REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 77 OF 1971

ET MONKS & CO. LTD .....APPLICANT

VERSUS

EVANS.....1ST DEFENDANT

KARIUKI GITHINJI.....2ND DEFENDANT

H.G JACKSON.....3RD DEFENDANT

KIPKETER ARAP MISOI.....4TH DEFENDANT

ORDER

I have before me a motion on notice dated May 10 this year and filed the same day, drawn by the advocates for the first defendant in this action. It is supported by the third defendant.

It is for orders that the plaint in this suit date January 13, 1971, and filed 5 days later, be struck out and the suit be dismissed with costs for want of prosecution. The first defendant also asks that the costs of this application be costs in the cause.

It is supported by an affidavit dated May 10 this year of Mr. Juma an advocate employed by advocates for the first defendant. There are two replying affidavits from a clerk, Mr. Mandalia, employed by Mr. Gautama, who has been instructed by the advocates for the plaintiff. The first is dated July 17, 1974 and the second dated July 17 and filed the next day. These two together with that of Mr. Juma and the minutes in this file supply some of the history of this action.

Here it is. The plaintiff owned a motor vehicle KKK 653. Someone was driving it at 9.15 pm on April 23, 1969 along the Langata Road from Nairobi towards Karen. It was damaged and the repairs cost Kshs 6,550. The plaintiff says it happened in a mix-up with two horses and a shetland pony which were in the care and control of two syces, namely, Mr. Kariuki Githinji and Mr. Kipketer arap Misoi, the second and fourth defendants, who at the material time were employed by Mr. Evans, the first defendant, and Mr. Jackson, the third defendant. The vehicle was damaged because the syces were negligent in controlling the horses and the pony, or so the plaintiff claims.

The first point to note is that no claim was filed between April 23, 1969 and January 13, 1971. This is a delay of 18 months. Summonses to enter appearance dated January 20, 1971 went out for each defendant but they were all returned on February 3, 1971 because the process server said the address was insufficient.

There was then a pause until June 4, which is four months when the advocates for the plaintiff asked for

new summonses which would be served by the East African Investigation Bureau. Two were served very quickly. The first defendant, Mr. Evans through his first advocates, entered appearance on July 27, 1971. He followed it up with a defence dated and filed August 10, 1971. Mr. Jackson, the third defendant, had an appearance entered for him by his advocates on August 26, 1971 and a defence dated September 8, and filed on September 10, 1971.

The defences deny in general and in detail any negligence by any syce and, in the alternative, allege contributory negligence on the part of the plaintiff.

Messrs GS Sandhu & Co, advocates for the plaintiff, must have decided to proceed only against the first and third defendants because on February 1, 1972, they wrote to the advocates for those two, asking them to report at the registry of this court on February 7 to fix a hearing date. This is 5 months after the pleadings were closed. Someone from Messrs Johar & Co, for Mr. Evans, attended but Messrs Kaplan & Stratton, for Mr. Jackson, did not. A hearing date for October 31 and November 1, was fixed. It was tenth on the list and was taken out of the list on September 25, 1972 by Trevelyan J, at the call over, because there were insufficient judges for it to be reached.

On November 13, 1972 Messrs GS Sandhu & Co, repeated their February manoeuvre and it followed the same progress save that the hearing dates were fixed for November 13 and 14, 1973. It was eight on the list.

On January 26, 1973, Mr. Evans changed his advocates who by mistake filed a notice of appointment for the plaintiff and this had to be corrected on February 13, 1973 with an amended notice of appointment.

The two syces have not been served with summonses and a copy of a plaint. Both defendants say they will need the two gentlemen to give evidence on their behalf. They have, however, both been dismissed by their respective employers, the defendants, soon after this accident and the defendants have not kept in touch with them.

There was a monthly call-over before Hancox J, on October 19, 1973 and the entry has not been completed by the deputy registrar but it is agreed by the advocates in this application that it was taken out of the list again because there were not enough judges to reach the eight confirmed suit on the list.

Mr. Mandalia - he is Mr. Gautama’s clerk - brought to the registry a summons for directions is quadruplicate which he wished to file for Messrs GS Sandhu & Co, for the plaintiff. One is dated March 18, two March 8 and one is blank. He says this court file was missing in the registry and he left two behind. He paid at least five fruitless visits to check on their course.

June 15 brought the notice of motion of the first defendant, Mr. Evans, to this clerk, and he went to the registry where he indicated they now had this file whereupon his summonses for directions were fished out of a heap of documents, waiting to be filed in appropriate files which were missing, and were eventually filed on June 17.

This notice of motion and affidavit dated May 10, were filed apparently with no difficulty on that day. Meanwhile, the summonses for direction were returned unserved on June 28, 1974 because they had no hearing date on them. Later, Messrs Archer & Wilcock and Messrs Kaplan and Stratton, were served with them for the first and third defendants on July 9, 1974 for hearing on July 16 and Chanan Singh J, on that day adjourned them for consideration with or after this motion.

It is agreed that the trial, if it ever comes on should be for three days in Nairobi and the costs of the summons should be costs in the cause. It is the application on the motion that is now disputed. The law on all this is as follows.

The defendant(s) to an action may apply to set down a suit for hearing or apply for its dismissal if the plaintiff(s) do not set it down for hearing within three months after the close of the pleadings or the removal of the suit from the hearing list or the adjournment of the suit generally. This is order 16 rule 5.

The English RSC, order 25, rule 1(4) is nearly the same but the defendant there may move if the plaintiff does not take out a summons for directions. This really provides that the defendant(s) cannot apply for the dismissal of the suit until three months have passed from the close of the pleadings or (each time) it is removed from the hearing list or adjourned generally. The alternative is for the defendant(s) to have it set down for hearing (or do nothing). It does not imply, as I understand it, that if the plaintiff does nothing about having it set down for hearing within 3 months or any time it will be dismissed for want of prosecution as the defendants' advocates submitted. It depends on many other factors.

It is the duty of the plaintiff's adviser to get on with the case. *Reggentin v Beecholme* (1967), III Sol Jo 216: [1968] 1 All ER 566 Note. No advantage may be derived from the defendants inaction *Fitzpatrick v Batger & Co Ltd*, [1967] 2 All ER 657, 659D (CA) per Salmon LJ: unless he has waived or acquiesced in it: *Allen v Sir Alfred McAlpine etc*, [1968] 1 All ER 543 (CA) Salmon LJ, p 563.

Public policy demands that the business of the courts should be conducted with expedition. *Fitzpatrick v Batger & Co Ltd*, [1967] 2 All ER 657, 658 E (CA) Lord Denning MR.This is in the interests of the plaintiff too: per Salmon LJ at p 69.

The court when pondering an application to dismiss for want of prosecution should, among other things, ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable? per Lord Denning in *Fitzpatrick v Batger* etc (*ibid*).

Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each case turns on its own facts and circumstances: per Salmon LJ *Fitzpatrick v Batger* etc.

Suppose the action is dismissed for want of prosecution, what can the plaintiff do if it is not its fault? It may sue its advocates for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates. Should the trial proceed despite a prolonged delay the plaintiffs may not succeed because it cannot after such a long time establish liability and then it has no remedy against anyone else: see generally Diplock LJ, in *Allen v Sir Alfred McAlpine & sons*, [1968] 1 All E R 543, 553, 554. If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself.

The courts in this part of Africa have dealt with such applications in the following way.

Dalton J in *Saldanah and Others v Bhailal and Company and others*, [1968] EA 28, relied on and followed the 1967 English case of *Fitzpatrick v Batger and Company Limited*. So did Trevelyan J, in *Sheikh v Gupta and Others* [1969] EA 140.

The claim was 7 ¾ years old in the last case and the plaintiff, so far as the court was concerned, had done nothing for over 3 years in the matter. The defendant sat back and awaited any remedies and rights coming to him by operation of law. The learned judge considered the matter of limitation and whether or not the plaintiff might probably succeed in the action for negligence against its lawyers. He preferred to be slow in deciding to dismiss for want of prosecution, but looking at the matter as a whole he ordered the suit to be dismissed and awarded the defendants the costs of the suit and of the application.

The former Court of Appeal for East Africa in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696 (CA-K) dealt with a case in which there was a delay of 6 years between the close of pleadings and the hearing date including one period of two years after it had been removed by consent form the hearing list.

Cases cited to the court included the English ones of *Fitzpatrick v Batger and Company Limited*: *Allen v Sir Alfred McAlpine & Sons*: *Clough v Clough*, [1968] 1 All ER 1179: *Marlton v Lee-Levitan*, [1968] 2 All E R 874 and *Gloria v Sokoloff*, [1969] I All ER 204.

