IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, O'KUBASU & ONYANGO OTIENO, JJ.A.)

CIVIL APPEAL NO. 231 OF 2007

BETWEEN

NATIONAL CEREALS & PRODUCE BOARD.....APPELLANT

AND

J. K. MUIRURI (As a Receiver & Manager of) KENSACK LIMITED .....1ST RESPONDENT

KENSALCK LIMITED.....2ND RESPONDENT

(An appeal from the ruling and orders of the High Court of Kenya at Nairobi (Osiemo, J.)

dated 17th November, 2006

in

H.C.C.C. NO. 2947 OF 1989)

****

JUDGMENT OF THE COURT

The history of the entire saga that has given rise to this appeal before us filed on 29th October 2007, is a demonstration of the extent to which parties and their advocates can and do abuse the court process to score benefits other than justice and still claim to do so in pursuit of justice.

The appellant, National Cereals & Produce Board was receiving its supplies of gunny bags of various sizes from East African Bag & Cordage Company Limited. It was apparently also receiving the same type of bags from Kensack Limited which is a subsidiary of East African Bag and Cordage Company Limited. It was paying for the bags received from both companies. For its business, Bag & Cordage borrowed money from Standard Chartered Bank Kenya Limited and that was secured by a debenture issued in favour of that bank. Kensack Limited borrowed money from National Bank of Kenya Limited which was also secured by a debenture in favour of National Bank of Kenya Limited. In February 1989, National Bank of Kenya Limited, appointed the first respondent in this case, J. K. Muiruri, Receiver and Manager of Kensack Limited, the second respondent herein. On 28th March 1989, a court acting on request of Standard Chartered Bank, Kenya Limited, appointed two Receivers for East African Bag & Cordage Limited as well. By the time each set of these Receivers were appointed, the appellant herein claims that the gunny bags purchased and paid for from both companies had not been delivered. This was because they were being stored with the second respondent at its stores pursuant to

arrangements between the appellant and the second respondent.

The appellant instructed its advocates to sue both East African Bag and Cordage Company Limited and its two Receivers and the first and second respondents in this appeal. The suits were to be separate. The suit filed against East African Bag and Cordage Limited was HCCC No. 2892 of 1989 and that against the respondents in this appeal was 2947 of 1989. The record shows that the latter case was filed together with a notice of motion seeking injunctive orders and that was filed in July 1989. There is no record as to the outcome of that application. Thereafter several applications were made. We will mention some of them as will be necessary for the purposes of this appeal. On 20th March 1992, both suits were placed before Lady Justice Walekhwa (now Lady Justice Nambuye) and the following order was made by the Honourable Judge of the superior court:-

"IT IS ORDERED

1. That the file No. HCCC 2947 of 1989, National Cereals & Produce Board vs J. K. Muiruri (As receiver and Manager of Kensack Limited) and Kensack Limited be and is hereby consolidated with HCCC No. 2892 of 1989."

That order was extracted on 24th September 1992. The other application made, we need to set out here, was an application by the first respondent dated 3rd July 1995, but filed on 24th July 1995 in HCCC No. 2947 of 1987. That application sought one main order which was:-

"That J. K. Muiruri the Receiver and Manager be permitted to sell the gunny bags the subject matter of this suit and proceeds of sale be kept in a deposit account pending the disposal of this suit."

That application was placed before Ole Keiwua J (as he then was – now Judge of Appeal). On 10th August 1995, the parties agreed to an order by consent which was:-

"That the first defendant be and is hereby permitted to sell the gunny bags the subject matter of this suit and the proceeds of the sale be kept in an interest earning account in the names of the first defendant and the plaintiff pending the disposal of this suit."

