REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALITY DIVISION

CIVIL SUIT. NO. 163 OF 2005

KENYA BUS SERVICES LIMITED...PLAINTIFF

VERSUS

GENERAL MOTORS EAST AFRICA LIMITED……………...DEFENDANT

RULING

1. I have before me an application seeking to dismiss the Plaintiff's claim for want of prosecution.

2. The Defendant cries foul. The Defendant states it has been prejudiced by the unending existence of the suit. It states that since 2011 the Plaintiff has done almost nothing to actively prosecute its suit. In response, the Plaintiff states that it is still keen in pursuing its claim. It still wants to prosecute the claim. The Plaintiff blames the unending negotiations for the inactivity. The negotiations were between the parties. The Plaintiff also blissfully blames the inactivity on some indolent and lethargic Counsel, and then asks the court not to fetch such lack of alacrity on the Plaintiff. Detailed affidavits were sworn both in favour of and in opposition to the application.

3. I start by first pointing out that the power to dismiss a suit for want of prosecution is a discretionary one to be exercised judiciously: see Order 17 of the Civil Procedure Rules. Indeed, it is a power not to be exercised lightly lest it be deemed to violate Article 50(1) of the Constitution which provides that everyone has the right to have a dispute that can be resolved by the application of law decided in a fair and public hearing before a court. The power to dismiss will however be invited and exercised when there is inactivity over a long period of delay.

4. I must also state that the principles, upon which the court will proceed when faced with an application for dismissal of a suit for want of prosecution, are now relatively clear. First, there has to be established an inordinate delay rife with inactivity on the part of the claimant. Secondly, the delay ought to be inexcusable. Thirdly, the trial of the issues between the parties, if allowed to go on must be shown or deemed to be seriously prejudicial to the parties. These principles are well- founded in a chain of authorities: see, for example, **Nilan *vs.* Patel [1960] EA 341, Ivita *vs.* Kyumbu [1984] KLR 44 , Agip (K) Ltd *vs.* Highland Tyres Ltd [2001] KLR 630.**

5. Additionally, the power to dismiss for want of prosecution will ordinarily be exercised upon motion by the court or the Respondent.

6. The Defendant herein claims that there has been inordinate delay in prosecuting the suit and that the Defendant has been and will be prejudiced unless the suit is dismissed. The prejudice is stated to be in the form of anxiety caused by the mere existence of the suit.

7. By way of a narrative, the claim herein was filed in March 2005. The Plaintiff alleged breach of certain commercial agreements and further contended that the Defendant was not entitled to repossess certain security. The Defendant thereafter filed a defense and also lodged a counterclaim. An amount of Kshs. 170,506,827/76 was claimed by the Defendant. An interlocutory application was then prosecuted and a ruling delivered on 16th September 2005. The parties were directed to try and reconcile their accounts within 60 days.

8. A lull then followed with intermittent court appearances by the parties between 2008 and 2011. In November 2011 another interlocutory application was heard and determined. The court then allowed the Defendant to dispose of various motor vehicles, had reposed. The court also, at the request of the Defendant, directed that the sole proceeds of the motor vehicle be deposited in an escrow account saw an amount of kshs. 6,707,893/80 deposited in March 2012. Both parties then went mute until the Defendant filed the instant application in November 2014. That was nearly one and a half years of apparent silence.

9. The above narrative is not in controversy.

10. What is in controversy is whether there was inordinate delay and whether such delay, if at all may be excused. What is also in controversy is whether the Defendant will suffer any prejudice if the suit was to be prosecuted further.

11. On first sight it may reflect that there has been delay in the prosecution of the case especially when one considers the fact that the claim was lodged over ten years ago. The record however reveals intermittent prosecution of either applications or short court attendances. The Plaintiff may thus only be accused of slumber between March 2012 and November 2014. In between that period there was certainly delay in prosecuting the claim. There would be no need to take a cumulative aggregate of the period of delay thus in the circumstances. Rather account should be given by the Plaintiff for the period between March 2012 and November 2014.

12. The explanation extended by the Plaintiff is that the parties were negotiating all along. Further, it is stated that when the negotiations, appeared to collapse and the Plaintiff's counsel assigned an advocate to prepare the file for trial, the said advocate seemingly just acted in a derelict manner and then left the employ of the law firm attorned by the Plaintiff. In consequence, the relevant file was skipped and never brought up for action or, indeed, trial.

13. There is no explicit evidence that the parties were negotiating. In any event, the negotiations must have or ought to have kicked off if at all in 2005 when the court ordered the parties to reconcile the accounts. Even though the Defendant did not contest this statement of fact, I am not convinced that that was a good enough reason to be advanced by the Plaintiff for the inactivity.

14. Perhaps, the Plaintiff stands in better stead when the blame is fetched on the advocate. Counsel has gleefully admitted to causing the delay. Then counsel stated that once the mistake was noted counsel quickly moved and prepared the claim for trial. Counsel though prompted by the application for dismissal, filed the requisite List of Documents and witness' statements.

15. This position adopted by counsel for the Plaintiff was also largely uncontested by the Defendant. I do not also view it that there was any intention to steal a march on the Defendant. I am ready to accept the reason for the delay advanced by the Plaintiff and which reason is pegged on documented evidence availed in the Replying Affidavit filed in court on 10th December 2014.

16. There was certainly a mistake on the part of the advocate which stretched beyond the ordinary. Perhaps, the words of Apaloo JA as he then was in the case of **Phillip Chemwolo & Another –v- Augustine Kubede [1986-89] EA 74 at 81**are also relevant to the instant case. So said the Judge:

> ***" Blunders will continue to be made from time to time and it does not follow that because of a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or***

intention to over each, there is no error or default that cannot be put right by payment of costs . The court as is often said exits for the purpose of deciding the rights of parties and not the purpose of imposing discipline."

17. The inaction on the part of counsel must have caused some inconvenience to the Defendant but was there also prejudice?

18. Mr. Ambala submitted that the fact that the case continues to subsist causes unnecessary anxiety. In my view, anxiety is not necessarily equivalent to prejudice. The prejudice that ought to be demonstrated by Counsel or the Defendant for that matter is that which goes to the trial itself when ultimately held. It is prejudice which cuts both ways. Both parties ought to be reflected to be inconvenienced in the form of lack of witnesses or dissipating evidence. It ought to be shown even on a prima facie basis that the trial of issues will not be possible. The Defendant, who also has a counterclaim, has not so demonstrated in the instant case.

19. In the end, I would not allow the application for dismissal for want of prosecution. The circumstances of this case considered in their totality would however lead me to order a conditional prosecution of the case and also condemn the Plaintiff to pay costs. I also see no reason why the sale proceeds continue to be held in escrow bank account for all this while. The parties ought to reflect on the same immediately and perhaps make an appropriate application to court.

20. I consequently make the following orders:

1. The Notice of Motion dated 4th November 2014 is hereby dismissed.

2. The Plaintiff shall pay the costs of the motion to the Defendant.

3. The Plaintiff shall ensure that it is fully compliant with the pre-trial procedures and set down the suit for a case management conference within the next 30 days, in default the suit will stand dismissed.

Dated, signed and delivered at Nairobi this 9th day of February, 2017.

J. L. ONGUTO

JUDGE