



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 642 of 1998

**KAMLESH MANUKHLAL PATTNI.....
.....PLAINITFF
VERSUS**

**CENTRAL BANK OF KENYA.....1ST
DEFENDANT**

**WESTMONT-HOLDINGS SDB.BHD.....2ND
DEFENDANT**

TITLE BY WAY OF COUNTER-CLAIM

**CENTRAL BANK LIMITED.....
PLAINTIFF
VERSUS**

**KAMLESH MANSUKHLAL PATTNI.....1ST
DEFENDANT**

**WESTMONT-HOLDINGS SDB. BHD.....2ND
DEFENDANT**

**UHURU HIGHWAY DEVELOPMENT LIMITED.....].....3RD
DEFENDANT**

BY ORIGINAL ACTION

TITLE BY WAY OF COUNTER-CLAIM

**WESTMONT-HOLDINGS SDB.BHD.....PLAINTIFF
VERSUS**

KAMLESH MANSUKHLAL PATTNI.....1ST DEFENDANT

**UHURU HIGHWAY DEVELOPMENT LIMITED.....2ND
DEFENDANT**

CENTRAL BANK OF KENYA.....3RD DEFENDANT

RULING

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1. The Notice of Motion application dated 11th June 2012 by Westmont-Holdings SDB.BHD has been brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21 Laws of Kenya) and all enabling provisions of the law. It seeks the following orders:-

- a. THAT the order dismissing this suit as regards to the Plaintiff Westmont Holdings SDB. BHD given on 17th day of April 2008 be and is hereby set aside.**
- b. ALTERNATIVELY, THAT the order dismissing this suit given on 17th day of April 2008 be and is hereby set aside.**
- c. THAT thereafter this suit proceed to a full hearing on a priority basis.**
- d. THAT the costs be in the cause.**

2. The grounds on which the Applicant relied on in support of its application are as follows:-

- a. THAT there are good reasons for the failure by the Applicant in prosecuting the case.**
- b. THAT the limitation period has expired.**
- c. THAT it is in the interest of justice that the dismissal order be set aside.**

3. The Applicant's application was supported by the Affidavit of Jasmine See sworn on 11th June 2012.

4. From the said affidavit, it appears to me that the delay in seeking reinstatement of the suit was caused by :-

- a. The enjoining of Kamlesh Mansukhlal Pattni as a co-Plaintiff.
- b. The investigations by the Judicial Commission into the Goldenberg International affair.
- c. The question of which firm of advocates had instructions to represent the Applicant in these proceedings.
- d. Failure by the advocates who were representing the Applicant to file an application for the reinstatement of the suit.
- e. The hospitalization of the deponent in Malaysia.
- f. Investigations by the Cockar Commission inquiring into the circumstances leading to the sale of Grand Regency to Laico.

5. The deponent stated that the Applicant had always been desirous of having the matter proceed to conclusion. It was claiming a sum of USD 3,700,000 and that it had in fact paid a sum of Kshs 3,500,000/= as security for costs as ordered by this court.

6. In opposing the said application, Kennedy Abuga, Central Bank of Kenya's Director, Governor's office swore his Replying Affidavit on 28th June 2012.

7. In the said Affidavit, he deposed that the Applicant's application to reinstate the suit was well outside the limitation period as had been conceded by the Applicant and the application was therefore vexatious, an abuse of the court process and ought to be struck out with costs.

8. Central Bank of Kenya's Preliminary Objection dated 27th July 2012 and filed on 31st July 2012 raised the following issues:-

a. The Applicant's application offends the mandatory provisions of the Limitations of Actions Act Cap 22 of the laws of Kenya.

b. This Honourable Court lacks the jurisdiction to adjudicate over this suit in the absence of the leave to extend the limitation period.

c. The Applicant's claim is scandalous, frivolous, vexatious and an abuse of the process of the court.

