



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO.1361 OF 1999**

**AFRICAN AIRLINES INTERNATIONAL LTD.....PLAINTIFF**

**VERSUS**

**THE EASTERN & SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK**  
**(THE PTA BANK).....DEFENDANT**

**RULING**

1. I am asked to adjudicate over two Applications of 24<sup>th</sup> August 2014 and of 5<sup>th</sup> August 2014 but filed on 29<sup>th</sup> February 2016.
2. The Court will first deal with the Application of 24<sup>th</sup> August 2015. It seeks the following prayers;-
  1. THAT this suit be dismissed for want of prosecution.
  2. THAT the costs of this application be provided for.
3. The Defendant asserts that the file has been inactive since 29<sup>th</sup> April 2013 when a Ruling was delivered herein and that the Plaintiff has since the inception of the suit on 24<sup>th</sup> September 1999, filed a multiplicity of Applications. That the Plaintiff has been guilty of prolonged, inordinate and inexcusable delay in prosecuting this matter.
4. The Plaintiff denies inordinate delay and in the Affidavit of Stephen Musalia Mwenesi sworn on 5<sup>th</sup> November 2015 on its behalf explains that on 5<sup>th</sup> August 2014 he prepared an Application for Leave to Re-Amend the Amended Plaintiff but was unable to lodge it promptly as the Court file could not be traced. That thereafter the Re-Amended Plaintiff (perhaps the Application for Leave) was not filed due to some oversight. He apologizes to Court for this oversight.
5. Counsel Mwenesi asserts that because of the magnitude of the issues in the case and the opportunity it gives for the development of the law, the matter ought to be determined on merit.
6. The Principles to be applied in determining an application to dismiss a suit for Want of Prosecution were ably set out by Cheson J. (as he then was ) in **Ivita vs. Kyumbu**[1984] 441, at page 449 when he said,

“So 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”.

7. From the Court record the last action in the file before the filing of the current Notice of Motion was a Ruling rendered by Mabeya J on 29<sup>th</sup> April 2013. The inaction was no doubt prolonged lasting about 20 months. However the Plaintiff explains that it had prepared an application dated 5<sup>th</sup> August 2014 but could not immediately file it because the Court file could not be traced. This explanation by the Plaintiff has not been controverted by the Defendant and I would have no reason to doubt it.

8. If that is so, then, there would have been inaction of about 16 months which is still a substantial delay. However the Court record shows that although the main hearing has not been prosecuted, the proceedings have been active with the Court dealing with numerous Applications. It does not seem that the Plaintiff has been altogether lethargic and the Court would excuse the delay. This is to give a chance for the matter to be determined on merit.

9. In granting this indulgence to the Plaintiff, the Court notes that the Defendant does not exactly set out what prejudice the delay has caused. And in particular the Defendant does not say how the delay has handicapped or compromised its ability to summon the evidence it may need in defending the Plaintiff's claim.

10. The other application is that of 5<sup>th</sup> August 2014 in which the Plaintiff seeks three (3) Orders as follows:-

1. THAT this Honorable Court be pleased to grant the Plaintiff leave to amend the Amended Plaint as per the draft RE-Amended Plaint annexed hereto.

2. THAT this Honourable Court be pleased to order that the proceeds from the sale of Land Reference Number 9042/583 be deposited in court pending hearing and determination of the present suit.

3. THAT in the alternative this Honorable Court be pleased to order that the proceeds from the Sale of Land Reference Number 9042/583 be put in an interest earning account in the names of the Plaintiff's and Defendant's Advocates until this suit is heard and determined.

That Application is contested and the three grounds raised by Defendant are considered in the Courts rendition.

