REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 340 OF 1971

IVITA.....PLAINTIFF

VERSUS

KYUMBU.....DEFENDANT

ORDER

This is an application by the defendant under order XVI rule 5 of the Civil Procedure Rules for an order that the plaintiff's suit against him be dismissed for want of prosecution. The defendant says there has been inordinate delay. In support of the application Navin C Patel, advocate for the defendant has sworn to an affidavit giving grounds for the application. I shall give a brief history of the case.

The suit was instituted by the plaintiff on March 3, 1971. The relief sought by the plaintiff is for Kshs 3,928.65 being balance of his shares in the business he jointly carried on with the defendant and in accordance with the elder's decision made in 1970. The defendant entered appearance on April 19, 1971 and on May 14, 1971 he filed his defence. It appears nothing further took place until on August 29, 1973, when the plaintiff's advocate wrote to the defendant's advocate suggesting that the advocates' clerks meet at the civil registry on September 11, 1973, and fix mutual hearing dates. The court record shows that the defendant's representative did not turn up at the registry on September 11 and *ex-parte* hearing dates were fixed for July 29 and 30, 1974. At the request of the plaintiff's advocate hearing notice was issued to and served on the defendant's advocate on October 19, 1973. On April 9, 1974, without assigning any reasons therefore, the plaintiff's advocate wrote to the registrar requesting him to take out the case from the hearing list for July 29 and 30, 1974, and he (the plaintiff's advocate) stated that an early hearing date would be fixed by consent. It appears Mr Patel was not aware of the move to take out the case from the hearing list as he, in his affidavit, states that he attended court with the defendant on July 29, 1974 only to find that the case was not on the cause list for that day. From April 9, 1974 to the date of the present application, that is April 2, 1975, matters have been at stand still as the plaintiff has taken no steps to further prosecute his case. It is this inactivity on the part of the plaintiff that has led the defendant to filing this notice of motion.

Order XVI rule 5 provides:

> "if, within three months after the close of pleading or the removal of the suit form the hearing list or 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."

I shall come to this rule after considering rule 2 in which Mr Bhatt for the plaintiff claimed refuge.

Neither Mr Bhatt nor his client filed any replying affidavit. I shall now read rule 2:

> Rule 2: "Where the hearing of a suit has been adjourned generally, the court may, if no application as aforesaid is made within twelve months of the last adjournment, give notice to the parties to show cause why the suit should not be dismissed. If cause be not shown to the satisfaction of the Court, the suit shall be dismissed."

This rule must be read together with rule 1 of the same order (order XVI) which says:

> Rule 1: "In any suit which the hearing of evidence has once began, the hearing of such suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court find the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded."

Thus rules 1 and 2 of order XVI deal with part-heard cases. Under rule 2 if in a case which the court found necessary to adjourn generally after hearing it in part, the parties (jointly or separately) do not apply to the court within twelve months of the last adjournment for hearing to resume, the court may call upon them (the parties) to show cause why the suit should not be dismissed. In practice it would appear the duty to apply for resumed hearing is upon the plaintiff because rule 2 speaks of the suit being dismissed if no cause to the satisfaction of the court is shown and the defendant my not care if a suit against him is dismissed before the hearing is finalised. Since the instant case is not part-heard rule 2 of order XVI does not apply to it as claimed by Mr Bhatt. Rule 2 like rule 6 is invoked by the court on its own motion when the parties to a suit appear to the court to be inactive or have lost interest in the case. No application by either party is necessary under these two rules. In may view order XVI is invoked only in cases which are not provided for and no action is taken by either party for where rule 6 may be invoked are where after appearance is entered no action is taken for 3 years; or summons has been issued for service but not returned served or unserved for 3 years. In these three examples, pleadings are not closed and these cases are not provided for since rule 2 deals with part-heard and rule 5 covers a case where pleadings fare closed, or the case removed from the hearing list or adjourned generally. If the summons is returned unserved the matter would, of course, be taken care of under order V rule 1 which empowers the court to dismiss the suit if the plaintiff has not for a period of one year after its return applied for the issue of a fresh summons.

