REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 126 OF 2006

BENJAMIN OKIRING OKIBOR…….....PLAINTIFF

VERSUS -

STANDARD CHARTERED BANK LIMITED.....DEFENDANT

MOSES OKUMU OWITI……THIRD PARTY

RULING

1. The application before me was brought by the defendant on 26th June 2015. It is an application for the dismissal of the suit, for want of prosecution.
2. It is common ground that the suit was instituted on 21st March 2006, and that the last step in the proceedings was the Mention on 2nd July 2012.
3. In effect, almost 3 years had gone by since the case was last in court.
4. Pursuant to Order 17 Rule 2 (1) of the Civil Procedure Rules;

"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?.

5. Sub-rule (3) stipulates that any party to the suit may apply for the dismissal of the suit as provided for in sub-rule (1).
6. By the time the application was being made, the suit was already a candidate for dismissal, considering that no steps had been taken to prosecute it for almost 3 years.
7. According to the defendant, it was obvious that the plaintiff had lost interest in the case as the plaintiff had not even taken steps to comply with the pre-trial procedures.
8. In answer to the application, the plaintiff sought the indulgence of the court.
9. It was the plaintiff's contention that both parties were under a duty to move expeditiously to prosecute the suit.
10. Secondly, the plaintiff submitted that the delay in this case was excusable. The delay was said to have arisen due to the fact that the plaintiff's advocate had been unwell on several occasions.
11. The plaintiff believes that his case against the defendant and against the Third Party was meritorious, and that, therefore, the court ought to give him an opportunity to prosecute it.
12. Finally, the plaintiff indicated that he was ready to abide by any conditions which the court may impose, so as to speed-up the prosecution of the case.
13. In **NILANI Vs PATEL & OTHERS [1969] E.A 340, at page 341,** Dickson J. said;

"It is only too trite to say that, as in every civil case, it is the plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his case?.

14. Whereas the defendant may also take steps to move forward the case, the primary responsibility of ensuring that a case was determined expeditiously vested upon the plaintiff.
15. In the case of **FITZPATRICK Vs BATGER & COMPANY LIMITED,** which was quoted with approval by Dickson J. Lord Denning M.R said;

"Delay in these cases is much deplored. It is the duty of the plaintiff's advisers to get on with the case. Every year that passes prejudices the fair trial?.

16. In this case, the account which was the subject matter of the case, was opened on 12th June 1996. And the plaintiff indicated, *(in the plaint)* that that account was scheduled to mature on 12th July 1996.
17. Thereafter, it is said that the Fixed Deposit was due to have been renewed regularly, in accordance with the terms of the contract.
18. On 14th April 2005, the plaintiff wrote to the defendant, demanding a statement of account.
19. The basic answer given in the Defence was that the plaintiff was never a customer of the defendant. Indeed, the Fixed Deposit Account which the plaintiff was making claims over, was in the name of **MOSES OKUMU OWITI.**
20. Ultimately, the defendant sought and was granted leave to enjoin the said Moses Okumu Owiti into the suit, as a Third Party.
21. According to the defendant, the Third Party had intimated to the defendant that he was utilizing the funds for the benefit of the plaintiff and the plaintiff's sister.
22. All these issues need to be put in perspective considering that the sums which were first placed in the Fixed Deposit Account, were said to have come from the plaintiff's father.
23. After the plaintiff's father passed on, Moses Okumu Owiti became the plaintiff's guardian. And it is in that capacity that the plaintiff says, that the guardian placed the sum of Kshs. 1,500,000/- in the Fixed Deposit Account.
24. At the time when the Account was opened, the plaintiff was 17 years old. According to him, that was the reason why the account could not be opened directly by him. He was still a minor.
25. It would have been expected that the plaintiff, who is now an adult, would have shown greater interest in getting the case prosecuted. In fact, I find it hard to appreciate the plaintiff's contention that the defendant had as much a duty as the plaintiff, in the prosecution of the case. The defendant was not seeking any relief from the plaintiff. And it is the plaintiff who stood to lose out if the case was dismissed for want of prosecution.
26. In **IVITA Vs KYUMBU [1984] KLR 441, at page 447,** Chesoni J. (as he then was), said;

"….the fact that the defendant has been inactive cannot be construed as a waiver or acquiescence unless the plaintiff shows by evidence that the defendant has by action or in some other manner waived or acquiesced in the delay. In the instant case no evidence of waiver or acquiescence has been produced to this court?.

27. I adopt those words in their entirety, as they appear to have been tailor-made for this case too.
28. The result is that there has been delay on the part of the plaintiff, for which the plaintiff bears responsibility.
29. I know that the advocate for the plaintiff has alluded to the fact that he had been unwell on several occasions. First, the identity of the particular advocate who had been unwell, was not disclosed to the court.
30. Secondly, it has not been shown that the illness was so serious and so continuous that it prevented the advocate from taking steps to prosecute the case.
31. Thirdly, it has not been shown that there was no other advocate who could have held brief for the ailing advocate, so as to advance the interests of the plaintiff.
32. The suggestion that the delay was attributable to the ailment of the advocate who had the conduct of the plaintiff's case was too vague to constitute a reasonable explanation for the plaintiff's

failure to take appropriate action.

33. In the case of **IVITA Vs KYUMBU** *(above-cited),* the court said;

"So, the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. Justice is to both the plaintiff and the 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?.

34. In this case, the delay is prolonged and the reasons for it did not sound convincing. Nonetheless, given the nature of the case, I find that justice could still be done to the parties.
35. In fact, I hold the considered view that justice can only be done if the plaintiff was given an opportunity to put forward his case. I say so because he was a minor when the money in issue was invested with the defendant. It would only be fair that he gets to know what happened to the investment. It is then that the matter would be brought to closure.
36. Therefore, I do hereby reject the application for the dismissal of the suit. Nonetheless, the plaintiff will pay to the defendant the costs of the application. I so order because although the application is not successful, it is that step which will compel the plaintiff to take steps which he ought to have taken earlier.
37. The plaintiff is directed to finalize all pre-trial procedures within the next 45 days. If he fails to comply with this direction, the defendant may set down the case for trial if it will have complied with its own share of the pre-trial procedures. The plaintiff would then be deemed to have chosen to either not call witnesses or to not produce any documentary evidence. In other words, it is the conduct of the plaintiff that will determine what the court will deem him to have chosen.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **8th day** of **February** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Odundo for the Defendant

No appearance for the Third Party

Collins Odhiambo – Court clerk.