



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 350 OF 2007

TRANSNATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

COMMODITY EXCHANGE LIMITED.....1ST DEFENDANT

JENIFFER JEMUTAI KOSITANY.....2ND DEFENDANT

REGINALD WILLINGHTON KARANJA.....3RD DEFENDANT

RICHARD ETHAN NDUBAI.....4TH DEFENDANT

RULING

1. The application before the court was brought by the 4th defendant, **RICHARD ETHAN NDUBAI**. His request is that the suit against him be dismissed for want of prosecution.
2. As far as the applicant was concerned, the plaintiff, **TRANSNATIONAL BANK of KENYA LIMITED**, had lost interest in prosecuting the suit against him. That would, in the understanding of the applicant, explain why the plaintiff had failed to take any action to prosecute the suit, for over one year.
3. The delay in the prosecution of the suit was described as inordinate, and the applicant said that the unmerited delay was prejudicial to him. He was forced to suffer unnecessary anxiety due to the delay in prosecuting the suit. It was for those reasons that the 4th defendant asked the court to dismiss the suit.
4. The suit was filed on 6th July 2007. After being served with the plaint, the applicant filed his Defence on 3rd April 2008. Thereafter, the plaintiff filed a Reply to Defence on 8th April 2008.
5. It was the considered view of the plaintiff that the Defence was a bare denial, which failed to raise any triable issues. Therefore, the plaintiff filed an application to strike out the Defence. That application was filed on 14th December 2010. By a Ruling dated 1st September 2011, Hon. Lady Justice M.G. Mugo dismissed the plaintiff's application. The learned Judge held that the 4th Defendant's Defence raised triable issues.
6. The court records show that the 1st and the 3rd Defendants failed to enter appearances, and also failed to file defences.
7. However, although the plaintiff's application to strike out the defence of the 4th defendant had been dismissed, a Decree was drawn up against the said defendant. Suddenly, on 23rd January 2013, the 4th defendant was faced with the prospects of having a Decree executed against him.

8. On 1st January 2013 the 4th defendant filed an application for stay of execution. That application was heard under a certificate of urgency, and on 1st February 2013, Havelock J. ordered that there would be a stay of execution of the Decree issued against the 4th Defendant. In the first instance, the order was granted *ex parte*.
9. However, on 15th February 2013, the plaintiff and the 4th defendant consented to the stay of execution.
10. As regards the costs of the application, Havelock J. ordered the plaintiff to pay to the 4th defendant, the sum of Kshs. 10,000/-.
11. It is the case of the 4th defendant that since February 2013, the plaintiff had not taken any steps to prosecute the suit. In the light of the said inactivity on the part of the plaintiff, the applicant has now asked the court to dismiss the suit for want of prosecution.
12. But the plaintiff has responded by saying that it had not been inactive, as alleged by the applicant.
13. A perusal of the court file reveals that on 7th August 2014, the plaintiff's advocates wrote to the learned Deputy Registrar, asking the court to re-issue Warrants for Execution.
14. There is also another letter dated 29th October 2014, from the plaintiff's advocates, explaining that there was a valid Decree against the 1st and 3rd Defendants. Therefore, the plaintiff, once again, asked the court to re-issue the Warrants for Execution.
15. The letters through which the plaintiff was applying for execution of the Decree constituted steps in the case. However, it is also clear that those steps were taken against the 1st and the 3rd defendants. Those steps were not taken against the 4th Defendant.
16. The plaintiff says that the suit was not yet ready to be set down for hearing because the requisite pre-trial procedures have not been complied with by both the Plaintiff and the 4th Defendant.
17. Whilst it is true that the parties are yet to comply with the pre-trial procedures, that fact cannot be a source of any comfort for the plaintiff. The failure of the plaintiff to make ready its case against the 4th Defendant is an indictment on the plaintiff, as a person who institutes proceedings is expected to be on the driving seat, to ensure that his case moves forward towards its destination.
18. The defendant is under no obligation to first demonstrate that it had complied with pre-trial procedures before the defendant can be in a position to ask the court to dismiss the plaintiff's claim for want of prosecution.
19. Nonetheless, the delay in prosecuting the case is not, of itself, sufficient to warrant the dismissal of the plaintiff's case. The delay must be inordinate.
20. Secondly, the defendant should show that due to the delay, the defendant would be prejudiced.
21. If the court is satisfied that notwithstanding the delay, justice could still be done to the parties, the court may sustain the suit.
22. In this case, the 4th defendant did not satisfy the court that the delay would be so prejudicial to the said defendant that it was no longer possible for justice to be done if the case proceeded to trial.
23. In the result, the 4th Defendant has fallen short of persuading the court that justice demands that the plaintiff's suit be dismissed for want of prosecution. I therefore reject the 4th Defendant's application dated 4th June 2015.
24. Although the application is not successful, I find that the interests of justice dictate that I should not award costs to the plaintiff. If costs were to be awarded to the plaintiff, it would be akin to rewarding a party who had failed to take steps to prosecute its own case against the applicant.
25. In the result, each party will pay its own costs.

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

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Kiche for Masika for the Plaintiff

Senteu for the Defendant

Collins Odhiambo – Court clerk.