I now revert to rule 5 under which this application is brought. The suit, it is assumed was removed from the hearing list on the date Mr Bhatt's letter of April 9, 1974 was filed which was on the same day. Mr Bhatt argues that rule 5 does not apply to this application because it is more than three months form the close of the pleadings, and, at any rate the applicant not having exercised the right to apply within the three months limitation, he (defendant/applicant) has waived that right. On a closer look at rule 5, I am of the opinion that the rule can be divided into two parts as follows.

Part one: The plaintiff should within three months from the date the pleadings are closed, or the suit is either removed from the hearing list or adjourned generally set it down for hearing

Part two: the plaintiff having failed to set down the suit the defendant may either set it down or apply to the court for the suit to be dismissed.

My reading of the rule is that the plaintiff has three months within which to set down the suit for hearing, although there is nothing to stop him from doing so even after the three months if the defendant has taken no step in the matter. At the end of the three months allowed to the plaintiff the defendant is at liberty to come to the court and either set down the suit or ask that it be dismissed. I shall deal with this point in detail later in this ruling.

Two decisions of this court by Kneller J have been referred to by Mr Patel. These are HCCC no 77 of 1971 – *ET Monks and Co Ltd v Y Evans and three others* and HCCC no 583 of 1971- *City Council of*

Nairobi v Habakuk Njiri Wandola - both unreported. It is in the first case that Kneller J fully considered the law on this subject. In the first case on or about January 18, 1971 the plaintiff filed a suit against the defendants in respect of an accident that occurred on April 23, 1969. He claimed damages of Kshs 6, 550 for the negligence of the defendants by reason of which he had been put to loss and expense and had suffered damages. The 1st and 3rd defendants entered appearance and filed their defences before the end of the September 1971. Case was fixed for hearing on October 31, and November 1, 1972, but at the call over on September 25, 1972, it was taken out of the list as it could not be reached. On November 13, 1972 the suit was fixed for hearing on November 13, and 14, 1973. On October 19, 1973 it was taken out of the list again. Although summons for directions appear to have been brought to court in March 1974 by the plaintiff this was not filed until June 17, when the application for dismissal of the suit was also filed. Kneller J after considering the law and the circumstances surrounding the suit allowed the application and dismissed it for want of prosecution.

The court in that case after stating that the English Rules of Supreme Court, order 25 rule 1 (4) is nearly the same as our order XVI rule 5 proceeded to consider the English cases of *Reggentin v Beecholme* [1967], 111 Sol Jo 216 [1968], 11 All ER 566 note; *Fitzpatrick v Batger & Co Ltd* [1967], 2 All ER 657 and *Allen v Sir Alfred McAlpine* etc [1968] 1 ALL E R 543.

I have already mentioned Mr Bhatt's contention that this suit ought not to be dismissed because the defendant did not take out the summons to dismiss for want of prosecution within the three months specified in rule 5 of order 16, and that the defendants have therefore waived or acquiesced in the delay. This is how courts have dealt with this point.

In *Allen v Sir Alfred McAlpine & Sons* it was argued on appeal that the defendants had waived or acquiesced in the delay on which they found their application. Diplock LJ at page 563 said:

> "Clearly no defendant can successfully apply for an action to be dismissed for want of prosecution if he has waived or acquiesced in the delay. Mere inaction on the part of the defendant cannot in my view amount to waiver or acquiescence."

In the case of *Fitzpatrick v Batger & Co Ltd* it was argued that the action ought not be dismissed, because the defendants might have taken out a summons to dismiss for want of prosecution much earlier than they in fact did. Salmon LJ page 659:

> "They no doubt, however, were relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to suppose that a dog which had remained unconscious for such long periods as this one, if left alone, might well die a natural death at no expense to themselves; whereas, if they were to take out a summons to dismiss the action, they would merely be waking the dog up for the purpose of killing it at great expense which they would have no chance of recovering ……..I do not think that the plaintiff's advisers should be allowed to derive any advantage from that fact."

