



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, GATEMBU & J. MOHAMMED, JJA)**

**CIVIL APPEAL NO. 273 OF 2012**

**BETWEEN**

**SANJITA SHAH.....APPELLANT**

**AND**

**CREDIT AGRICOLE INDOSUEZ LIMITED**

**Formerly trading as Banque Indosuez.....1<sup>ST</sup> RESPONDENT**

**GANSHYAM CHHOTABHAI PATEL.....2<sup>ND</sup> RESPONDENT**

**WILFRED J. C. KASHOMI.....3<sup>RD</sup> RESPONDENT**

**PALLINDER HOLDINGS LIMITED.....4<sup>TH</sup> RESPONDENT**

***(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi***

***(Kimondo, J) on 2<sup>nd</sup> December, 2011)***

***in***

**H.C.C.C. NO. 803 of 2002)**

**\*\*\*\*\***

**AND**

**CIVIL APPEAL NO. 65 OF 2013**

**BETWEEN**

**NILAM DOSHI.....APPELLANT**

**AND**

**CREDIT AGRICOLE INDOSUEZ LIMITED**

**Formerly trading as Banque Indosuez.....1<sup>ST</sup> RESPONDENT**

**GANSHYAM CHHOTABHAI PATEL.....2<sup>ND</sup> RESPONDENT**

**WILFRED J. C. KASHOMI.....3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Ruling and Order of the High Court of*

*(Kimondo, J) on 2<sup>nd</sup> December, 2011)*

*in*

H.C.C.C. NO. 802 of 2002)

**JUDGMENT OF THE COURT**

1. These two appeals arise from the same ruling, namely the ruling and order of the High Court (G. K. Kimondo, J) given on 2<sup>nd</sup> December 2011 dismissing three consolidated suits, for want of prosecution namely High Court civil case 802 of 2002; High Court civil case 803 of 2002; and High Court civil case 804 of 2002. Consequently, this judgment relates to the two appeals, Civil Appeal No. 273 of 2012 and Civil Appeal No. 65 of 2013.

2. The ruling and order appealed from was made under the provisions of Order 17 Rule 2(1) and (2) of the Civil Procedure Rules which provides as follows:

***“(1) in any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.***

***(2) if cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.” [Emphasis]***

3. As is discernible from those provisions, the court has a discretion in the matter. The appellants contend that the impugned order constitutes a wrong exercise of discretion by the lower court and that this Court should therefore interfere with that decision and restore the suits for hearing and determination on merits. In a nutshell, the appellants complain that the Judge failed to take into consideration the totality of the circumstances in the case before dismissing the suits.

4. The circumstances in which this Court may interfere with the exercise of discretion by the lower court are restricted. A party asking the court to do so, needs to demonstrate that the lower court misdirected itself or considered matters it should not have considered or failed to take into account matters which it should have taken into account and in so doing arrived at a wrong decision. See, **Mbogo & another v Shah (1968) EA 93.**

5. In the context of the exercise of the discretionary powers of dismissal of a suit for want of prosecution under the provisions of Order 17 Rule 2(1) and (2) of the Civil Procedure Rules the court should have regard to established legal principles. Chesoni, J, as he then was, enumerated those principles in the case of **Ivita v Kyumbu [1984] KLR 441.** Those principles were adopted by this Court in **Moses Muriira Maingi & 2 others v Maingi Kamuru & another [2013] eKLR.** In the former case, Chesoni, J, had this to say regarding the test to apply in considering whether or not to dismiss an action for want of prosecution:

***“... 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.”***

6. Given those parameters, what are the circumstances under which the lower court ordered the dismissal of the consolidated suits and is this a proper case for this Court to interfere with the decision of the lower court? But first, the background in brief.

7. On 2<sup>nd</sup> July 2002, Sanjita Shah, the appellant in Civil Appeal No. 273 of 2012 filed suit against Credit Agricole Indosuez Limited (formerly Banque Indosuez), the 1<sup>st</sup> respondent herein, before the High Court at Milimani, Nairobi, being HCCC No. 803 of 2002 seeking an account of several deposits she allegedly placed with the 1<sup>st</sup> respondent between September 1995 and June 1996. She sought judgment for Kshs. 165,274,849.30, general damages, interest and costs.

8. In its defence, the 1<sup>st</sup> respondent denied the appellant’s claim and averred that the loss suffered by the appellant, if any, had been as a result of fraud perpetrated by the 1<sup>st</sup> respondent’s employees, namely, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, and further that there was collusion between the appellant and its said employees.

9. The initial pleadings were subsequently amended on several occasions. Numerous interlocutory applications for: provision of security for costs; amendment of pleadings; change of advocates; joinder of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents; third party proceedings; dismissal of the suit;

enlargement of time *et al*, characterized the proceedings. Pallinder Holdings Limited, the 4<sup>th</sup> respondent, was joined in the action as a third party on the application of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

10. Similarly, on 2<sup>nd</sup> July 2002, Nilam Doshi, the appellant in Civil Appeal No. 65 of 2013 filed suit against Credit Agricole Indosuez Limited (formerly Banque Indosuez), the 1<sup>st</sup> respondent herein, before the High Court at Milimani, Nairobi, being HCCC No. 802 of 2002 seeking an account of two deposits she allegedly placed with the 1<sup>st</sup> respondent between April 1996 and June 1996. She sought judgment for Kshs. 21,093,780.80, general damages, interest and costs.

