



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED,

J.J.A.)

CIVIL APPEAL NO. 256 OF 2016

BETWEEN

ECOBANK GHANA LTD.....APPELLANT

VERSUS

TRITON PETROLEUM CO. LTD (IN RECEIVERSHIP).....1ST RESPONDENT

TRITON BULK STORAGE LTD.....2ND RESPONDENT

TRITON GAS STATION LTD.....3RD RESPONDENT

TRITON SERVICE STATION LTD.....4TH RESPONDENT

TRITON NETWORK SOLUTIONS LTD.....5TH RESPONDENT

YAGNESH MOHANILAL DEVANI.....6TH RESPONDENT

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

at Nairobi delivered on the 21st June, 2012 by Hon Mr. Justice J. M. Mutava)

In

Civil Suit No. 24 of 2009)

JUDGMENT OF THE COURT

Background

1) This appeal is against a ruling delivered by the High Court dismissing the appellant's suit for want of prosecution. The appellant, **ECOBANK GHANA LIMITED** filed suit against **TRITON**

PETROLEUM CO. LTD (IN RECEIVERSHIP) the 1st respondent, **TRITON BULK STORAGE LTD**, respondent, **TRITON GAS STATION LTD**, the 3rd respondent, **TRITON SERVICE STATION LTD**, the 4th respondent, **TRITON NETWORK SOLUTIONS LTD** the 5th respondent and **YAGNESH MOHANILAL DEVANI**, the 6th respondent, (the respondents) by way of plaint dated 15th January, 2009.

2) A brief background of the suit as can be gleaned from the plaint is that the appellant claimed the sum of US\$2,417,797.99 together with interest at the rate of 9.5% per annum from 15th January, 2009 until payment in full. The appellant also claimed costs of the suit together with interest on such costs.

3) Vide the aforesaid Plaint, the appellant averred that it maintained a banker and customer relationship with the 1st respondent; that pursuant to the said banking relationship the appellant and Ecobank Kenya Limited made available various banking facilities and other financial accommodation to the 1st respondent to enable the 1st respondent import oil into Kenya; that the said lending was guaranteed by the 2nd, 3rd, 4th, 5th and 6th respondents vide written instruments of Guarantee and Indemnity; that despite the 1st respondent enjoying the said facilities it blatantly refused to repay the monies; that the 2nd, 3rd, 4th, 5th and 6th respondents failed to honour their guarantees thereby compelling the appellant to file the subject suit.

4) The 1st respondent filed its Statement of Defence on 23rd April, 2009 while the 2nd, 3rd, 4th, 5th and 6th respondents filed their joint Statement of Defence on 22nd April, 2009.

5) Vide its Statement of Defence, the 1st respondent denied *inter alia* that the appellant and the 1st respondent maintained a banker and customer relationship at all times material to the suit and that pursuant to the said banking relationship the appellant and Ecobank Kenya Limited from time to time made available various banking facilities and other financial accommodation to enable the 1st respondent finance its business operations to import oil into Kenya.

6) Vide its Statement of Defence, the 2nd, 3rd, 4th, 5th and 6th respondents denied the averments in the plaint that there existed a banker-customer relationship between the appellant and the 1st respondent. The said respondents averred that the appellant was none suited; that the appellant has no cause of action against any of the 2nd, 3rd, 4th, 5th and 6th respondent and that the appellant's cause if any is incompetent for involving and seeking orders that will affect the parties excluded from the suit.

7) The respondents filed an application dated 25th January, 2012 for dismissal of the appellant's suit under the provisions of Order 17 Rules 2(1) and (3) and Order 51 Rule 1 of the Civil Procedure Rules. The said application also sought for costs of the application. The application was made on the following grounds:-

“1. The Plaintiff has failed and/or neglected to set down this suit for hearing.

2. The Plaintiff filed his suit on 15th January, 2009 and more than 2 years have passed.

3. Public policy and the overriding principles under sections 1A and 1B of the Civil Procedure Act demand that matters should be heard expeditiously.”

8) The appellant opposed the application and filed a replying affidavit deposed by Mr Grishon Thuo, an associate in the Law Firm representing the appellant herein. Mr Thuo outlined the steps that the appellant had taken to prosecute its suit to disprove the respondents' contention that it had lost interest in its suit and that the suit should therefore be dismissed for want of prosecution.