11. The Law on Amendment of pleadings is that it ought to be freely allowed if it is necessary for determining the real questions in controversy between the parties, or of correcting any defect or error in the proceedings (Order 8 Rule 5 of the Civil Procedure Rule). The principles to be applied were reinstated by the Court of Appeal in Civil Appeal No. 101 of 2011 **PETER NGANGA MUIRURI AND HOUSING FINANCE CO. OF KENYA LTD** (unreported);

“As a general rule, amendment of pleadings and joinder of parties is permitted by law and it can be done at any stage of the pleadings. Such amendment should be allowed freely, if the party sought to be joined is necessary in order to enable the court to efficaciously, effectively and completely adjudicate upon, and settle all questions involved in the suit.

However, joinder of parties may be refused where such joinder will lead to confusing or clouding issues; the party being joined is unnecessary; unnecessary delay will result; or no cause of action

whatsoever arises against the party intended to be joined. The court will also have to consider if the amendment or joinder, as the case may be, will result in prejudice or injustice to the other party which cannot be adequately compensated for in costs”.

12. While the Applicant does not explain why it did not seek this leave earlier, the Court notes that the request is brought before hearing of the substantive matter has commenced. In that way the undue delay is somewhat tempered. In addition the Defendant does not state that the delay prejudices the manner in which it will defend itself.

13. As to the contents of the Amended sought, the Amendment introduces a claim for the loss allegedly incurred by the Plaintiff because of the appointment of the Receiver Manager over its affairs and the Plaintiff seeks the following damages:-

5. Damages for loss of Business in the sum of USD 2,671,000.00.

6. Special Damages for loss of an Aircraft 5YI and loss of spare parts of Boeing 707 valued at USD 3,340,000.00.

In addition the Defendant is assailed for allegedly delaying the prosecution of an application for Arbitration. It is asserted that this delay has led to loss on the part of the Plaintiff.

14. A contention by the Defendant is that the Amendments introduce a new cause of action and claim which is barred by the provisions of the Limitations of Action Act.

15. The Court notes that the issue of the appointment of a Receiver was already a subject of complaint by the Plaintiff in the original claim. What the further Amended seeks is to introduce a claim for damages allegedly caused by the Receivership that is contested by the Plaintiff. In that sense the claim may well relate back to the original claim. But if I am wrong and the new claim is indeed caught up by the Statute on Limitation, then nothing will preclude the Defendant from pleading this in the answer to the further Amended Plaintiff.

16. As for the claim relating to the delay in prosecution of the Application for Arbitration, these would be in respect to issues that have arisen after the suit was filed. There should be no reason why the Plaintiff should be foreclosed from presenting this claim.

17. The other Prayers in the Motion revolves around the sale of Land reference 9042/58. It is said that the Defendant sold LR. No.9042/58 on 8<sup>th</sup> July 2014 by way of Public Auction. The Plaintiffs plea is that the proceeds therefrom be safeguarded by being deposited in Court or put in an interest earning account in the names of the Advocates on record pending the main hearing and determination of the suit. The reason is that the Defendants Principal Operations have since the filing of the suit moved from Nairobi Kenya to Bujumbura Burundi. That there would be a risk as the proceeds could be banked outside the Court's jurisdiction and this could jeopardize the outcome of the suit.

18. This argument must be rejected without much ado. There is no allegation that other than moving its Principal Operations to Bujumbura, the Defendant has ceased operating in Kenya or is about to move out completely or at all.

19. My orders:-

a) The Application dated 24<sup>th</sup> August 2015 is hereby dismissed but with no order as to costs because of the considerable delay in prosecution of the suit.

b) Prayer 1 of the Application of 5<sup>th</sup> August 2014 is allowed. The Plaintiff shall file and serve a further Amended Plaintiff within 14 days hereof with Leave to the Defendant to amend its Pleadings within 14 days of service.

c) Prayers 2 and 3 of the Application of 5<sup>th</sup> August 2014 are dismissed.

d) Each party to bear its own costs on the Application of 5<sup>th</sup> August 2014.

**Dated, Signed and Delivered in Court at Nairobi this 4<sup>th</sup> day of May, 2017.**

**F. TUIYOTT**

Chacha Odera for Defendants

Nguya for Mwenesi for Plaintiffs

Alex -Court Clerk