9. Kamlesh Mansukhlal Pattni filed his Statement of Grounds of Opposition dated 1st November 2012 on 27th November 2012. In addition to the points raised by Central Bank of Kenya Limited in its Notice of Preliminary Objection, he added the following:-

a. The Applicant was guilty of inordinate and inexcusable delay and the application being mischievous ought to be dismissed with costs to the Respondents.

b. That it was grossly unfair and clearly unreasonable for the Applicant to visit the differences between it and its counsel on other un-connected parties who suffered and continued to suffer substantial and irreparable damages, loss and expenses.

10. Save for Kamlesh Mansukhlal Pattni, the other parties filed their written submissions on 27th March 2012 and 4th May 2012 respectively. For expediency purposes, I will address the substantive motion and the preliminary objection in this ruling as they essentially deal with the same issues.

11. The Applicant was represented by Messrs Nzioka and S. Owino in the prosecution of this application. Messrs Murgor and Samora Owino appeared for Central Bank of Kenya Limited while Mr Adala acted for Kamlesh Mansukhlal Pattni.

12. The question of the limitation period featured greatly in this application. Central Bank of Kenya argued that the Applicant's application offended the provisions of Section 4 of the Limitations of Actions Act Cap 22 of the Laws of Kenya which provides as follows:-

“4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued:-

a. Actions founded on contract;

d. Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of a penalty or forfeiture;

e. Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law”

13. It was the position of Central Bank of Kenya that by virtue of this, the Applicant's claim was time barred and in any event null and void *ab initio* for failure to comply with the mandatory provisions of the said Act.

14. In its submissions, the Applicant cited the decision of **Birkett vs James [1977] 2 All E.R. 801** which essentially stated that it would be pointless to dismiss a suit for want of prosecution, where any relevant limitation had not expired since another suit could be filed on the same subject matter.

15. I do appreciate the able submissions by the counsel for Central Bank of Kenya and Kamlesh Mansukhlal Pattni and the admission by the Applicant's counsel that the limitation period had expired. I

have noted the Applicant's argument that the court should not have dismissed the suit as the relevant limitation period had not expired because either way, it would have applied for the reinstatement of the same. However, it appears that even when the suit was dismissed within the limitation period, the Applicant did not make an application to reinstate the suit herein.

16. It will suffice for me to make the above observation on the limitation period and not dwell on it further as this is not an application for leave to extend time. The question that is properly before this court, for determination, is whether the suit herein should be reinstated, the order for dismissal having been given on 17th April 2008.

17. A brief history of this matter shows that the suit herein was filed in 1998 and the order dismissing the suit for want of prosecution given on 17th April 2008. More than four (4) years had passed before the Applicant brought this application. There were commissions that were set up to investigate the affairs of Goldenberg International and Grand Regency Hotel which came to be known later as "Laico" Hotel.

18. The Applicant submitted that it was forced to wait for the outcome of Goldenberg International and the Cockar Commissions. There is, however, nothing on the court record to suggest that parties were expected to await the outcome of the Commission of Inquiry to enable the matter proceed for determination. Delving into the circumstances of what transpired at the Commissions would be clearly outside the scope of what has been placed before me. In the absence of any proof, I am also unable to attach any weight to the Applicant's assertions that Kamlesh Mansukhlal Pattni's advocate at the time had a hand in the dismissal of the suit herein. If I did so, I would be looking at the merits and demerits of the Applicant's case.

19. I have carefully considered the Applicant's averments on what transpired between it and its advocates but it would be unjust for the Respondents to be prejudiced by the relationship between it and its advocates. In this regard, I agree with Mr Adala's submissions and Ground of Opposition No 6 when he stated that it was grossly unfair for the Applicant to visit the differences it had with its advocates on the Respondents.

20. The Applicant has argued that the court ought not to have dismissed the suit and suggested that the court ought to have proceeded under Order XVI Rule 2 or 5 of the Civil Procedure Rules Cap 21 of the laws of Kenya and that it was not given notice of the dismissal. This court cannot also at this stage consider whether or not a notice of the dismissal of the suit was issued. These are issues that should have been canvassed once the Applicant became aware of the dismissal of the suit. This court would not have any jurisdiction to do so at this stage as it would be purporting to sit on an appeal of a decision of a court of similar jurisdiction and in that regard, I will also not attach any weight to that submission.

