REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 143 OF 2006

DAQARE TRANSPORTERS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

CHEVRON KENYA LIMITED.....1ST DEFENDANT/RESPONDENT

CALTEX (K) LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

This suit was filed on 14th December 2014. The Plaintiff mainly sought injunctive orders against the Defendants from terminating or purporting to terminate an agreement entered by the parties on 20th September 2004 and in the alternative damages for breach of contract, damages for fraudulent misrepresentation, costs and interest.

By a Chamber Summons dated 14th December 2006 the Plaintiff sought and obtained a temporary injunctive order restraining the Defendants from terminating the agreement between them until the dispute between them was referred to arbitration, heard and determined or until further orders of this Court. The record shows that by consent of the Advocates for the parties dated December 6th 2007 two Advocates were appointed to arbitrate the case. The arbitration was to be heard and determined within ninety (90) days of the appointment of an umpire by the arbitrators. On 29th December this suit was stayed pending arbitration. On 13th May 2008 the Plaintiff obtained orders restraining the defendants from selling, removing, alienating or disposing their property pending the hearing and final determination of the suit. The respondents also undertook not to take any action or to make any decision or to do anything in relation to their businesses and assets in Kenya and Uganda that may jeopardize or otherwise detrimentally affect the pending arbitral proceedings. The record further shows that by a consent recorded by the Advocates for the parties dated 22nd May 2008 the 2nd Defendant was removed from the case leaving only the 1st Defendant. On 24th October 2008 the arbitration proceedings were extended by a period of six (6) months from 21st August 2008 and were to be fully heard and determined before 21st February 2009. It was extended again for a further nine months and the date for full hearing and determination pushed to 21st December 2009.

By a Notice of Motion dated 1st March 2013 the Defendant sought to have the mandate of the arbitral tribunal terminated and the reference of the dispute to the arbitration set aside. That Notice of Motion also sought orders to have the Plaintiff's suit against the defendant dismissed for want of prosecution. That application was heard by way of written submissions and on 19th March 2015 I delivered a ruling, in the presence of the Plaintiff's Advocate, which saved the suit but ordered the Plaintiff to within sixty (60) days of the ruling take steps to move either the arbitrators or this Court with a view to having the suit heard.

Following that order the Plaintiff's Advocate had the suit fixed for hearing on 16th September 2015 but come that day there was no attendance by either party and this Court proceeded to dismiss the case. It is this order of dismissal that the Plaintiff seeks to set aside in the Notice of Motion dated 16th October 2015.

The gist of the application is that the failure to prosecute the suit was occasioned by the Advocate who did not even notify the applicant of the hearing date and that as mistakes of Counsel ought not to be visited on the client this application should be allowed. It was also urged that where a case has not been heard on the merits latitude should be afforded. Several authorities were cited in support of the application.

The application was vehemently opposed vide the replying affidavit sworn on 30th October 2015 by Boniface Abala, Legal Manager. He blames the Plaintiff/Applicant for what has befallen its suit for what he calls not pushing its Advocates to fix the suit for hearing. He also blames the Plaintiff/Applicant for the stalled arbitral proceedings. He deposes that the Plaintiff/Applicant ought to have been more diligent and contends that the Defendant/Respondent stands prejudice if the suit is reinstated as first it has already spent a lot of money and resources in this suit; Secondly that due to lapse of time the key witnesses' memory has been and continues to be eroded and it has also become increasingly difficult to trace the witnesses who have since left the Defendant's employment. He also accuses the Plaintiff/Applicant of squandering the opportunity it was afforded to have its case heard by not availing itself at the hearing. It has therefore not established sufficient cause to warrant the variation or setting aside of the orders earlier made and this application ought to be dismissed.

Order 12 rule 7 of the Civil Procedure Rules gives this Court discretion to set aside or vary an order dismissing a suit upon terms as may be just. The orders sought by the Plaintiff/Applicant are therefore discretionary. However such discretion must be exercised judicially and is according to section 1A(2) of the Civil Procedure Act, to be exercised with the overriding objective of the Act and rules in mind. That overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. With the introduction of this overriding objective into the Act, it is no longer "fashionable" for parties to shift blame on their Advocate. This is because Section 1A(3) places a duty on the party as well as his Advocate to assist the Court to further the overriding objective. Sub-section (3) states:

> ***''A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act, and to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.''***

By the ruling dated 19th March 2015 this Court ordered the Plaintiff/Applicant to move either the tribunal or this Court within 60 days, with a view to setting down its case for hearing. The record shows that on 15th May 2015 the Advocates for the Plaintiff/Applicant caused the suit to be fixed for hearing. The Plaintiff/Applicant however blames their Advocate for not informing it that matter had been fixed for hearing. The Managing Director of the Plaintiff/Applicant had on 26th August 2013 sworn an affidavit in opposition to the Defendant/Respondent's application to have the suit dismissed for want of prosecution and must therefore have been aware that they needed to put their house in order. Like the Advocate he had a duty to assist the Court by complying or seeing to it that the order was complied with. It cannot therefore be heard to say that the date was taken by the Advocate who did not inform it. The period between 19th March 2015 when the ruling was delivered, 15th May 2015 when the hearing date was fixed and 16th September 2015 when the hearing was to take place is close to six (6) months and any party interested in their matter and more so who was just recovering from an application to dismiss their suit for want of prosecution would have been in close consultation with their Advocate to know the position. The Plaintiff/Applicant does not state what it did in that period which bespeaks of its lack of interest in the suit. During the application to dismiss the suit for want of prosecution the Court was told how the Plaintiff/Applicant had stalled the arbitral proceedings for refusing and/or neglecting to sign a consent to extend the term of the arbitrator a fact which it never rebutted.

The Defendant/Respondent has sworn that it is prejudiced by the continued pendency of this suit as so far

it has spent a lot of money, that memories are fading and some of its witnesses have left its employment. This cannot be too far fetched.

By giving the Plaintiff/Applicant 60 days to move either the tribunal or the Court this Court was being alive to the right of the Plaintiff to have the matter heard on the merits. The facts of this case is clearly distinguishable from those cited by Counsel for the applicant. Sixty days is a reasonable period for any party wishing to push their case forward to do so. The Plaintiff has given me no reason at all that would warrant this Court to exercise its discretion in itsfavour. Accordingly I find no merit in the application and it is dismissed with costs to the Defendant/Respondent.

As submitted by the Advocate for the Defendant/Respondent the Plaintiff/Applicant has recourse against his Advocate it at all.

Signed, dated and delivered at Kisumu this ..11th.. day of .February.. 2016

E. N. MAINA

JUDGE

In the presence of:-

Mr, Amule for Plaintiff/Applicant (Holding Brief for Mr. Oguttu)

N/A for Defendant/Respondent

CC: Felix Magutu