Law JA, delivered the leading considered judgment of the Court of Appeal and having dealt with several matters including the fact that Farrell J, had not appreciated that he had inherent power to dismiss the suit for want of prosecution, said this at p 700 paragraph H:

> "Without wishing in any way to condone the inordinate delay which has undoubtedly occurred in this case, it seems to me that both sides contributed to the delay in reaching a hearing, and that if the appellant genuinely believed itself to be prejudiced by the delay, it would have applied for dismissal at a much earlier stage."

Sir Charles Newbold P, and Duffus VP, agreed with that. The learned President also had this to say (p 701 paragraph C):

> "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 this case there was, undoubtedly, excessive delay. It may well be that had all facts been properly placed before the trial judge he, or on appeal to his court, might have performed the draconian act of dismissing the suit for want of prosecution."

and, he added (Paragraph E):

> "I wish, however, to make it clear that in future a plaintiff who, for whatever reason, delays for over 6 years before bringing his suit for trial, can expect little sympathy."

The same court dealt with much the same matters in *Abdul and Another v Home and Overseas Insurance Company Limited*, [1971] EA 564, (CAK). The suit was filed in the middle of January, 1962. The two plaintiffs claimed damages from the defendant because their building had been damaged in the middle of December, 1960 as a result of an earthquake in Nairobi. A hearing date was fixed on August 9, 1962 but taken out by consent on August 11. It had not been heard in the middle of November 1971, which was 9 years later. It was dismissed for want of prosecution in the middle of January 1971 because Simpson J was

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

He noted among other things, there was a delay of over 2 years and 9 months between the date when the case was taken out of the list by consent and put back in it for hearing. This was condoned by the defendant.

There was another delay of over 18 months between the grant of letters of administration to the widow of the second plaintiff and her application to be substituted.

10 years had elapsed since the alleged damage which was the subject of the suit. There had been inordinate delay in prosecuting it. It was impossible to have a fair trial of the suit and after such a lengthy stage a trial would be prejudicial to the defendant company.

The principal witness for the company was dead and 3 others had left Kenya and their whereabouts were unknown. Simpson J said

> " ... even if they can be traced, which is doubtful, they can only be brought to Kenya at considerable inconvenience and expense..."

Law JA, delivered the first judgment again and said Simpson J was justified in finding that a fair trial of the suit could not be had today and his findings on the question of prejudice were reasonable, Lutta JA, and Mustafa JA, agreed and so the appeal was dismissed with costs.

So much for the law. I am reluctant to take the draconian step of dismissing this suit for want of prosecution. I have remembered the period of limitation and recall that each case must be dealt with on its own facts. I am looking at the matter as a whole. The alleged damage is said to have occurred about 5 1/2 years ago. All the parties and the witnesses are still in Kenya. Two of the defendants are to be witnesses of the other two but their whereabouts at the moment are unknown. One is a M'Kikuyu and the other a M'Kipsigis or a M'Nandi. They are both syces and they may be difficult to trace because although anyone with any skill or calling is normally employed these days the number of employers of syces is not great in this country at this time. Also, it will be difficult to trace the men if they are still syces because in all probability there is not likely to be such a thing as a register of syces with any local horse society or the Ministry of Labour here. If they are not syces they may be employed in any work anywhere in the country. The first available hearing date according to the registry is probably at the beginning of May 1975. This would make the matter about 6 years old.

The defendant has not set down the action for hearing or applied for it to be dismissed for want of prosecution before but on the authorities this does not avail the plaintiff. The latter will probably succeed in an action for negligence against its lawyers unless it has waived or acquiesced in the delay and then it has only itself to blame.

The second and fourth defendants have not been served yet and as far as they are concerned the pleadings have not been closed. The advocates for the plaintiff have managed to procure hearing dates within a reasonable time but twice the dates have not been confirmed: they would probably have been confirmed if the plaintiff had explained this was an old case.

Taking one thing with another, however, I find that the delay has been inordinate and inexcusable. A fair trial cannot now be had. A trial would be prejudicial to the defendants because the only people who could speak about the matters set out in the plaint would be those in the car and those with the horses and the pony and the latter, the syces, may be untraceable after all these years. There is no duty laid on the defendants to keep in touch with their witnesses over such a period.

Accordingly, the application succeeds. The suit is dismissed for want of prosecution. The two defendants asked for the costs to be costs in the cause but they must have meant they wanted the costs of the suit and of the application which are now awarded to them and if they are not agreed they must be taxed.

If this goes elsewhere and I am found to be wrong in all this then this action by consent will be heard in Nairobi for three days and the costs of the summons for directions will be costs in the cause.

Orders accordingly.

Dated and delivered at Nairobi this 15th day of August , 1974.

A.A KNELLER

JUDGE