REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 636 OF 2004

BURNABY PROPERTIES LIMITED.....PLAINTIFF

Versus

SUNTRA STOCKS LIMITED.....DEFENDANT

RULING

Dismissal of suit for want of prosecution

[1] The Defendant is asking the court to dismiss this suit for want of prosecution and award costs to it. It has so applied through a Motion dated and filed on 28th July 2014. The Motion is expressed to be brought pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 17 Rule 2(1) of the Civil Procedure Rules.

[2] The application is supported by two Affidavits of Fredrick Ngatia sworn on 28th July 2014 sworn and 5th November 2014. The Applicant also filed submissions dated 5th November 2014. The Applicant deposed that the Plaintiff has not taken any steps in prosecuting the suit since 15th March 2013 and that the delay greatly prejudiced the Applicant. It was further deposed that the court had, out of its own initiative dismissed the suit for want of prosecution on 23rd January 2012. However, on 15th March 2012 the Plaintiff filed an application and convinced the court to set aside the ruling of the court dismissing the suit through a ruling dated 15th February 2013. It was averred that the Plaintiff failed to prosecute the suit despite an earlier order for dismissal being set aside. The Plaintiff only contends that they are trying to procure witnesses without stating how long that will take. It is not clear whether they will procure witnesses or not. Therefore, the conduct of the Plaintiff in not prosecuting the suit amounts to flagrant disregard of the overriding objective of the law. The delay is inordinate, inexcusable and unreasonable. It was, thus, only fair and just for the suit to be dismissed. They cited the case of **ET Monks & Co. Ltd v Evans [1985] KLR 584**, **Ivita v Kyumbu [1984] KLR 441** and **Allen v Sir Alfred Mc Alpine [1968] 1 All ER 543.**

[3] The Applicant also submitted that the replying affidavit was defective for the reason that it was not in compliance with Section 5 of the Oaths and Statutory Declarations Act. To buttress this argument, they relied upon the cases of **Charles MuturiMwangi v Invesco Assurance Co. Ltd [2014] eKLR**, **BenardRuto v Republic Misc. Criminal Application No 64 of 2008**, **Fredrick MwangiNyaga v Garam Investments & Another [2013] eKLR** and **Abdul Aziz Juma v nkikisuhiInvetsment& 2 Others ELC Suit No 291 of 2013**.

The Respondent wants its suit sustained

[4] The Respondent filed a Replying Affidavit of Akbarali Karim Kurji on 30th September 2014. It was deposed to that the Plaintiff's key witness, a Mr Fred Mweni, had informed the deponent that he was indisposed, and was not able to visit the Plaintiff's advocates offices for the purposes of recording a statement. It was further deposed that it would be in the interest of justice for both the Respondent and Applicant to be allowed leave to file their respective documents. It was averred that the Defendant had not shown any prejudice that it would suffer if the Plaintiff was granted leave to lodge its documents.In its submissions dated 28th November 2014 and filed on 4th December 2014, the Plaintiff asserted that the application was brought under the wrong provisions of the law, and that the court, therefore, lacked the jurisdiction to entertain the application. They referredto the cases of **Owners of Motor Vessel "Lilian S" v Caltex Oil (K) Ltd (1989) KLR 1** and **Abdul Aziz Juma v NikisuhiInvestments & 2 Others** (supra) that rules and procedure had to be complied with and that the provisions of Article 159(2)(d) of the Constitution would not suffice in this instance. The said the Replying Affidavitwas properly on record, and that in any event the Defendant had failed to show or prove its assertion that the same was in violation of any laws. They further submitted that the application failed to meet the legal threshold for such an application. It went further to submit that there had been no inordinate delay in prosecuting the suit as numerous attempts had been made to get the main witness to issue his statement with the Plaintiff's advocates to no avail. It was submitted that the delay was not intentional, contumelious nor inexcusable as the Plaintiff had been active all along and resorted to the dicta of Lord Denning in **Clough & Others v Clough & Clough and Others (1968) 1 All ER 1176**.

[5] The Respondent argued that the Defendant had also failed to demonstrate the prejudice it would stand to suffer, instead it is the Plaintiff who would suffer prejudice for the dismissal of the suit. In summation, the Plaintiff submitted that Section 1A of the Civil Procedure Act and Article 50 of the Constitution, should guide the court and serve justice which would avoid an injustice.

DETERMINATION

[6] I see three(3) issues for determination. Two are of preliminary significance, that is; a) whether the Replying Affidavit sworn and filed on 30th September, 2014 contravenesthe provisions of Section 5 of the Oaths and Statutory Declarations Act? And, b)whether the application is an appropriate application for dismissal of suit for want of prosecution under Order 17 Rule 2(1) of the Civil Procedure Rules? Depending on the result of the two preliminary points, I will determine the substantive issue, which is: whether I should dismiss the suit.