9) Upon hearing the parties, the learned Judge, (Mutava, J.) dismissed the appellant's suit for want of prosecution and stated as follows:-

“While it is one thing for the Plaintiff to claim that a step was taken within one year by way of attempting to fix the suit for hearing on two occasions, it is quite another to convince this court that the matter was ripe for hearing as to merit the taking of that step. This burden looks to have been hardly discharged as barring the move towards fixing the matter for hearing, the suit is as raw as it was over two years ago. The Plaintiff did completely nothing to progress the suit towards the seat of justice. Attempting to fix the suit for hearing when it was not ready for hearing is to me no step at all and at best amounts to a preemptive strike against the fate stipulated in Order 17 Rule 2(1) and (3) Civil Procedure Rules. This maneuver cannot find favour with this court as it runs contra to the overriding objectives stipulated in Sections 1A, 1B and 3A of the Civil Procedure Act and which courts have affirmed as the quintessential building pillars to expeditious dispensation of justice... the Plaintiff has been unable to explain why no steps have been taken since the defences were filed to progress the matter, save for the futile attempts to fix it for hearing in its unprepared state.”

10) Aggrieved by that decision, the appellant preferred this appeal on the following grounds that the learned Judge erred and misdirected himself

- a) in dismissing the suit for want of prosecution;**
- b) That the learned Judge erred and misdirected himself by finding that fixing the suit for hearing did not amount to a “step in the proceedings” as provided for in Order 17 of the Civil Procedure Rules;**
- c) by taking into consideration matters he should not have taken into consideration and in doing so, arrived at a wrong conclusion;**
- d) by failing to find that the 1st respondent had not demonstrated what prejudice it had suffered or would suffer to merit the suit being dismissed for want of prosecution; and that**
- e) The exercise of discretion by the learned Judge was erroneous in law and was exercised in a manner that was clearly wrong as the learned Judge misdirected himself and acted on matters which he should not have acted upon and in doing so arrived at a wrong conclusion;**
- f) The Ruling was inconsistent with the evidence adduced and with established legal principles and is therefore an affront to the law in material respects and ought to be set aside.**

11) The appellant sought the following orders:

- i) This appeal be allowed;**
- ii) The ruling and/or order of the High Court dated and delivered on 21st June, 2012 be set aside;**
- iii) An order be made reinstating the appellant’s suit in the High Court;**
- iv) Costs and incidentals in the High Court case and in this appeal be awarded to the appellant**
- v) This Honourable Court be pleased to grant such further order or orders as may be just and appropriate.**

Submissions by Counsel

12) At the hearing of this appeal, learned counsel, Mr Njoroge Regeru appeared for the appellant while learned counsel Mr Paul Ogunde appeared for the 1st respondent. Mr Njoroge Regeru relied on the appellant’s written submissions and list of authorities. Counsel submitted that this Court is entitled to interfere with the learned Judge’s judgment pursuant to the holding in **Mbogo & Another V Shah [1968]**

EA 96 if it is satisfied that its decision was clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong conclusion.

Counsel submitted that from the facts of this case, it is clear that the learned Judge did not exercise his discretion judicially in that from the chronology of events there was no inordinate delay on the part of the appellant in prosecuting its suit to justify the suit being dismissed for want of prosecution; that the appellant prosecuted this case diligently and as early as March, 2011 the appellant had procured a hearing date; that the date was mis-minuted to March, 2012; that thereafter the court file went missing and there were renovations being undertaken in Milimani Commercial courts which all caused delay in the prosecution of the appellant's suit.

13) Counsel further submitted that the appellant took various step to prosecute the suit pursuant to Order 17 Rule 2; that the learned Judge misapprehended the law when he held that the appellant failed to take pre-trial steps as provided under Order 11 to qualify as taking steps in the proceedings; that this was a complete misdirection as Rule 2 (1) of Order 17 provides for any step being taken in the suit; that the learned judge was aware that the appellant had made efforts to have the suit listed for hearing; that the application to dismiss the appellant's suit was made in January, 2012, within a year after filing suit; that authorities show that failure to take pre-trial directions is not a ground of dismissing a suit for want of prosecution.

