REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 550 OF 1970

1. NJOKI GACHUGU

2. GATHENDU MBATHI

3. MWANGI KABIRU

4. TIRUS KABIRU.....PLAINTIFFS

VERSUS

1. FRANCIS GITHI

2. MUSA MUNDIA

3. STANLEY KABIRU

4. BENJAMIN NJINE.....DEFENDANTS

JUDGMENT

This is an application by the defendants under order XVI, rule 5, of the Civil Procedure (Revised) Rules 1948 seeking for orders that this suit be dismissed with costs, and that the defendants should have the costs of this application. This application is being opposed by the plaintiffs. Rule 5 of order XVI provides as follows:

If, within three months after (a) the close of pleadings; or ... (c) the removal of the suit from the hearing list; or (d) the adjournment of the suit generally, the plaintiff does not set down the suit for hearing, the defendant may either set down the suit for hearing or apply for its dismissal.

Mr Shah, for the defendants, submits that it is a proper case in which the plaintiffs' action should be dismissed under rule 5. The plaintiffs' cause of action is based on an alleged oral partnership agreement entered into by the four plaintiffs with the four defendants in 1946 (more than thirty years ago from this date), yet the plaint was not filed until 29th April 1970. The defence was filed on 26th August 1970, when the pleadings were closed, there being no reply to the defence. No concrete action having been taken by the plaintiffs to bring this case to trial for more than six years thereafter, the defendants filed the present application on 8th December 1976. Mr Shah has referred me to *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, 701, where Sir Charles Newbold P observed:

I wish, however, to make it clear that in future a plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy.

Mr Kapila for the plaintiffs submits that there is documentary evidence available to the plaintiffs which could not be disputed: that, by Minute 64 of 1967 of the Kirinyaga County Council, the plot allegedly belonging to the partnership was registered jointly in the names of all the plaintiffs and defendants ie the plaintiffs had a good cause of action. He had written nine letters to the plaintiffs' advocates to send their representatives to fix hearing dates and that on 29th August 1975, he had fixed *ex parte* hearing dates for 27th, 28th and 29th October 1976, and that the only lapse on his part was not to get the hearing notice issued on the defendants. He referred me to *Victory Construction Co v Duggal* [1962] EA 697 where it was held by Edmonds J that where parties to an action are called upon to show cause why an action should not be dismissed for want of prosecution, the Court should be slow to make an order if satisfied that the suit can be heard without further delay; that the defendant will suffer no hardship; and that there has been no fragrant and culpable inactivities on part of the plaintiff. Mr Kapila contended that there had been no such flagrant or culpable inactivity on part of the plaintiffs and that they should be given an opportunity to have the suit heard on its merits.

The question of delays in bringing civil actions to speedy conclusion was exhaustively considered by the Court of Appeal in England in *Allen v Sir Alfred McAlpine & Sons* [1968] 1 All ER 543 where it was held that when the delay is prolonged and inexcusable, and is such as to do grave injustice to the one side or the other or to both, the Court may in its discretion dismiss the action straightaway. On the other hand this power should be exercised unless the Court is satisfied: (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party. Speaking on the respective roles of a plaintiff and a defendant in an action this is what Diplock LJ had to state at pages 554 and 555:

As regards the position of the defendants, the Rules of the Supreme Court give to the plaintiff the initiative in bringing his action for trial. The pace at which it proceeds through the various steps of issue and service of writ, of pleadings and discovery, of order for directions and setting down for trial is in the first instance within his control. The Rules also provide machinery whereby the plaintiff can compel the defendant to take promptly those steps preparatory to the trial which call for positive action on his part and provide an effective sanction against unreasonable delay by the defendant. They enable the plaintiff to sign judgment against the defendant in default and so obtain forthwith the remedy for which the action was brought. The times within which these successive steps should be taken are laid down by the Rules, though subject to extension by agreement or order of the court; but under the adversary system the only sanction for their observance by either party is dependent upon the other party's choosing to make an application to the Court. Where the delay is on the part of the plaintiff, there are some steps, such as obtaining an order for directions or setting down the action for trial, which the defendant may take himself; but it is seldom in the defendant's interest to press on with the trial of the action, whatever view he takes of the plaintiff's chances of success. He has in any event the use during the period of delay of any money which he might ultimately have to pay in damages...

It is thus inherent in an adversary system which relies exclusively upon the parties an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the Court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.

In *Rowe v Tregaskes* [1968] 3 All ER 447, in an appeal from the dismissal of a suit for want of prosecution, Lord Denning MR observed at page 448:

What is to be done? We have said on many occasions that we consider all the delay, not only the delay after writ, but also the delay before it. The delay in the first two or three years is often the most prejudicial of all. At any rate, if a plaintiff does delay until the period of limitation is nearly expired, he should keep

to the timetable thereafter. Bearing this in mind, it seems to me that the delay here was inordinate. It was inexcusable; and there is serious prejudice to the defendant. The judge directed himself properly in accordance with the recent cases. He dismissed the action for want of prosecution, and I do not think that we should interfere with his direction.