The record shows that the respondents in HCCC No. 2892 of 1989, filed a notice of appeal against the decision of Walekhwa J. consolidating the two cases but there is no evidence that that intended appeal went beyond the notice of appeal stage. Thus the order consolidating the two cases has not been in any way disturbed on appeal. But the appellant was not amused by that stillborn attempt by the defendants in that case to appeal. It filed a notice of motion seeking leave of the court to proceed with the hearing in HCCC No. 2947 of 1989 from which this appeal arose. That application is one of the many applications – about seven in all, that have not been prosecuted to date. On 29th November 2002, the appellant filed a notice of motion dated 26th November 2002 in which it sought three orders namely; that judgment on admission be entered against the first respondent for the admitted sum of Kshs.34,235,863/=; that the first respondent be ordered to render accounts of the proceeds of sale and other costs pursuant to the consent order of 10th August 1995 and that an order be issued compelling the first respondent to release the sum of Kshs.34,235,863/= to the appellant. Again there is no evidence on record that that notice of motion was heard and determined one way or the other. On 10th February 2003, three months later, the first respondent filed a Chamber Summons under ***Order 24 rule 6*** of the Civil Procedure Rules and ***section 3A*** of the Civil Procedure Act seeking orders:-

"(a) That, the consent order which was recorded in this suit on the 10th day of August, 1995 wholly adjusted the suit.

(b) That, the substratum of the suit was completely extinguished and destroyed by the said adjustment and the suit should be dismissed.

(c) That, the costs of this suit and of this application should be awarded to the first defendant in any event."

That application is one of the many that were filed but apparently not heard and decided. However, there was another application filed earlier on 13th December 2000. That was filed by the first respondent. It prayed for the dismissal of the suit for want of prosecution. That application was heard by Githinji J. (as he then was – now Judge of Appeal) and the learned Judge, in a well considered ruling dated and delivered on 16th October 2001, dismissed that application stating in conclusion as follows:-

"The first defendant is not in court. He did not file defence. He has not shown compliance with the orders of Ole Keiwua J. in that the money the proceeds of sale of gunny bags were not deposited as ordered by Ole Keiwua J. Dismissing the suit will cause injustice and uncertainty. In HCCC No. 2947 of 1989, the Receivers were appointed by the National Bank of Kenya.

In HCCC No. 2892 of 1989, the receivers were appointed by Standard Chartered Bank. It appears that the two suits relate to the same gunny bags. So to which of the two banking institutions should the money be released? ……..

In all the circumstances of the consolidated suits, I am satisfied that failure to prosecute the suits was due to failure beyond the control of plaintiff's advocates and that it is just to allow plaintiff to prosecute the suit. Costs will sufficiently compensate the applicant. Consequently I dismiss the application with costs to the first defendant in HCCC No. 2947 of 1989."

As on 8th July 2004, the applications that were pending were five in all. On that date, parties appeared before Aluoch J. (as she then was) and a consent order was entered into respect of those pending applications as follows:-

"By Consent

1. Let all the 5 pending applications in this suit be marked stood over generally.

2. Plaintiff to file and serve an application for leave to amend the plaint, within 7 days.

3. Hearing of the above application, if filed to be heard inter partes on 22nd July 2004 at 2.30 p.m."

There is again nothing on record to indicate that the application for leave to amend the plaint was filed as was ordered above and there is no amended plaint in the record before us. However, on 2nd September 2004, both parties, by consent, fixed the main case for hearing on 2nd and 3rd March 2005. Come 2nd March 2005, the matter was placed before Osiemo J. (as he then was) for full hearing. Mr. Havi, the learned counsel then on record for the appellant applied for adjournment on grounds, among others, that the parties were seeking settlement out of court. Mr. Ougo, the learned counsel for the first respondent then, opposed the application stating that there were no discussions for reaching a settlement going on and the respondents were ready to proceed with the hearing as scheduled. The learned Judge rejected the application stating that the suit was filed in court sixteen years ago as at that time of the ruling, the hearing date was taken by consent and the same was confirmed during the call over, and so there was no justification whatsoever to warrant the adjournment. Immediately after the learned Judge refused adjournment, Mr. Havi moved the court on a preliminary point which had been filed earlier on 7th April 2003, claiming that as the first respondent had not complied with the consent order endorsed by Ole Keiwua J, in that he had not deposited the proceeds of sale of gunny bags, the first respondent be denied the right of audience. That preliminary objection was opposed by Mr. Ougo for the first respondent. The learned Judge again dismissed that preliminary objection stating that it was not raised at an appropriate time.

