REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 77 OF 2010

SEBASTIAN MUTIMU KANG'ATTA …..… PLAINTIFF/RESPONDENT

VERSUS

CAPITAL MARKETS AUTHORITY ……..….. DEFENDANT/APPLICANT

RULING

1. What is before Court is the Notice of Motion brought by the Defendant dated 17th July 2013 seeking to strike out the suit as against it for want of prosecution. The Application is brought under the provisions of **Order 17 rule 2 (3)** and **Order 51 rule 1** of the *Civil Procedure Rules, 2010*. The grounds upon which the Application is brought are as follows:

"a) That the Plaintiff herein last invited us to fix a date for hearing on 13th December 2010, which was a public holiday, hence no date was fixed.

b) That the matter was thereafter scheduled for hearing on the 18th July 2011, but was not listed at the call-over and hence not confirmed.

c) It would be in the interest of justice to allow the application.

d) The Defendants continue to suffer prejudice in the pendency of the suit which is an old matter that needs to be finalized.

e) Further grounds to be adduced at the hearing hereof".

2. The Application is supported by the Affidavit of **Zehrabanu Janmohamed** sworn on even date. The deponent detailed that she was acting for the Defendant in this matter and practising as an advocate of this Court in the firm of Archer & Wilcock, Advocates. The deponent related the history of the suit before Court and noted that the matter was fixed for hearing on 18th July 2011 but did not proceed as the suit was not confirmed at the Call Over. Since that date, the Plaintiff had not taken any step to fix the matter for hearing. It appeared to the deponent that the Plaintiff had no interest in prosecuting the suit and had not shown any cause why the same should not be dismissed for inaction.
3. The Plaintiff swore a Replying Affidavit on 3rd October 2013. He noted that he was an Advocate of this Court and confirmed that the case had been set down for hearing on 18th July 2011. However, on 8th February 2011, he had written to the Defendant's advocates proposing that the parties should explore the possibility of an out-of-court settlement. Sometime later, he had been

informed by Ms Janmohamed that the Defendant was instructing Senior Counsel George Oraro. The Defendant had been to see Mr. Oraro in his office and he had indicated that he also felt that it would be appropriate for the parties to explore settlement. Unfortunately, Mr. Oraro had then proceeded to the Hague to defend a client there and settlement discussions were postponed until he returned. The Defendant mistakenly thought that there was no need to push the case forward for hearing before the parties had discussed and agreed or disagreed on the possibility of an out-of-court settlement. The Defendant noted that he had lost over Shs. 37 million owing to the failure of the Defendant to perform its statutory duties and consequently there was no way that he would not be interested in prosecuting his case to its logical conclusion. Finally, the Defendant concluded that his case as against the Defendant was unprecedented and raises an issue of public interest. Such issue was whether or not the Defendant, as a statutory body, was liable to compensate an investor in stocks and shares trading on the Nairobi Securities Exchange who suffered loss and damage as a consequence of the Defendant's neglect of its statutory duties.

4. The Defendant's submissions set out the facts of the matter in hand, noting that the Plaintiff had not fixed the suit for hearing nor taken any other steps in regard to the same since July 2011. The Defendant asked the Court to consider: (i) whether the delay was inordinate; (ii) whether the delay was inexcusable and (iii) whether the Defendant is prejudiced. It noted that at the time of filing the Application herein, 2 years had elapsed with the Plaintiff taking no steps to have the suit set down for hearing. It was the primary duty of the Plaintiff to take such steps to progress the matter as he was the party who had dragged the Defendant to Court, regardless of whether or not the parties were engaging to settle the matter out of court. There were two letters in this connection, the first from the Plaintiff dated 8th of February 2011 replied to by the Defendant's advocates on 11th February 2011 detailing that the said advocates were taking instructions. The Plaintiff had not even bothered to engage the Defendant's advocate by letter or otherwise, to establish whether the Defendant would settle for another Senior Lead Counsel if the said Mr. Oraro was engaged that the Hague. The Defendant submitted that it was evident that the Plaintiff's conduct exuded indolence in failing to take such steps to ensure a speedy conclusion to this matter.
5. The Plaintiff's Submissions were filed herein on 15th May 2014 and detailed that the reasons given by the Defendant in support of its Notice of Motion were:

"a. The Plaintiff has not fixed the suit for hearing since July 2011.

b. The Plaintiff appears to have no interest in prosecuting the suit.

c. The Defendant is being prejudiced by the pendency of the suit."

The Plaintiff said in his Replying Affidavit, that he had explained in detail the reasons why he did not push to have the case set down for hearing. He considered that the question that the Court had to ask itself was whether it was proper for the Defendant to file the present Application before Court, seeking to have the suit dismissed, when the Plaintiff and the advocates for the Defendant had, as a matter of fact, agreed to wait so that they could consult over the possibility of settling this matter out of court. It was the opinion of the Plaintiff that if the Defendant and its advocates had decided not to engage in exploring a possible out-of-court settlement, they should have communicated such to the Plaintiff's advocates. If after such communication, the Plaintiff had not moved to have the case listed for hearing, only then would the Defendant be justified in bringing its Application before this Court.

6. I have considered the Application, the affidavits sworn in support and against as well as the submissions of the parties herein. **Order 17 rule 2** 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 drawn 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 cogent reasons as to why 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 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 of the interpretation of any of its provisions, seek to give effect to the overriding objective 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."

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). In my view, even though there may be moves towards settlement of the suit as between parties, this is no excuse for a party not to abide by the rules of procedure. So often in my experience, where parties fix a suit for hearing, there is a much greater likelihood that settlement discussions bear fruit in view of the datelines involved. I consider that the Plaintiff in this suit has dragged his feet and even today has failed to prosecute the same. His actions amounted to inordinate and inexcusable delay which, in my opinion, has prejudiced the Defendant herein.

7. As a result, I allow the Defendant's Notice of Motion dated 17th July 2013 and dismiss this suit for want of prosecution. The Defendant will have the costs of its Application as well as the costs of the suit.

DATED and delivered at Nairobi this 15th day of July, 2014.

J. B. HAVELOCK

JUDGE