21. The Applicant persuaded this court to find that the application herein fell squarely within the principles set out in relied in the case of **Shah vs Mbogo & Another [1967] EA 116** in which the court held as follows:-

"Applying the principle that court's discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice..."

22. The same principle was outlined in **CMC Holdings Ltd vs Nzioki [2004] eKLR** and the other cases that the Applicant has relied on in support of their case. The Applicant admitted the delay in prosecuting the matter but stated that the same was certainly excusable due to the facts as stated in the Applicant's Supporting Affidavit.

23. I also have taken note of the Applicant's submissions in respect of the overriding objective of the Civil Procedure Rules 2010 and Article 159 (2)(c) of the Constitution 2010 and agree with them entirely.

24. The test for allowing the Applicant's application is whether the delay in bringing this application falls

squarely within the parameters of the court's discretion to allow the same. It is trite law that a party must be given a fair and reasonable opportunity to present its case and should not be penalised for the omissions or commissions of its legal representative.

25.The court's discretion is not an absolute one. It must be exercised judiciously on the basis of facts and legal principles. A court must consider what prejudice the other party would suffer if it exercised its discretion in favour of an applying. In this case, I must establish whether the Respondents would suffer any prejudice if the court allowed the Applicant's application herein.

26.Similarly, the court must be satisfied that such an applicant would suffer prejudice if the court did not exercise its discretion to reinstate a suit which has been dismissed for want of prosecution. Save for stating that it was still keen on prosecuting its claim for USD 3,700,000, the Plaintiff did not show this court what prejudice it would suffer if the suit herein was not reinstated.

27.I am alive to the fact that refusal by a court to allow a party to ventilate its case especially where its legal representative has done and/or omitted to do something to its detriment is a very drastic action. In this regard, the court must be very cautious in denying a party such opportunity which must only be done as a last resort.

28.I have, however, considered the explanation of the causes of delays in reinstating the suit herein as had been deposed by the deponent and from the filed submissions of the Applicant and do not find the explanations to be sufficient and good reason why the suit herein should be reinstated. The sword of justice must cut both ways. No party should suffer prejudice as a result of a right being given to the other party.

29.From the circumstances of this case, I find that the revival of a suit that was dismissed almost four (4) years ago is apparent prejudice against the Respondents herein bearing in mind that it is now almost fifteen (15) years since the suit herein was filed. In this regard, I wholly concur with the case law by Mr Murgor to the effect that the Applicant has been guilty of inordinate delay and that his client will suffer prejudice if this suit is reinstated. In addition, Kamlesh Mansukhlal Pattni transferred the subject matter of these proceedings, Laico Hotel to third parties.

30.It is my duty as an officer of this court to adhere to Section 1A(1) of the Civil Procedure Act Cap 21 (laws of Kenya) which provides that:

“The overriding objective of this Act and rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes...” and Article 159(2)(b) of the Constitution of Kenya 2010 which provides that justice shall not be delayed.

31.I reject the Applicant's submissions that the overriding principle of Article 159 (2) (b) of the Constitution of Kenya 2010, to wit that justice shall be administered without undue regard to procedural technicalities is applicable herein. There were no procedural technicalities in respect of the Applicant's application. I do not find this to be a case which merits the exercise of my discretion in favour of the Applicant herein. I concur with the Respondents' counsels that the delay in bringing this application was inordinate and inexcusable. Allowing this application will be an abuse of the court process.

32.Accordingly, the upshot of my ruling is that the Applicant's Notice of Motion application dated 11th June 2012 is not merited and for that reason, the same is hereby dismissed with costs to the Respondents.

33.Orders accordingly.

DATED and DELIVERED at NAIROBI this 7th day March of 2013

J. KAMAU
JUDGE