Thereafter the hearing started and PW1 John Ngetich was sworn and gave his evidence in full. The hearing was then adjourned to 8th March 2005. On that date, PW2, Clement Shikuku Khaembe was sworn and started giving evidence. However, before he could proceed further and particularly immediately after he stated in evidence that this case was consolidated with another case, Mr. Havi

applied for adjournment stating and we quote him:-

"I have come across an order which consolidated this suit with another way back in 1992 and I apply for adjourned (sic) to enable me trace that file which I am told is missing from the registry."

Mr. Ougo opposed the application. The learned Judge adjourned the hearing to 14th March 2005 when he would also deliver the ruling on that application. Although that ruling is not included in the record of appeal, it is clear from the main ruling of Osiemo J, the subject of this appeal that he dismissed it and ordered that the suit before him i.e. HCCC No. 2947 of 1989 which had already been partly heard should proceed to hearing on its own. That, in effect reviewed the earlier decision by Walekhwa J. which consolidated the two suits. The appellant felt aggrieved by that order and intended to appeal against it. We make haste to state here that after Osiemo J. had made that ruling on 14th March 2005, the hearing which was scheduled for that day, was adjourned to 28th April 2005 due to time constraints. In the intervening period, the appellant filed a notice of motion dated 25th April 2005 seeking two orders which were:-

"(i) That pending the hearing and determination of the intended appeal by the plaintiff there be a stay of the proceedings and of the orders of 14th March 2006 by Osiemo J. directing that hearing of HCCC No. 2947 of 1989 proceed on 28th April 2006 independent of HCCC No. 2892 of 1989 despite the order of 20th March 1992 consolidating the two suits.

(ii) The defendants be compelled by way of a mandatory order to comply with the consent order of 10th August 1995 before they can take any further step in the hearing of this matter or intended appeal."

Although 28th April 2005 was set aside for the hearing of the main suit, that did not take place. Instead the above application dated 25th April 2005 was set down before Osiemo J. who fixed it for hearing on 12th May 2005 but was further adjourned to 29th March 2006 and it was on 25th September 2006 when the hearing of that application was finalized. In a lengthy ruling dated and delivered on 17th November 2006, Osiemo J., considered several provisions of the Civil Procedure Rules and several authorities, which he posed after the question as to whether the entire suit could be dismissed for want of prosecution in the exercise of the court's inherent powers on grounds that the appellant made it clear through its conduct that it was not interested in proceeding with the suit. He then cited with approval the judgment of Law JA in the well known case of ***Mukisa Biscuits Co. Ltd vs. West End Distributors (1969) EA 697,*** and in the extract from *Halsbury's Law of England 4th Edition, Volume 37 paragraph 448,* after which he declined to grant the two orders sought and proceeded to dismiss the entire suit stating in so doing as follows:-

"For the above reason I decline to grant the order for stay of the proceedings sought and dismiss the plaintiff's suit with costs to the defendant. I further order that the plaintiff do meet the costs of this application."

That is the order that prompted this appeal before us premised on a memorandum of appeal containing nine (9) grounds of appeal which, in a summary, fall under three main grounds, namely that the learned Judge erred in dismissing the earlier suit when the suit had not been heard on merit; that the learned Judge erred in dismissing the suit and the application without considering and making findings on the issues raised by the application and that the learned Judge erred in the exercise of his discretion and exercise of his inherent jurisdiction to dismiss the suit without appreciating that if he found no merit in the application, he had no option but to dismiss the application and order the hearing of the suit to proceed.

In his submissions before us, Mr. Maondo, the learned counsel for the appellant conceded that the learned Judge had jurisdiction in the matter that was before him to exercise his discretion but he was of the view that the learned Judge none-the-less exercised that discretion wrongly as the learned Judge's ruling omitted to address the main issue that was before him which was whether the proceedings could be stayed on the grounds cited in the application and in the supporting affidavits. In his view, all that was

open to the Judge was either to allow the application and thus stay the proceedings or refuse the application and call upon the appellant to offer more evidence and if the appellant declined to do so then he could call upon the applicant to close its case and proceed with the defence case. In his view, it was not proper for the learned Judge to dismiss the suit when there was no application for dismissal before him. Mr. Chacha Odera, the learned counsel for the first respondent on the other hand referred us to the history of the entire case and submitted that it was clear that the appellant was using every avenue to delay the prosecution and completion of the hearing of its own case. Under those circumstances, Mr. Odera, submitted, the learned Judge was perfectly entitled in exercise of his discretion to have the saga ended. He conceded however that the orders went a bit too far but he felt that the court had the duty to prevent abuse of the court process.