Jurat on separate page

[7] Section 5 of the Oaths and Statutory Declarations Actis the guide on jurat of an affidavit. It provides as follows;

> ***Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly <u>in the jurat or attestation at what place and on what date the oath or affidavit is taken or made</u>.*** *(Emphasis added).*

The Defendant contended that this was a fundamental defect in the affidavit, as it was not discernible whether the jurat was in relation to the affidavit or not. The Defendant has not demonstrated how the jurat being on a separate page in the affidavit violates the provisions of Section 5 of the Oaths and Statutory Declarations Act, or how such arrangement becomes incurable under Article 159(2)(d) of the Constitution. The word ''shall'' used in section 5 of the Oaths and Statutory Declarations Act should never confuse a litigant in the hope that a mere irregularity or defect in form would make an affidavit fatally defective. The word ''shall'' used in section 5 of the said Act has been interpreted by courts to be directory rather than mandatory. You may consider the remarks by *Ringera, J,* (as he then was) in the case of ***Milimani – HCCC No. 462 of 1997, Standard Chartered Bank Limited Vs. Lucton (Kenya) Ltd (unreported),***that:-

> ***"There appears to be a common belief by many in these courts that the use of the word "shall" in a statute makes the provision under construction a mandatory one in all circumstances. That***

belief is in my discernment of the law a fallacious one. As I understand the canons of statutory interpretation, the use of the word "shall" in a statute only signifies that the matter is prima facie mandatory. The use of the word is not conclusive or decisive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only. As long ago as 1861, in the case of LIVERPOOL BOROUGH BANK V TURNER [1861] 30 L. J. Ch. 379, pp. 380-381, Lord Campbell had laid it down that;

"No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered".

And from PRINCIPLES OF STATUTORY INTERPRETATION by Justice G.P. Singh, a former Chief Justice of Madhya Pradesh High Court in India, the following instructive passage appears at p. 242:-

"The use of word "shall" raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other consideration such as object and scope of the enactment and the consequences flowing from such construction. There are numerous cases where the word "shall" has, therefore, been construed as merely directory".

[8] On the basis of the above legal position, Courts have stated that the jurat of an affidavit being in a separate page is not a defect or a matter that goes to jurisdiction of the court. I would, therefore, regard the alleged defect as an irregularity of form rather than substance. See again what Ringera J (as he then was) stated in ***Milimani HCCC No. 26 of 2004, Patrick Thinguri& 1, 006 Others Vs. Kenya Tea Development Agency Co. & Another*** **(unreported),** that;

"Turning to the defects concerning the Jurat it is important to consider whether the defect as described is as to form or is fundamental and likely to touch on jurisdiction. Firstly it is not alleged that apart from appearing on a separate page there is any other defect like the name or place of swearing for example. The court finds that this is not a fundamental defect or irregularity and is both curable under the Order on affidavits namely Order 18 rule 7 which reads:-

7 "The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the file or other irregularity in the form thereof".

For the avoidance of doubt and in view of the frequent of objections being received by the courts it should be pointed out that S. 72 of the Interpretation and General Provisions Act does give the courts wider powers and discretion to avoid being blinded by technicalities which are now being raised on a daily basis by advocates and give the court time to consider and embark on matters of substance.

Section 72 of the INTERPRETATION AND GENERAL PROVISIONS ACT states:-

"Save as is otherwise expressly provided, whenever a form is prescribed by a written law an inherent or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document or which is not calculated to mislead."

In the Court of Appeal case of MWATHI v IMANENE 1982 KLR 323 the court upheld the position as above concerning S. 72. I therefore hold that this Section does give the court authority to overlook the defect concerning the Jurat and to admit the affidavit in evidence…"

We are most lucky jurisdiction now that article 159(2) (d) of the Constitution expressly depreciates such

technicalities in favour of substantive justice. I dismiss the objection based on jurat and hold the Replying Affidavit is proper for all purposes and intents.