11. That suit followed a similar trajectory as HCCC No. 803 of 2002. It was equally characterized by interlocutory applications; the joinder of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as well as the third party; summary judgment application, *et al*.

12. The record of proceedings of 13<sup>th</sup> March 2006 show that there was concurrence by counsel for the parties that those two suits, as well as a third suit, HCCC No. 804 of 2002, were closely related and should be consolidated. The record also shows that the matters were fixed for hearing on occasions, but were adjourned due to such reasons as shortage of judges; it could not be reached; discovery not done, etc. On 21<sup>st</sup> October 2009, an order was recorded by consent that:

***“By consent parties to file the agreed bundle of documents on or before 20<sup>th</sup> November 2009. If documents are not agreed, the same should be placed in a separate bundle. The parties to file statement of agreed issues on or before the 20<sup>th</sup> November 2009.”***

13. In September 2011, the court, on its own motion, issued a notice to the parties to show cause on Friday 23<sup>rd</sup> September 2011 why the suit should not be dismissed under the provisions of Order 17 Rule 2(1) of the Civil Procedure Rules.

14. Counsel for the appellant in Civil Appeal No. 273 of 2012 filed an affidavit in response to the notice to show cause, in which he sought to explain why the suit should not be dismissed. He deposed that after an order for consolidation of the suits was made on 29<sup>th</sup> November, 2009, the parties were also ordered to file a consolidated bundle of documents and thereafter proceed to set down the matter for hearing. He deposed that in the meantime, the advocates then on record for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had filed an application to cease acting, which application was granted on 26<sup>th</sup> February, 2010. He deposed further that although the appellant forwarded her bundle of documents to the 1<sup>st</sup> respondent for consolidation with their bundle, the 1<sup>st</sup> respondent had failed to do so and that the appellant had accordingly been unable to set the matter down for hearing.

15. On its part, the 1<sup>st</sup> respondent supported the dismissal of the suit for want of prosecution. Counsel for the 1<sup>st</sup> respondent swore an affidavit on 22<sup>nd</sup> September, 2011 in which he deposed that there was inordinate delay in the prosecution of the suit; that as a result of that delay a fair trial would be compromised on account of loss of documents and unavailability of witnesses; that change of advocates by the appellants on four occasions also contributed to the delay; that an application for dismissal of the suit for want of prosecution had earlier on been made by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and the appellant had therefore been put on notice; and that the 1<sup>st</sup> respondent had sold its interests to the Bank of Africa and was no longer in operation in Kenya. In effect, the 1<sup>st</sup> respondent attributed the delay in prosecution of the suit on the appellant.

16. The 4<sup>th</sup> respondent also supported the dismissal of the suit for want of prosecution apportioning the blame for the inordinate delay entirely on the appellant. It was stated that the appellant had, on several occasions, failed to give discovery thereby leading to several adjournments on the dates the suit had been fixed for hearing; and that the appellants had not, by their conduct, demonstrated that they were serious about prosecuting the suit.

17. Kimondo J heard the parties and found that the delay in prosecuting the suits was too lengthy and inexcusable. The Judge was not satisfied with the explanation tendered by the appellant as to why the suits had yet to be heard. Strengthened by the words of Lord Denning in *Fitz Patrick v Batger & Co. Ltd [1967] 2 ALL ER 657* to the effect that “*it is the duty of a plaintiff’s advisers to get on with the case*” and that “*public policy demands that the business of the courts should be conducted with expedition*” the Judge concluded that the appellants had not shown sufficient cause why the suits should not be dismissed. The Judge stated:

***“I am of the considered opinion that the plaintiff has failed to show cause to the satisfaction of the court that it should remain on the seat of justice. The plaintiff has not placed sufficient matter(sic) before the court to enable the court exercise discretion in its favour not to dismiss the suit. On the contrary, the dictates of justice and the overriding objective to do justice requires that the defendants, who have over the years defended the proceedings the plaintiff has not prosecuted for all those years, be freed from the hold of the plaintiff’s inertia.”***

18. With that, the three consolidated suits were dismissed with no orders as to costs giving rise to the present two appeals.

19. At the hearing of the appeal, learned counsel Mr. A. Wandabwa appeared for the appellants while Mr. Omino, holding brief for Mr. Karungo, appeared for the 1<sup>st</sup> respondent. There was no appearance for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents despite having been served with hearing notices. Counsel present relied on their respective written submissions which they orally highlighted.