We have gone into the detailed history of this suit that was before the learned Judge mainly because we believe it was necessary for the understanding of the decision of the learned Judge and to demonstrate what we stated at the beginning of this judgment that the court process was clearly abused in this case. For what will be clear soon hereafter, we will not go into facts of the matter that are in the pleadings and as related by the two witnesses, one of whom was fully heard.

This was a comparatively straight forward case which should not have taken more than few weeks to be finalized. It was filed way back in July 1989, i.e. some 21 years back and by the time it came up for hearing before the superior court on 2nd March 2005, over fifteen years had passed and all that had been done was to file one application after the other, most of which applications ended up not being heard at all; to be precise five applications are as yet not heard. Even worse, after parties had agreed to proceed to full hearing of the suit, and after the hearing had started, the appellant (the plaintiff), who should have been interested in the finalization of the case, sought further delay of the case on the pretext that its counsel had not been aware that the case had earlier been consolidated with another, a fact which any advocate reading the records of the case should have been aware of long before the hearing commenced even if he came to the case only one week to the hearing date, which was not the case here. After that attempt to delay the hearing was thwarted by the learned Judge, the appellant still continued with that effort to delay the hearing and this time, its counsel decided to raise a preliminary point filed one year back to stop further hearing. The learned Judge, exercised patience as was required of him and heard that preliminary point, but after ruling on it and adjourning the hearing, perhaps because it could not be reached as the time set for its hearing had been consumed in arguing the preliminary matter. The appellant again seized the window opened by the adjournment period to file a substantive application seeking stay of its own case on clearly unsatisfactory grounds. The learned Judge admirably set out all these in his ruling. We cannot fault him when he made a finding which he did that:-

"The concept of justice is however a two way traffic. This Court cannot continue to protect a party which has taken no step to help itself and particularly in a situation like this when its inaction is occasioning prejudice to the other side."

We are satisfied on our part, that the learned Judge was perfectly entitled to dismiss as he did, the application that was before him and that aspect will not be disturbed.

However, the learned Judge did not dismiss the application only, but he also dismissed the entire suit. In our view that was not proper. What was before the learned Judge was the application for stay of proceedings pending the hearing and determination of the appellant's intended appeal to this Court against his orders of 14th March 2006 and a prayer that the respondents be compelled by a mandatory order to comply with the court order of 10th August 1995. Those were the prayers before the learned Judge. The parties addressed the learned Judge on those aspects only. The learned Judge never invited them to address him on whether or not the suit was for dismissal for want of prosecution. That being the case, the learned Judge was confined to matters before him. Much as we agree and it was conceded by both parties that he had discretion and jurisdiction to make the orders appealed against, that discretion was only to be exercised on matters that were before him and on the matters canvassed before him. Dismissal of the entire suit was not before him as there was no application for the same. Githinji J. (as he then was) had dealt with such an application earlier on and dismissed it. We think, if the learned Judge was minded to consider dismissal of the suit on whatever basis of hearing, he should have invited

the parties to address him on that aspect before he could take such a drastic action.

It is only on that score, and on no other reason that we allow this appeal as far as the dismissal of the entire case is concerned. In taking this view, we are fully aware that our decision amounts to interfering with the learned Judge's exercise of judicial discretion. We have however exercised caution before doing so as is required by law - See the decision of the predecessor to this Court in the well known case of ***Mbogo and another vs. Shah (1968) EA, 93*** where Sir Charles Netbold, P. stated:-

"We now come to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial Judge where his discretion, as in this case was completely unfettered ……..
A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

Appeal against dismissal of the entire suit is allowed and that order is set aside.
We order that the hearing proceeds before any other Judge under the provisions of the Civil Procedure Act and Rules as we note Osiemo J. is no longer in the service of the Judiciary. The dismissal of the application will stand as only the appeal against dismissal of the entire case is allowed. For the reasons given above, we decline to award costs to the appellant. Each party to bear its own costs.

Dated and delivered at Nairobi this 10th day of December, 2010.

S.E.O. BOSIRE

…….
JUDGE OF APPEAL

E. O. O'KUBASU

…….
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR