REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 2113 OF 1989

SAVANNA DEVELOPMENT CO LTD.....PLAINTIFF

VERSUS

MERCANTILE FINANCE CO LTD.....DEFENDANT

RULING

On first principles, adjournment is only granted on the most compelling of reasons laid bare for anyone to see, that indeed adjournment is called for, given the circumstances of the particular case. This is a principle always acted upon, and for good reason. It is in the interests of justice that litigation must be got on with at a reasonable speed – reasonable expedition, the wise say: not too quickly; not too slowly. In the administration of civil justice proceeding at break – neck speed may work injustice in some cases; so may tardiness. Unreasonable haste aborts justice. Proceeding sluggishly fossilizes it. Has it not come down to us through the ages from men of old and wisdom, that justice delayed is justice denied?

In Shakespear, through *Hamlet*, we see the law's delays condemned and ranked among the whips and scorns of time, a grievous wrong hard to bear, just as the oppressor's wrong, the proud man's contumely, the pangs of dispraised love, and the insolence of office, are hard and painful to endure. In Dickens, through *Bleak House* we see it lamented that delays in the Court of Chancery (here read any Court of justice), exhausts finances, patience, courage and hope. It is an evil recognised over the centuries; it has been fought against throughout the annals of history. It gathers fog over justice. It is not a reputable thing at all; it brings disrepute to the administration of justice. It confers neither honour nor solace to anyone. It is a repudiation of right.

Delay is often brought about by adjournments – often adjournments which can be avoided without much exertion of effort. But sometimes they may be unavoidable. Recognizing such occurance the rule-making authority laid down some allowance and stated that an adjournment may be granted where it is "necessary for reasons to be recorded" (o 16 r1). On that provision case-law and judicial comment and interpretation has proliferated beyond exhaustive citation here. Speaking from memory I understand judicial authority to be that the first question a Judge must address his mind to is whether there are reasons, to be recorded, which make an adjournment "necessary". Though discretionary, the power to grant an adjournment must not be idiosyncratically exercised. It is a judicial power – a power beyond whim and caprice; a power beyond benevolence and sympathy. It is to be exercised selectively. That is only possible when the Court is satisfied on the adequacy of the reasons given for seeking the adjournment, the extent to which an adjournment may cause prejudice, and on whether the opposite party can be suitably compensated by mulcting the applicant in costs. These three elements are only too well-known to require citation of supportive authority.

I think the Courts have also laid it down that an application to postpone a hearing must be made timeously, and not at the very last minute. A postponement will not be granted to a plaintiff where the

need for it has come about as a result of circumstance or happenings which the plaintiff, at the time of setting down the suit for hearing could have, and should have foreseen. Again I hazard to say from memory which I hope does not abandon me, that this is what one gathers from *Shah and Another v Allu* and *Patel v Gottofreid*, which, I think, were decided in 1947 and 1953 respectively, and have stood the test of the passage of time. If I had reserved this ruling to check my books I would cite the reports of these cases, and many more other decisions on the point.

Apply these principles to this present application. What am I told are the reasons for seeking this adjournment? I am told that an adjourment is necessary because Mr Sheth was instructed to lead in this case about of dispraised love, and the insolence of office, are hard and painful to endure. In Dickens, through *Bleak House* we see it lamented that delays in the Court of Chancery (here read any Court of justice), exhausts finances, patience, courage and hope. It is an evil recognised over the centuries; it has been fought against throughout the annals of history. It gathers fog over justice. It is not a reputable thing at all; it brings disrepute to the administration of justice. It confers neither honour nor solace to anyone. It is a repudiation of right.

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I think the Courts have also laid it down that an application to postpone a hearing must be made timeously, and not at the very last minute. A postponement will not be granted to a plaintiff where the need for it has come about as a result of circumstance or happenings which the plaintiff, at the time of setting down the suit for hearing could have, and should have foreseen. Again I hazard to say from memory which I hope does not abandon me, that this is what one gathers from *Shah and Another v Allu* and *Patel v Gottofreid*, which, I think, were decided in 1947 and 1953 respectively, and have stood the test of the passage of time. If I had reserved this ruling to check my books I would cite the reports of these cases, and many more other decisions on the point.

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Despite this gratuitious accommodation of the plaintiff - rendered without effort and its asking and in its

absence – today the plaintiff's advocate comes, and straightway asks for an adjournment. Not a mention about what happened yesterday. No apology for yesterday's absence. No explanation for yesterday's absence. No remorse about it at all. And, of course, knowing that mine is a thankless task, he offered no thanks to the Court for not invoking order 9B or order 16 in a manner which would have disposed of the case yesterday by dismissing it for non-attendance as no part of the claim is admitted. As if courtesy among professional colleagues in the legal profession had long ago dried up, no offer of thanks or apology to the advocates for the defendant was forthcoming. For all yesterday's indulgence to the plaintiff what the Court and the defendant's advocates get is a robustious demand for an adjournment today. Where we are heading to in this good profession, only the heavens know.