Counsel for the plaintiff urged us to take another matter into consideration. He said that in this case the plaintiff might not recover against the solicitor. The delay on his part has not been so great as to amount to negligence; and it may be that he could not recover against the trade union because they might be protected by their rules. All I would say on this point is this. It is not the function of the court to attribute blame or to apportion it. We have only to ask ourselves; was the delay inexcusable? I think that it was. This was a simple action for falling off a roof or off a ladder even after 51/2 year no statement of claim has been delivered. No sufficient excuse has been put before the Court for the delay. It is, therefore, inexcusable. It is impossible to have a fair trial after this length of time. I would dismiss this appeal.

In *William C Parker Ltd v FJ Hamm & Son Ltd* [1972] 3 All ER 1051, *Rowe v Tregaskes* was followed and it was held that, in considering whether an action should be dismissed for want prosecution, the Court may take into account the delay before the issue of the writ in ascertaining whether subject delay after proceedings have commenced is inordinate, inexcusable and prejudicial to the defendant, even though the earlier delay was permissible under the rules governing the limitation of actions; where, however, the defendant has been prejudiced as a result of the earlier 'permissible' delay in commencing the action, but has not been put in any worse position in consequence of the plaintiffs' subsequent inordinate and inexcusable delay in prosecuting the action, it is not open to the Court to dismiss the action for want of prosecution since there is no sufficient nexus between the plaintiff's inexcusable delay and the prejudice to the defendant.

In *Wallersteiner v Moir* [1974] 1 WLR 991, 1005, Lord Denning MR stated:

Since *Alen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 WB 229 this Court has repeatedly struck out actions where there has been excessive delay. In many of these cases the plaintiff's solicitor has been at fault. He has not observed the timetable laid down by the rules of the court. He has been guilty of inordinate and inexcusable delay. It has prejudiced the fair trial of action. So, on the defendant's application, the action has been struck out. The plaintiff has been left to his own remedy for negligence against this own solicitor.

Bearing in mind these principles, I am satisfied that in the instant case there has been such excessive, flagrant and inordinate delay on part of the plaintiffs, which has so seriously prejudiced the fair trial of the action that it merits dismissal. The suit was instituted on 29th April 1970; more than 7 years ago. Pleadings were closed more than six years ago. Mr Kapila states that he wrote nine letters to the defendants regarding the listing of the case which are on record. I can only find three such letters in the court file. Be that as it may, even if the defendants did not turn up to fix hearing dates, the plaintiffs were entitled to do so and get a hearing notice served on the defendants. In this connection, the observations of Diplock LJ in *Allen v Sir Alfred McAlpine & Sons Ltd* are very relevant. I note that on 19th September 1973, the suit was listed by consent for hearing on 3rd and 4th July 1974. When it came up for confirmation on 21st June 1974, Mr Shah appeared but there was no appearance for the plaintiffs and the suit was taken out of the hearing list.

The plaintiffs took no action from September 1973 until 29th August 1975, when they listed the matter *ex-parte* for hearing on 27th, 28th and 29th October 1976, hearing notice to issue on application. However, no application for the issue of the hearing notice upon the defendants was ever made and the plaintiffs took no further steps at all in the matter until the defendants had filed their present application.

I consider it pertinent in this connection to deal with the previous conduct of the plaintiffs, and also make some observations about their cause of action. The plaintiffs' claim is based on alleged oral agreement of partnership with the defendants to erect a shop on plot 5, Kutus Market, each of the eight partners having allegedly contributed varying sums of money towards that project. However, the plaintiffs further allege that from 1946 to 1956, the defendants alone received rents from the partnership property, and that only

in 1956 did they pay to the plaintiffs on account a sum of Shs 720/30. There is no explanation by the plaintiffs why they took no steps to enforce their rights for ten years after the alleged partnership and come into force. But that is not the end of the story because the plaintiffs claim that in 1968 their plot was "eventually" registered in the names of all the eight partners. However, again there is no explanation of the further twelve years' inactivity on their part. Although the plaint alleges registration to have taken place in 1968, according to Mr Kapila's affidavit it was done by the Kirinyaga County Council by Minute 64 of 1976, which, however, he claimed was a typing error and should read "64 of 1967". A copy of the minute attached to the affidavit does not throw much light on the matter since there is no indication as to the circumstances and in whose presence it came to be recorded.

With the lapse of more than thirty years from the time when the original cause of action arose and a lapse of more than six years after the close of pleadings, in my view it would be unfair and unjust to call upon the defendants to meet the plaintiff's claim now.

I am aware of a court's duty to decide the fundamental issues in dispute between the parties without undue disregard to technicalities. I am also aware that I have a discretion in the matter (*Rawal v Mombasa Hardware Ltd* [1968] EA 392). Normally, I am averse to dismissing a case for want of prosecution, but in my judgment this is a fit and proper case which should not be allowed to continue any further.

Accordingly, I allow the defendants' application and dismiss the suit with costs to the defendants together with costs of this application to be borne by all the plaintiffs jointly and severally.

Order accordingly.

Dated and Delivered at Nairobi this 25th day of May 1977.

S.K.SACHDEVA

JUDGE