



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 247 OF 2010

EQUITY BANK LIMITEDPLAINTIFF

VERSUS

TARGET PROMOTIONS LIMITED DEFENDANT

RULING

1. In answer to this Court's Notice to Show Cause why this suit should not be dismissed dated 12th May 2014, the Advocate who has the conduct of this matter on behalf of the Plaintiff, **Mr. Tom Maina Macharia** swore an affidavit dated 26th June 2014. The deponent maintained that while perusing the day's causelist on 15th May 2014, he had noticed that this case was scheduled for dismissal. Such revelation is somewhat disturbing to this Court as it was the Notice to Show Cause which was dated 15th May 2014, the said Notice coming before Court on 6th June 2014 when Mr. Macharia's brief was held by Miss Kilonzo. Be that as it may, when the matter came for further mention on 27th June 2014 Mr. Macharia's brief was held a second time as before Court. Such reluctance on the part of the advocate on record for the Plaintiff to appear before Court only raised question marks in the mind of the Court as to the sincerity of the said Affidavit.
2. The Affidavit detailed that the Advocate had been experiencing difficulties in tracing the Defendant herein in order to effect service of Summons directly upon its officers. The deponent noted that he had written to the Registrar of Companies attaching a copy of a letter to this end dated 30th April 2010. The deponent failed to indicate before Court as to whether he had received any response from the said Registrar. It seems that the next step taken by the Advocate for the Plaintiff was a Request for Judgement dated 26th October 2010. As he himself says, that request was turned down by the Court on the grounds that Summons herein had not been served on an officer of the Defendant. The Applicant then went on to say that he sought instructions from the Plaintiff to file an application for leave to serve the Defendant by way of substituted service. Apparently consent having been given by the Plaintiff, the Advocates filed a Notice of Motion dated 13th April 2011 seeking *inter-alia* Orders for extending the validity of the Summons herein by a further period of 12 months and for leave to serve the Defendant by way of advertisement in a local daily newspaper. That Notice of Motion remains undetermined today. The Applicant maintains that one of the reasons for the said Application having not been pursued was that his firm moved offices and the file was unintentionally misplaced which was a mistake on the part of the advocates. Finally, Mr. Macharia maintained that the Plaintiff was always willing to prosecute this suit and was still ready to prosecute the same. He maintained that the Plaintiff will be denied justice and will suffer irreparable loss should this Court dismiss the suit for want of prosecution.
3. I have considered the said Affidavit of Mr. Macharia. I am of the view that it leaves a lot to be desired in terms of explanation for the delay in prosecuting this suit. The un-heard and undetermined Notice of Motion dated 13th April 2011 has sat on the Court file since 15th April

2011, over 3 years ago. **Order 17 rule 2** of the *Civil Procedure Rules, 2010* reads as follows:

“17. 2. (1) 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.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

Order 17 was deliberately applied so as to ensure that parties did not drag their feet in prosecuting and/or defending cases pending in Court. It is difficult enough for parties to suits to obtain hearing dates taking into account the heavy caseload of the Courts at all levels. This was one of the main reasons that the Legislature passed **section 1 A** of the *Civil Procedure Act* in 2009. That section reads as follows:

“1A (1) The overriding objective of this Act and the

Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objectives specified in subsection (1).

(3) 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.”

4. As I read **section 1A (3)** any and every party to a suit, including the Plaintiff herein, is under a duty to assist the Court to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. (Underlining mine). Leaving aside the indolence of the Advocate on record for the Plaintiff, there would seem to be no reason why the Plaintiff itself could and should not have pursued its advocate so as to enquire as to and ensure progress in the prosecution of this suit. In my view, a delay of over three years in further prosecuting this suit is not only inordinate but inexcusable. As a result, I have no hesitation in dismissing this suit for want of prosecution. Order accordingly.

DATED and delivered at Nairobi this 10th day of July, 2014.

J. B. HAVELOCK

JUDGE