



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO.692 OF 2012

ALY ENTERPRISES LIMITED.....1ST PLAINTIFF
HALAL MEAT PRODUCTS LIMITED.....2ND PLAINTIFF
MOHAMED ALI MOTHAS.....3RD PLAINTIFF
MAFUTA PRODUCTS LIMITED.....4TH PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

RULING

[1] The Notice of Motion dated **14 April 2016** was filed by the Defendant, **Barclays Bank of Kenya Limited**, pursuant to **Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 17 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010**, for orders that this suit be dismissed for want of prosecution and that the costs of the application be provided for. The application was premised on the ground that the Plaintiffs have been guilty of prolonged, inordinate and inexcusable delay in prosecuting this matter. The application was supported by the affidavit of **Eddy Owiti** annexed thereto and the Further Affidavit of **Anne Mbatha** filed on **22 July 2016**.

[2] In the Supporting Affidavit, a chronology of the steps taken herein by the Plaintiffs were set out thus: that the suit was filed on **1 November 2012** along with a Notice of Motion for injunction, and that, the Defendant filed its Defence and Replying Affidavit thereto on **29 November 2012** and **22 November 2012**, respectively. Thereafter both the application and the suit remained unprosecuted until **15 April 2014** when the Plaintiffs filed yet another Notice of Motion seeking to restrain the Defendant from selling the suit properties. The Defendant responded to the second application vide its Replying Affidavit sworn on **6 May 2014**; and now contends that since the filing of the applications aforementioned, the Plaintiffs have made no steps to prosecute this matter. The Defendant further averred that it invited the Plaintiffs to attend the Court for the purpose of taking a hearing date on **9 March 2015**, but they deliberately failed so to do. On the basis of the foregoing, the Defendant prayed that the suit be dismissed with costs for want of prosecution.

[3] In the Replying Affidavit sworn by **Ramadhani Juma Ali** and filed herein on **30 May 2016** on behalf of the 2nd and 4th Plaintiffs, it was averred that the Plaintiffs have all along been ready, able and

willing to prosecute the two applications, but that the parties agreed to negotiate and have been negotiating out of court and working together towards an amicable settlement of this dispute. It was further deponed on behalf of the Plaintiffs that, with the consent of the Defendant, the Plaintiffs resolved to sell one of the charged properties with a view of off-setting the entire debt; but that the Purchaser, **Mountain Mall Limited**, having paid a deposit of **Kshs. 46,000,000** directly to the Defendant, failed to complete the sale agreement even after two extensions of time; and that it was thereafter that the Defendant opted to file the instant application.

[4] In the Further Affidavit sworn by the Defendant's Manager, Corporate Recoveries, **Anne Mbatha**, the Defendant endeavoured to demonstrate that although negotiations were ongoing, the Plaintiffs were not precluded from prosecuting their applications or progressing the main suit. It was further posited that the Plaintiffs only used the negotiations as a ploy, to buy time, and were never serious or sincere about having the suit amicably settled. An example was given that on **26 February 2016** and **11 March 2016** when the parties met and agreed that the Plaintiffs would furnish the Defendant with documentation regarding a joint venture that they intended to undertake with a foreign investor. That the Defendant averred that the Plaintiff failed to avail to it the Memorandum of Understanding in respect of the joint venture as had been agreed; and that as of the time of making the affidavit, not a single document evidencing the proposed joint venture had been supplied to the Defendant.

[5] I have considered the Notice of Motion dated **14 April 2016**, the affidavits filed herein in support and opposition thereto as well as the pleadings and proceedings herein. The application was filed pursuant to **Order 17 Rule 2(1) and (3) of the Civil Procedure Rules**, which provide as follows:

“(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 should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

...

(3) “Any party to the suit may apply for its dismissal as provided in sub-rule 1.”

[6] Accordingly, the Defendant was under duty to demonstrate that the delay complained of is not only **inordinate**, but also that it is **inexcusable**; and that it is likely to be **prejudiced** by such delay. It is also trite that in weighing the pros and cons of each party's case, the court is under obligation to bear in mind always that each litigant that approaches the seat of justice is entitled to a hearing and a decision on the merit and therefore that it should strive, where possible, to sustain rather than prematurely terminate a suit. (See the case of **Naftali Opondo Onyango Vs National Bank of Kenya [2005] eKLR**).

[7] It is not in dispute that this is a suit that was filed under Certificate of Urgency on **1 November 2012** and was accordingly certified urgent by **Mutava, J** on account of the impending sale; whereupon interim orders of injunction were issued pending hearing *inter partes*. In the course of time, the parties informed the Court that negotiations were ongoing and thus, several mention dates were taken for the purpose of recording a settlement, which never materialized. It was during the same time that a second application was filed on **15 April 2014** to forestall an attempt by the Defendant to sell the suit property in a public auction that had been scheduled for **16 and 17 April 2014**. Yet another application for more or less similar orders was filed on **30 July 2015** dated **28 July 2015**, and one of the prayers sought was a Mandatory Injunction directing the Defendant to give the 3rd Plaintiff first preference and to cooperate with the 3rd Plaintiff to facilitate the redemption of the property known as **LR No. 111/463 Mtwapa, Mombasa**.

[8] It is manifest therefore that on each occasion, having been granted interim orders restraining the Defendant from proceeding with the public auction of the suit property, the Plaintiffs would be content with that and would see no need of progressing the applications to their logical conclusion. In the same vein, the main suit itself remained unprosecuted. Nevertheless, the record does show that the last action taken herein was in respect of the Notice of Motion dated **14 April 2014**; which was, on the **18 March 2015**, fixed for hearing on **20 May 2015**. The record further shows that on the **20 May 2015**, there was no

appearance for or by the Plaintiffs. Accordingly, the order of the Court was that a date be taken in the Registry for the hearing and disposal of that application. No action was taken thereafter by the Plaintiffs by **15 April 2016** when the instant application was filed.

[9] From the foregoing, it is evident that the Defendant moved the Court prematurely as one year was yet to elapse since the last step was taken in the matter. Thus, it cannot be said that there has been inordinate delay in the prosecution of this matter for the purposes of **Order 17 Rule 2 of the Civil Procedure Rules**. Furthermore, the Plaintiffs did explain that the parties were engaged in out of court negotiations with a view of amicable settlement; such that what may appear to be a delay in the prosecution of the main suit has been satisfactorily explained by the Plaintiffs. Accordingly, I entirely agree with the following words of **Visram J**, (as he then was) in **Agip (Kenya) Limited-v-Highlands Tyres Limited [2001] KLR 630**, that:

"Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay."

[10] Although one of the grounds raised in support of the application by the Defendant was that its interests herein stand to suffer prejudice "...if this application is granted...", I take it that that is a typographical error, and that it was meant to convey the position that the continued pendency of this suit is prejudicial to the Defendant's interests. I note however that nowhere in the Supporting Affidavit sworn by **Eddy Owiti** or the Further Affidavit of **Anne Mbatha** was this ground of prejudice explicated. Thus I would take the view that no prejudice will befall the Defendants for which an award of costs would not be adequate remedy.

[11] In the result, it is clear that the Defendant's application is premature, having been filed before the expiry of the 12 months' period stipulated in **Order 17 Rule 2 of the Civil Procedure Rules**. In any event, the Plaintiffs have proffered an explanation for the perceived delay in progressing this suit. Accordingly, I would exercise my discretion herein in the Plaintiffs' favour and afford them a chance to prosecute this case for a determination on the merits. Thus, the application dated **14 April 2016** is hereby dismissed, with an order that costs thereof be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2017

OLGA SEWE

JUDGE