissions filed on their behalf provide an explanation. The Respondent's argument is that the last action taken was in fact on 14th December 2012 and not 26th October 2012 as asserted repeatedly in the Notice of Motion. It is conceded that as a consequence pleadings closed in early 2013 and the matter ought to have been fixed for a pre-trial conference so directions could be taken. It is set out clearly both in the Replying Affidavit and the Written Submissions that the Plaintiffs did not take any further steps due to the actions of their Advocates. Those actions were inadvertent in that the file was lost/misplaced during a move of premises. The Plaintiffs admit there has been a delay but argue that the delay "was not too inordinate". It seems that inordinate would be sufficient. The Respondents rely on the case of ***HCC 849 of 2009 Hoswell Mbugua Njuguna v Celtel Kenya Limited eKLR 2014*** in its entirety. That Ruling refers to the earlier case of Irungu v Ivita. It is also argued that the Defendants have not established what prejudice they would suffer or have suffered as a consequence of the delay. That must be a correct analysis as there is not mention of prejudice in the Grounds relied upon. Nevertheless the Court must consider that. To that extend the Respondents rely upon ***HCC 32 of 2010 Utalii Transport Co Ltd and 3 Others – v – NIC Bank and Another***.

13. It is clear that the Court must exercise its discretion in deciding this matter the principles to be applied have been enunciated on various occasions and are set out below for ease of analysis. In ***HCC 32 of 2010 Utalii and 3 Others vs NIC Bank and Another*** after an analysis of the authorities the Learned Judge referred to applicable principles and said; These principles are:

1) *Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*

2) Whether the delay is intentional, contumelious and, therefore, Inexcusable

3) Whether the delay is an abuse of the court process;

4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;

5) What prejudice will the dismissal occasion to the plaintiff;

6) Whether the Plaintiff has offered a reasonable explanation for the delay;

7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court"

14. As stated above the Plaintiff Respondent concede that there has been a delay. In relation to the question, was it intentional, the answer must be in the negative. The Advocate for the Respondents have been completely candid as to how the delay arose. The omissions of the Advocates cannot be visited upon the Clients. In these circumstances that would be unfair. To hold clients responsible for the efficiency of their Advocates offices would be too onerous a burden. In the case of **Ivita vs. Kyumbu (1984) KLR** 441, Chesoni, J (as he then was) held as follows:

"*The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant: so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time*."

In the circumstances, it must be correct that the delay could be excused.

15. The court must also consider whether it is inordinate and whether that has caused prejudice to any of the Parties. The Applicants have

not put forward any argument relating to what if any prejudice they would suffer. The Plaintiffs has set out that their Claim relates to a significant sum of money, Ksh.30,638,424/=. It is said it is a cumulative figure arising from costs and breach of contract, specifically, the lease of the Suit Property. Therefore the Suit can only be decided after consideration of that document (if that is the appropriate outcome of this Application). The Applicant themselves can only be liable on a contingent basis. They are guarantors, their liability can only arise from the default of the principal alleged debtor. In the circumstances, it seems that even if the suit should be dismissed against the First Defendant, it should endure against the 3rd and 4th Defendants because their liability stops being contingent when the principal debtor falls out of the picture.

16. Whether the delay has been inordinate, must also be assessed from the timescales of the proceedings before the filing of the Application. The Applicants use the failure to file a pre-trial questionnaire and the consequent absence of a Pre-trial conference under CPR Order 11. The Applicant's have not exhibited any correspondence showing that they raised the matter with the Plaintiffs. Neither did they file anything themselves. They were not in a hurry to have the matter heard either. Can the delay be considered inordinate in that context?

17. If the complaint is that the trial has been delayed to the prejudice of the Applicants, the question must be asked as to how ready they were for trial. Prior to the filing of the Plaint the Parties had been in correspondence. The parties had been in correspondence regarding the dispute. The Plaintiffs had obtained certain concessions in correspondence. That correspondence appears on the Court file. Although the Court does not make any finding at this stage, the contents are readily apparent. The Plaintiffs had served a Final Demand and it has not been met. Litigation was the obvious consequence. The Plaint was issued on 16th July 2012. The Applicants entered an Appearance in August but did not comply with order 7 Rule 5 until 29th October 2012. That does not suggest a Party rushing to finalise litigation. The Applicants have not filed a list of documents nor indicate which of the Plaintiffs and/or First Defendant's documents they wish to rely upon. They have neither filed, nor sent any correspondence attempting to define the issue in dispute. Therefore, it is readily apparent that the Defendants and the Applicants in particular have not been prejudiced by the delay.

18. In exercising its discretion, the Court must also look at the other factors of this case that effect each Parties right to access to Justice Within the meaning of ***Article 50*** and ***Article 159 of the Constitution***. From the documents that have been filed it is readily apparent that this is a matter that relates to much more than a debt collection exercise. The Principal Parties, that is the Plaintiffs and First Defendant entered into correspondence. There is correspondence demonstrating admission of at least some liability for rent and remedial works and costs. That is an issue that must be enunciated. Thereafter the Company goes into receivership. The Debenture Holder see for example Plaintiffs Bundle page 23 and 1st Defendant's Bundle pages 120 and 135 and 136. The Applicants explain the difficulties the 1st Defendant was experiencing during the 2007 – 08 period. However they did not wind up the Company, they continued to trade. The question arises as to whether they were trading while insolvent. They occupied the Suit Property pursuant to a Lease but did not vacate it at the end of the Lease, they continued to occupy it possibly with no intention or ability to pay. The legal and business implication of those actions must be something that must be looked into for the wider public interest.

19. In addition, the conduct of the Receiver raises cause for concern. Neither the Witness Statement nor the Documents filed, demonstrate when and how the Second Defendant as Receiver, was authorised to defend the proceedings. Whether that was not done by one or more of the creditors or the Court is not enunciated. It may be that he intends to defend the suit in his own right. ***Section 348 of the Companies Act (Cap 486)*** is instructive on that point. The Bundle of Documents also includes at page 135 a Letter for PTA Bank to the Plaintffs guaranteeing the payment of rental arrears and rent including pro-rated disbursements on account of Insurance, Ground Rates and Site Value Tax for six months. Those are now denied.

20. The Receiver in his Statement of Defence denied personal liability but then aligns himself with the deliquent directors rather than the position of the Debenture holder. He does so without making an application to Court or calling a creditor's meeting to validate his decisions. It is again fundamental to the application of the law to ascertain whether by exceeding and/or going against the Debenture Holder's undertakings he exceeded his authority and thereby became personally liable as alleged by the Plaintiffs. It is those issues rather than the quantum of the Claim are serious and have important implications for the economy and therefore must be aired. The professional credibility of the 2nd Defendant is affected by the allegations made and therefore he must have an opportunity to answer them, on oath if necessary.

21. For the reason set out above, this Court finds that there has not been inordinate delay. The Court finds that the Applicants have failed to demonstrate what prejudice they have or will suffer. In addition, there are important issues of public importance that must be aired. For those reasons the Application is dismissed. As the Plaintiffs have admitted their part in the delay and the consequent application, the Court finds that this is a case where it is appropriate for each Party to pay its own costs.

Orders accordingly,

FARAH S. M. AMIN

JUDGE

Dated 14th June 2018

FARAH S. M. AMIN

JUDGE

GRACE NZIOKA

JUDGE

Dated, Signed and Delivered in Nairobi, this 5th day of July, 2018

In the presence of

Court Assistant

Applicants:

Plaintiffs:

1st and 2nd Defendants