Citing wrong provisions of law

[9] The Respondent submitted that the application herein fall foul of the law because it cited wrong provisions of the law. On that basis, the plaintiff concluded that this court does not have jurisdiction to preside over the said application. The Defendant based his application on Order 17 Rule 2(1) of the Civil Procedure Rules as well as Sections 1A, 1B and 3A of the Civil Procedure Act. The only provision it did not cite is Order 17 Rule 2(3) of the Civil Procedure Rules. Therefore, the correct question to ask is whether failure to cite Order 17 rule 2(3) of the Civil Procedure Rules is fatal omission. Failure to cite rule 2(3) of the Civil Procedure Rules is not fatal at all. First, the rules allow any party to the suit to apply for its dismissal on the grounds set out in Order 17 rule 2(1) of the Civil Procedure Rules. Order 17 Rule 2(1) of the Civil Procedure Rules is, therefore, available to any party in the suit and not the court alone as argued by the Plaintiff. Second, the application is also appealing to the inherent jurisdiction of the court to get rid of these proceedings for being an abuse of the court process. Third, the omission does notgo to the jurisdiction of the court and is curable under article 159(2) (d) of the Constitution. Hence, this court has jurisdiction over and I will proceed to determine the application on merit.

Should I sustain the suit?

[10] At one time, in exercise of its powers under Order 17 Rule 2(1), the court had dismissed the instant suit on 29th January 2012, but those orders were set aside following an application by the Plaintiff dated 15th March 2012. In the ruling delivered on 15th February 2013, Mabeya, J gave the condition of reinstatement of the suit to be that the Plaintiff would take steps to complete the pre-trials within ninety (90) days and list the matter for trial. The ruling read in part;

> ***"The upshot is that the application is merited and I allow the same on the condition that the Plaintiff shall forthwith take steps to complete pre-trials within 90 days and thereafter list the suit for trial."***

[11] The record shows that no steps were taken by the Plaintiff towards compliance with the orders of Mabeya J. The only contention by the Plaintiff is that its key witness was unavailable to make a statement. It is not clear why the deponent of the affidavit dated 30th September 2013 MrAkbarali Karim Kurji, could not issue the statement himself as he seemed well versed with the facts of the case and issues in contention. He is also the same person who deposed to the Verifying affidavits in which he verified the allegations set out in both the Plaint and Amended Plaint dated 29th October 2004 and 20th September 2007 respectively. Further, it is not shown why there was non-compliance with Order 11 of the Civil Procedure Rules. No reasonable explanation has been given at all on the default as well as the delay in prosecuting the matter. The Plaintiff was awoken by the Defendant's application to have the suit dismissed. The Plaintiff has been indolent for a period of well over one (1) year from the directions by Mabeya, J on 15th February 2013. In the absence of any reasonable explanations as to why the directions of the court were not complied with, there is only one presumption which emerges; that the Plaintiff is not ready and willing to prosecute its suit. Towards this end, it be known that equity is not known to serve the indolent, but the vigilant. See what Odunga, J in **Civil Suit No 1238 of 2004 Charterhouse Bank Ltd & Another v Nation Media Group & Another; [2012] eKLR**stated that;

> ***"It is the duty of the Plaintiff to take the necessary steps to ensure that the matter is fixed for hearing. The Defendant's primary aim is to have the suit dismissed and therefore the Defendant cannot be faulted for choosing the route of terminating the suit rather than sustaining it. In PirbhaiLalji& Sons Ltd v HassanaliDevji (1969) EA 439Russel, J emphasized that although the Defendant had the right to set down the suit for trial it was not incumbent on him to do so as it might only have involved him in further and unnecessary costs. He was entitled to sit back and in due course make an application for dismissal of the suit for want of prosecution."***

[12] The Plaintiff had been given a lifeline by the court to resuscitate its case. He did not take the opportunity or fulfil the conditions given. The vigilant suitor here is the Defendant who has even taken time to apply for the dismissal of the suit. In such circumstances, even if summary dismissal of suit is such draconian act, it fits the bill that the suit should be dismissed. Justice is about all the parties not only the plaintiff, and so, a suit which becomes a source of prejudice to the Defendant and the administration of justice generally should be dismissed. This is one such case where the plaintiff wishes to hold another party in court *ad infinitum*for no good reason. Keeping a suit hovering on the Defendant's head indefinitely would be most prejudicial; it is denial of justice. As was stated in **Allen v Sir Alfred Mc Alpine** (supra):

> ***"To put right this wrong, we will in this court do all in our power to enforce expedition; if need be we will strike out actions where there has been excessive delay. This is a stern measure, but it is within the inherent jurisdiction of the court, and the rules of the court expressly permit it. It is the only effective sanction that they contain."***

Accordingly, the only effective and justifiable action to take despite its unpleasant nature is to dismiss the suit. I hereby dismiss the suit with costs to the Defendant. The upshot is that I allow the application dated and filed on 28th July 2014. It is so ordered.

Dated, signed and delivered in court at Nairobi this 4th day of May 2015.

F. GIKONYO

JUDGE