Then there are those reasons given by the advocate for the plaintiff. This is not the only matter, he attends to. He has other work to do. Now, what is all this? I would have thought it a matter of common sense that when you have too much on your plate, more than you can fairly handle at once, you do not take on more than you can handle within acceptable time limits. Leave the excess work for others who can manage it. Do not be a dog in a manger, the sages advise. There are many other competent and affordable lawyers who could have done this case without dilatoriness if the present advocate was only minded to let it go to someone else with time, less work, or with a better-managed schedule of duties and work-timetables. But to hold onto work which you consider overwhelming and complicated, till you will find time at your own unilaterally set pace of proceeding, is, to say the least, being less than fair to one's client, opposite party, the Court and the tax-payer who maintains these Courts with the hope and expectation that justice there will be expedited at a reasonable rate of progression.

To say that the case is complicated and involving voluminous documents requiring further time to study in detail is to reveal a shortcoming in one's ability as a lawyer. We take a very long time to train our lawyers. One reason for this is, so that when they come out and join the profession to handle the affairs of men, they are bound to encounter mattes of complexity and volume requiring quick solutions satisfactory to the men who entrust them to the lawyers. We do not train our lawyers to study voluminous documents in perpetuity without being ready to take off at fixed times. If you need a lot of time to be ready, leave difficult cases for those who can handle them within reasonable time schedules. Assuming that Mr Sheth has been in this case for three months only (it is disputed), that should have been enough time to prepare. He has not told me what documents he says he is tracing. They may turn out to be useless to this case. They may be vital. But the Court is entitled to have at least an inkling of what those documents are. I have none. It should have been the applicant to supply it to me.

Passage of time usually tends to expel recollection in human beings. Each passing day takes with it a portion of one's tenacity to retentiveness. In the end, delay dims memories. Witnesses forget. The vagaries of time do not spare documents. The documents may get lost, torn, stolen, destroyed, misplaced or otherwise become unavailable. Like in the present case because, at least in part, time has been allowed to pass before litigation concluded, the whereabouts of certain required documents have not been known by the plaintiff's advocate. A further delay may allow the plaintiff to change to a fifth firm of advocates, probably with a further problem to locate other documents form four previous firms, including this present one. So, whether evidence depends on memories of witnesses or on documents, delay may be prejudicial.

From these considerations, one sees that delay is a blot on the administration of justice.

The plaintiff's advocate offered to pay witness expenses and to-day's costs incurred by the defendant. It has been said in the books that costs are ordinarily a panacea which heals all ills of adjournment. I am yet to be presented with datal information in this respect. Litigational anxiety, the damaging effects of looming or actual but suspended litigation over one's head, especially if he is a professional or in business requiring intergrity and clean reputation, wasted opportunities elsewhere, and psychological trauma of suit, are imponderables incapable of quantification in money for compensation purposes. So, when one offers costs, it is upon him to show that the costs he offers to pay will reasonably compensate the other party in all these and other respects. Transport expenses, hotel bills and attendance costs from the witnesses and or advocates, are but an aspect of cost, but they are not the only ones. The opposite party may be prejudiced in more ways than mere monetary loss incurred in travelling, food, accommodation,

and attendance. It is not for the opposite party to prove the loss in the first place; it is for the applicant to show no loss or reasonably compensetable loss.

Bringing all these factual and legal factors to the fore, in the light of this particular case, the Court is not satisfied that an adjournment is necessary for reasons to be recorded. The reasons given for seeking adjournment are bad. Delay would be prejudicial, given the injunctions already existing against the defendant. It is not made known as to when the plaintiff will be ready, when the Court calender can permit this case to come back into the list. If the plaintiff considers that its lawyer has not attended to its case because of other work and as a result he is not ready today and the plaintiff is thereby prejudiced by a refusal to adjourn the case today, it can seek legal advice as to what remedy (if any) is available to it.

The application is dismissed, adjournment is refused.

Order: The plaintiff having been given time failed to produce its evidence, or to cause the attendance of its witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed prior to yesterday, and today. This being the case, notwithstanding the plaintiff's aforesaid default, this Court proceeds to decide the suit. As there is no admission of any part of claim, which has been on the pleadings and to-day, and as the plaintiff has not proved any part of the claim the Court decides the case by dismissing it forthwith. The suit is dismissed with costs to the defendant to be paid by the plaintiff.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of July , 1992.

R.C.N KULOBA

JUDGE