20. For the appellant, it was submitted that the Judge failed to consider that the appellant had set down the suit for hearing on numerous previous occasions (13<sup>th</sup> March, 20<sup>th</sup> & 21<sup>st</sup> November 2006, 18<sup>th</sup>, 19<sup>th</sup> December, 2009 and 11<sup>th</sup> December, 2008); that on each occasion the hearing had been adjourned for one reason or another; that even as the notices to show cause were pending the appellant had already fixed the suit down for hearing and was ready to prosecute the suit; and that no evidence was tendered to show that the appellant caused the delay.

21. It was submitted that the issue raised by the 1<sup>st</sup> respondent that it would suffer prejudice on account of unavailability of witnesses and loss of documents was raised for the first time in its affidavit in support of the dismissal of the suits; that contrary to that claim, there was on record an affidavit filed on behalf of the 1<sup>st</sup> respondent, sworn by its officer Razia Sheikh, that clearly demonstrated that the transactions from which the causes of action arose are traceable and available; and that the claim that the 1<sup>st</sup> respondent would suffer prejudice was lame as record keeping is a feature of any banking institution.

22. According to counsel, the justification for dismissal of the suit on the ground that the appellant's bundle of documents had not been filed was erroneous as the appellant's bundle had indeed been filed prior to the order consolidating the suits. It was submitted that an agreed bundle of documents was envisaged and counsel for the parties were engaged in that regard.

23. It was submitted that the Judge erred in dismissing the suit; that in doing so the Judge failed to take into consideration that the delay was not lengthy or inexcusable and that the suit could be heard without further delay; that had the Judge considered that the appellant had already filed its bundle of documents, he would have arrived at a different conclusion.

24. Opposing the appeal, counsel for the 1<sup>st</sup> respondent submitted that the Judge properly exercised his discretion in dismissing the suits and there is no basis for this Court to interfere with that decision; that under Section 3B of the Appellate Jurisdiction Act, this Court has a duty to ensure that there is timely disposal of actions; that the appellant failed to prosecute the suit from 25<sup>th</sup> November 2009 until the notices to show cause were issued; that the excuses given by the appellant for the delay in prosecuting the suits were not sufficient; that as rightly stated by the Judge, the 1<sup>st</sup> respondent stood to suffer prejudice as it had sold its assets and was no longer in operation in Kenya and would have challenges in getting witnesses.

25. We have considered the appeal and the submissions. The only issue that requires determination is whether the appellants have made out a case for this Court to interfere with the exercise of discretion by the lower court.

26. As already indicated, the order for dismissal of the suit was made under the provisions of Order 17 Rule 2 of the Civil Procedure Rules. In keeping with the principles in *Ivita v Kyumbu* (supra), some of the relevant factors for consideration in exercising the court's discretion under that provision include considerations as to whether the delay is inordinate; whether the delay is excusable; the prejudice likely to be suffered; whether the delay amounts to a denial of justice; and whether despite the delay, justice can still be done. Indeed, in *Paxton v Allsopp [1971] 3 ALL ER 370* Edmund Davies LJ expressed the view that whether justice can still be done despite delay is an overriding consideration.

27. Undoubtedly, there was delay in having the suits disposed. As mentioned, the suit was fixed for hearing on several occasions. The adjournments on those occasions were however not attributable to any one party. As already noted there were a variety of reasons for the adjournments. There can be no issue therefore that there was a proper basis on which the Judge rightly found there was delay.

28. However, what the Judge does not appear to have considered is that despite the absence of an agreed bundle of documents, the appellant had already filed a separate bundle of documents. This is borne out of the affidavit sworn on behalf of the appellant in response to the notice to show cause and was not controverted. It was also asserted in the same affidavit that the matter already had a hearing date by the time the notice to show cause came up for hearing. This again was not considered by the Judge.

29. As the Court stated in *Eurobank Limited v Shah Munge & Partners*.

*“As has been pointed out severally, the language of Order 17 Rule 2 is permissive rather than mandatory. The trial court is not obliged to dismiss the suit. Even where it finds delay to be inordinate and not satisfactorily explained, it can still save the suit to be heard on merits by imposing conditions to ensure sooner or expeditious hearing and determination or by requiring, as a term of refraining from dismissing the suit, an undertaking from the plaintiff to list the suit for hearing within a specified time.”*

30. The suits, it would appear, were ready for hearing and a hearing date had already been fixed by the time the notices to show cause were being considered. The circumstances in this case called for sustaining, rather than dismissing. For those reasons, we are satisfied that the learned Judge failed to consider relevant factors in order to determine whether or not to dismiss a suit for want of prosecution.

31. In the result, we allow the appeals and set aside the ruling and order of the lower court given on 2<sup>nd</sup> December, 2011. We direct that the two consolidated suits the subject of this appeal, namely HCCC No.802 of 2002 and HCCC No.803 of 2002 be fixed for mention before the Registrar of the High Court within 21 days from the date of delivery of this ruling with a view to giving dates for hearing of the suit.

We make no orders as to costs.

*Dated and delivered at Nairobi this 8<sup>th</sup> day of March, 2019.*

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**