In the case of *ET Monks & Co Ltd*, Kneller J briefly but correctly put it in the following words:

> "No advantage may be derived from the defendant's action, unless he has waived or acquiesced in it."

In my opinion the three months limitations in rule 5 of order XVI does not apply to a defendant's application to dismiss the suit. The defendant may take out a notice of motion to dismiss for want of prosecution at any time after the three months limitation. Failure to take out such notice early does not prejudice the success of the defendant's application. He might have been inactive or deliberately waiting for the case to die a natural death, but if so, the fact that the defendant has been inactive cannot be construed as a waiver or acquiescence unless the plaintiff shows by evidence that the defendant has by action or in some other manner waived or acquiesced in the delay. In the instant case no evidence of waiver or acquiescence has been produced to this court. In the circumstances I find Mr Bhatt's contention of waiver unacceptable. I would, however, express an opinion that a defendant who genuinely believes himself to be prejudiced by the plaintiff's delay to prosecute the suit will apply for dismissal earlier and

may not adopt the "sleeping dog tactic".

This court has dealt with applications of this nature in the cases of *Saldanah & Ors v Bhailal & Co Ors* [1968] EA 28; *Sheikh v Guta & Ors* [1969] EA 140 and the two unreported ones – *ET Monks and Co Ltd v Y Evans & Three others* and *City Council of Nairobi v HN Wandolo – ibid*. In all these cases and in the East African Court of Appeal case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696, this court and the Court of Appeal relied and followed the English case of *Fitzpatrick v Batger* and *Allen v McAlpine ibid*. Post independence English cases have proved to be of great assistance and persuasive authority to this court.

In the *Fitzpatrick* case Lord Denning MR said at page 658:

> "…….it is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. Just consider the times here. The accident was on December 13, 1961…….. It is impossible to have a fair trial after so long a time. The delay is far beyond anything, which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution."

Salmon LJ entirely agreed with the Master of Rolls and added at page 659:

> 'It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition."

In the *Mukisa Biscuit Co* case Sir Charles Newbold P said at p 701:

> "The second matter relates to the undoubted delay in the hearing by the High court of this case. It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty by saying that the defendant consented to the position."

In that case the court was of the view that both parties had contributed to the delay in reaching a hearing. The suit was not dismissed but Sir Charles Newbold P at the same p 701 added:

> "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."

There is one other local authority which was considered in case of *ET Monk* cited by Mr Patel, which I should also consider. That is the case of *Abdul & Anor v Home & Overseas Insce Co Ltd* [1971] EA 564. This appears to be the latest East African authority. In that case the plaintiff filed an action against the defendant in January 1962. The cause of action arose in 1960. The case was fixed for hearing, but taken out of the list in August 1962. The 2nd plaintiff died in 1965. Although his administratrix obtained letters of administration in November 1968 she did not apply to be substituted for the deceased until July 1970. No steps were taken to set the action down for hearing for a further two months and the defendant applied for the suit to be dismissed for want of prosecution alleging that a fair trial could not be had after so long a time as one witness was dead and three had left the country and their whereabouts were unknown. Simpson J dismissed the action and the plaintiffs appealed. Simpson J had dismissed the action because he was, to quote his own words:

> "entirely satisfied that there will be prejudice to the defendant if the case proceeds and that it will be impossible to have a fair trial."

The Court of Appeal for East Africa dismissing the appeal agreed with the judgment of Simpson J and Law JA (as he then was) said at p 568:

> "I agree with Mr Humphrey Slade, for the respondent, that the judge was justified in his decision that a fair trial of the suit could not be had to-day."