Counsel submitted that the well established principle of dismissal for want of prosecution had therefore not been met. Counsel relied on the case of **Rajesh Rughani v Fifty Investments Limited & Kembi & Muhia Advocates [2016] eKLR where this Court set out the factors for dismissal of a suit for want of prosecution. Counsel urged us to allow the appeal**

14) Mr Ogunde, learned counsel for the 1st respondents relied on his written submissions and list of authorities. Counsel submitted that the writing of a letter seeking a hearing date does not amount to taking a step in prosecuting a suit; that the appellant was not moving forward in the prosecution of his suit and could not be said to have been interested in the expeditious disposal of its suit and that the learned Judge exercised his discretion judicially and in the circumstances of this case he was entitled to hold as he did.

In a brief rejoinder, Mr Regeru submitted that the learned Judge erred in holding that the appellant had not taken any steps towards the prosecution of its suit.

Determination

15) We have considered the grounds of appeal, the written submissions, the authorities cited and the law. The instant appeal is against the exercise of discretion on the part of the learned trial Judge to dismiss the appellant's suit for want of prosecution. As stated in the oft cited case of **Mbogo & Another v Shah (supra):-**

“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion...”

16) The power of the court to dismiss a suit for want of prosecution is a discretionary power which should be exercised judicially. (See **Eliud Munyua v Francis Murerwa [2014] eKLR**).

17) The 1st respondent filed the application for dismissal of the suit under Order 17 Rule 2 of the Civil Procedure Act which states as follows:

“ a) 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 should not be dismissed,

and if cause is not shown its satisfaction, may dismiss the suit. suit to

b) *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.*

c) *Any party to the suit may apply for its dismissal as provided in sub-rule 1.*

d) *The court may dismiss the suit for non-compliance with any direction given under this Order.”*

18) In the case of Moses Muriira Maingi & 2 Others v Maingi Kamuru & Another Civil Appeal No 151 of 2010, this Court adopted the decision of Chesoni, J. (as he then was) in the case of Ivita v Kyumbu (1984) KLR 441 where it was held that the test for dismissal of a suit for want of prosecution is as follows:

“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 the 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 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.”

19) In the case of Allen -Vs- Sir Alfred McAlpine & Sons Ltd [1968]1 All ER 543 Salmon LJ stated thus:

“When delay in the conduct of an action is prolonged or inordinate and is inexcusable, the natural inference in the absence of credible excuse, and there is substantial risk by reason of the delay that a fair trial of the issues will no longer be possible or that grave injustice will be done to one party or the other, or to both parties, the Court may in its discretion dismiss the suit straight away, without giving the Plaintiff an opportunity to remedy the default.”

20) This Court has had occasion to pronounce itself on this issue in the case of Salkas Contractors Limited V. Kenya Petroleum Refineries Limited [2004] eKLR held as follows:-

“The principle that pervades these decisions (Ivita V. Kyumbu (supra) and Allen V. Sir Alfred McAlpine (supra)) is that the court has to be satisfied that the inordinate delay is excusable and if so satisfied, then the court has to consider whether justice can still be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable, then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution.”

21) Applying the laid down principles to the instant appeal, it is well settled that in considering whether to dismiss a suit for want of prosecution the courts will consider the following guiding principles; whether the delay is inordinate, and if it is, whether the delay can be excused and lastly, whether either party is likely to be prejudiced as a result of the delay or that a fair trial is not possible as a result of the delay.

22) In the instant appeal, the question is whether the appellant has given a satisfactory explanation for the delay in prosecuting the suit before the High Court and whether the delay was inordinate. The appellant contended that it had not delayed in prosecuting its suit as it had complied with the requirements of Order 17 Rule 2(1) and taken steps in ensuring that its suit was listed for hearing. The respondent opposed this contention and argued that the appellant was duty bound to give cogent reasons why no step had been taken in the prosecution of the suit for a period of 12 months as to make the delay excusable. The learned Judge found as follows:-