I should also mention that the Uganda High Court followed the English and East African authorities I have cited. That was in the case of *Nilani v Patel & Ors* [1969] EA 340 where the delay was for some nine years. Dickson J held that the delay was inordinate and inexcusable and he dismissed the suit.

The authorities I have considered here show that the law and principle upon which courts go are clear. The test was enunciated by Lord Denning MR in *Allen v Sir Alfred McAlpine & Sons Ltd* at p 547 and it was repeated by Edmund Davies LJ in *Paxton v Allsopp* [1971] 3 ALL ER 370 at p 378, who put it as follows:

> "If I may be acquitted of immodesty by quoting some words of mine used in *Austin Securities Ltd v Northgate & English Stores Ltd* [1969] 2 All ER 753 where having set out the familiar tests to be applied in such cases, I said: 'But these questions are, as it were, posed enroute to the final question which overrides everything else and was enunciated by Lord Denning MR, in *Allen v Sir Alfred McAlpine & Sons Ltd*, in these words: "The principle on which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away …….". So the overriding consideration always is whether or not justice can be done despite the delay. Thus, Lord Denning MR referred later in his judgment in that case, to "delay…….so great as to amount to a denial of justice'……"

So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in *Allen v McAlpine*, at p 561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying, which will never wear out however often said that, justice delayed is justice denied.

Order XVI rule 5 is intended to put the plaintiff and his advocate on guard so that they do not put their case on one side as long as they please without fear of consequences. One may say courts are harsh by striking out the plaintiff's suit, but as Lord Denning MR put it in *Allen v Sir Alfred McAlpine & Sons Ltd* at pp 546 & 547 and I quote the MR:

> "The delay of justice is a denial of justice ……To no one will we deny or delay right or justice'. All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3, Sc 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, C1). To put right this wrong, we will in this Court do all in our power to enforce expedition: and, if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it. It is the only effective sanction that they contain."

The court in *Paxton v Allsopp* disapproved the dictum of Diplock LJ in *Allen v McAlpine* that in exercising a discretion, even a judicial one, the court can temper logic with humanity and the prospect that an innocent plaintiff will be left without any effective remedy for the loss of his cause of action against the defendant is a factor to be taken into consideration in weighing, on the one hand, the hardship to the plaintiff if the action is dismissed. The Court of Appeal in the *Paxton v Allsopp* case was of the

firm view that such consideration is irrelevant in determining whether the action should be struck out for want of prosecution. Salmon LJ, in my opinion, put it in the correct words when he said:

> "If he (ie the plaintiff) is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his own fault." (*Allen v McAlpine* – at p 561).

In *Paxton v Allsopp* the plaintiff, who was injured in a motor accident was a minor at the time the cause of action arose. The first delay was due to her father; but when she became of age and after her father's death she did nothing about the claim for 3 years. Then there was further delay by her solicitors. The whole delay amounted to ten years. Liability of the defendant was admitted. All the same the court held that the action must bee dismissed for want of prosecution, despite the hardship which that would occasion the plaintiff and despite the fact that the driver's (ie defendant's) negligence had been admitted.

It has been necessary to go into all these authorities – English ones are highly persuasive, and our local ones which have established the law in this part of the world, so as to once more make clear the courts' views about prolonged and inexcusable delays in prosecuting suits, which appear to be on the increase. Such delays must not, and will not be tolerated by this court.

The instant case is now 4 1/2 years less two months. It has been left to go to sleep for 14 months and in my opinion where an action has been dormant for twelve months or more the defendants are entitled to apply to the court for its dismissal, and, unless the plaintiff shows sufficient reason for reviving it the suit may be dismissed. Each case must be decided on its own facts and the matter is one of the discretion of the court, but this court will frown at any inexcusable delay, and it will do everything possible to enforce expedition of trials. This is a simple suit for a small sum of Kshs 3,928.65 being the plaintiff's share in a partnership business at one time carried on by the plaintiff and the defendant. The elders adjudicated upon the claim in 1970 when it was agreed the sum should be paid to the plaintiff. The defendant refused to pay the sum. In ordinary cases such a claim would be heard by a Senior Resident Magistrate's Court whose civil jurisdiction extends to Kshs 6,000, but this being a partnership suit it is by law supposed to be heard by the High Court (Partnership Act – cap 29, section 2). This is the only reason this case finds itself before me. It is therefore five or more years since the tribal elders adjudicated the claim. We do not know whether there is any record of the elders' decision, but bearing in mind the high rate of illiteracy in the rural areas of this country there may be no record in existence. The elders who adjudicated upon the claim may therefore be required to give oral evidence at the hearing. The five years that have lapsed might have passed with one or more of the elders. The memory has faded or is hazy now and without any notes or minutes to refresh their mind the elders' and the parties' evidence may prove of not much assistance to the presiding judges in reaching a fair decision in the matter. It is not known whether with the current inflation the defendant can afford to raise the sum claimed if a decision is given in favour of the plaintiff, or whether the plaintiff would manage to pay the costs should he lose the suit to the defendant. Travelling expenses for the parties and their witnesses are now much more than they would be a year ago and in this country it is not unknown for a plaintiff or defendant or their witnesses to fail turning up in court because they could not raise the money for transport. If the suit is allowed to continue it will not be possible for it to be heard before next year (1976), at the earliest that will bring it to the age of over five years since the date it was filed.

The plaint was filed on March 3, 1971, summons served on April 7, 1971; appearance entered on April 19, 1971 and on May 14, 1971 the defence was filed. Since May 1971 to September 11, 1973, that is a period of 2 years and 4 months nothing happened, for it was on September 11, 1973 that the hearing dates of July 29 and 30, 1974 were fixed. So at the close of the pleadings the suit was dormant for 2 1/3 years. Then after it had been taken out of the hearing list on April 9, 1974, it went to sleep again for some twelve months when the defendant decided to take out a summons for its dismissal for want of prosecution. Neither Mr Bhatt nor his client (the plaintiff) swore any affidavit in reply to the defendant's giving reasons or excuse for the delay. During the hearing of the application Mr Bhatt, however, said that a hearing date could not have been fixed in 1971 because the suit was filed by the plaintiff himself. I do not accept that as an excuse because in this country where there are so few advocates most litigants conduct their own litigation unrepresented by a lawyer. All Mr Bhatt's argument amounts to is to place blame for the first delay of 2 1/3 years on the plaintiff himself.

He also said that there were other cases relating to the plaintiff and the defendant in certain matters at Kitui and Machakos. Whatever the relevance of that may be, the statement is so vague and unspecific that it cannot be an excuse for anything let alone failure to get on with a suit. Mr Bhatt also argued that he and the defendant's advocate were out of the country, but he did not say when and for how long that was. All the same Mr Patel answered the last excuse by saying that his office remained open for business during the time he was out of the country, and in fact he had an advocate working full time, but there was no communication to Mr Patel's office. By August 1973 the court record shows that Mr Bhatt was acting for the plaintiff although he filed notice of appointment on April 28, 1975, after the present summons had been taken out.

It is apparent from what I have stated that the plaintiff has shown no sufficient excuse for the alleged delay. I am satisfied that the defendant has established that there was delay in prosecuting this suit, and in the circumstances of this case, and the absence of any credible excuse made by the plaintiff, I have not the slightest hesitation in finding that the delay in this case was inordinate and inexcusable and that for the reasons I have already given the defendant will be prejudiced if the suit is allowed to continue, and justice cannot be done now.

Accordingly in exercise of my discretion I allow the application and dismiss the suit for want of prosecution. I award the defendant the costs of the suit and of this application.

Dated and Delivered at Nairobi this 20th day of September 1975.

Z.R.CHESONI

JUDGE