“While it is one thing for the Plaintiff to claim that a step was taken within one year by way of attempting to fix the suit for hearing on two occasions, it is quite another to convince this court that the matter was ripe for hearing as to merit the taking of that step. This burden looks to have been hardly discharged as barring the move towards fixing the matter for hearing, the suit is as raw as it was over two years ago. The Plaintiff did completely nothing to progress the suit towards the seat of justice. Attempting to fix the suit for hearing when it was not ready for hearing is to me no step at all and at best amounts to a pre-emptive strike against the fate stipulated in Order 17 Rule 2(1) and (3) Civil Procedure Rules. This maneuver cannot find favour with this court as it runs contra to the overriding objectives stipulated in Sections 1A, 1B and 3A of the Civil Procedure Act and which courts have affirmed as the quintessential building pillars to expeditious dispensation of justice.”

23) It is therefore important that we determine what amounts to “a step” in the prosecution of a suit under Order 17 Rule 2. We note that what amounts to “a step” is not defined under the Civil Procedure Rules or the Civil Procedure Act.

While we were unable to trace any local decision on this, we have found an appropriate definition in the American case of **Augusta Sugar Co. V. Haley, 163 La. 814, 816, 112 So. 731, 732 (1927)**, which stated that a step in the prosecution of a suit is:-

“...something more than a mere passive effort to keep the suit on the docket of the court; it means some active measure taken by the plaintiff, intended and calculated to hasten the suit to judgment.” (Emphasis added)

24) In the present case, we note from the record that on 10th June, 2010 the appellant commenced the process of discovery by filing its list of Documents dated 9th June, 2010. Thereafter, the appellant’s advocates’ representative fixed the suit for hearing on 15th March, 2011, the matter was omitted from the cause-list of 15th March, 2011 and was listed for hearing precisely one

25) year later, on 15th March, 2012 on which date the court directed that a hearing date be taken at the registry on 22nd March, 2012 as already scheduled by the appellants’ newly appointed advocates. The suit was however not heard on 22nd March, 2012 as the registry of the High Court’s Commercial Division was undergoing a major re-organization of its filing system and the Court file was missing. Counsel for the appellant wrote to counsel for the respondent on 17th April, 2012 inviting them to attend the Court registry on 26th April, 2012 for purposes of taking a hearing date. On 19th April 2012 the 1st respondent filed its application dated 25th January, 2012 seeking dismissal of the subject suit for want of prosecution.

26) It was the appellant’s contention that the subject suit was filed during the transition period before the newly introduced Order 11 of the Civil Procedure Rules came into operation in September, 2010. Order 11 of the Civil Procedure Rules introduced new provisions on pre-trial steps to be taken before suits could be fixed for hearing. The application to dismiss the subject

suit for want prosecution was dated 25th January, 2012. The suit was filed on 15th January, 2009 during the transition period and failure to comply with the pre-trial steps, should not therefore, of itself have led to the dismissal of the suit for want of prosecution. As per the laid down principles, it is still possible to sustain the suit and do justice to the parties by hearing and determining the suit on merit.

27) As stated in the case of **Ivita -vs- Kyumbu (supra)**, it is upon the party making the application to show the court the prejudice it would suffer as a result of the delay. From the supporting affidavit and the submissions before the High Court we note that the respondents did not address the court on the prejudice it was likely to suffer as a result of the delay. This is despite the appellant raising the issue of prejudice, inter alia, in view of the colossal amount of money in contention (US\$2,417,797.99).

28) We are satisfied that the appellant made credible, satisfactory and sufficient explanation for any delay

in prosecuting its suit and that in the circumstances of this case the appellant has been diligent and took requisite steps to prosecute its suit. The learned Judge should have taken cognizance of the colossal amount of money that is in contention (US\$2,417,797/99) and the public interest involved as the appellant is a deposit taking and lending institution.

29) In light of the above, we hold that the learned Judge erred in the exercise of his discretion in dismissing the appellant's suit for want of prosecution. We therefore allow this appeal. The Ruling and Order of the High Court dated and delivered on 21st June, 2012 is hereby set aside and the appellant's Civil Suit No. 24 of 2009 in the High Court is hereby reinstated. We award costs in the High Court and in this Court to the appellant.

Dated and delivered at Nairobi this 27th day of April, 2018

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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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