REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 249 OF 1997

AGIP (KENYA) LIMITED…….....…..…….. PLAINTIFF

VERSUS

HIGHLANDS TYRES LTD……..…. DEFENDANT

RULING

On 5th February, 1997, the plaintiff filed this suit against the defendant claiming Kshs 37,363,791.45 being the balance of the agreed price for goods sold and delivered by it to the defendant at the defendant's request.

The defendant filed its defence on 18th March, 1997 in which it denied the plaintiff's claim and claimed set off and/or counterclaimed against the plaintiff. On 27th May, 1997, the plaintiff applied for summary judgment under order XXXV rule 1 of the Civil Procedure Rules (hereinafter referred to as "the Rules") and judgment on admission under order XII rule 6 of the Rules. That application was withdrawn by consent vide the letter of consent order dated 27th November, 1998 signed by counsel for both parties. That consent was recorded as an order of this Court on 29th May, 1999. The repealed summons for directions was fixed by the plaintiff on 16th February, 2000 for 20th March, 2000. Those summons were adjourned twice on that date and on 20th April, 2000. On 31st May, 2000, the plaintiff fixed this matter for hearing for 16th and 17th October, 2000. On 16th October, 2000, the case was adjourned generally. On 10th July, 2001, the defendant filed this application under order XVI rule 5(d) and order L rule 1 of the Rules seeking the dismissal of this suit for want of prosecution. That application is supported by the affidavit sworn on 6th July, 2001 by Mr James Ochieng Oduol, advocate. Having rehearsed the matters constituting this application, Mr Oduol depones as follows at paragraph 8 of his affidavit.

"8. That the continued maintenance of this suit is oppressive to the applicant (defendant) and the same is otherwise an abuse of the Court process".

From the record it is clear that no action has been taken in this suit for over 8 months since it was last adjourned generally on 16th October, 2000. The plaintiff filed a replying affidavit on 9th October, 2001. That affidavit intitules the plaintiff as follows:

"Shell and BP (Malindi) Kenya Limited (formerly known as Agip (Kenya) Limited,"

There has not been any application to amend the pleadings in this suit to depict this intituling and as Mr Oduol rightly pointed out the substitution of the plaintiff as would appear from this intituling is unclear. I will therefore ignore those changes. That matter will not affect my mind in deciding this case. That aside, there was no other objection to the plaintiff's replying affidavit. Under order XVIII rule 7 of the Rules, this Court is empowered to

"receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof."

I will, therefore, consider that affidavit in deciding the application before the Court.

The substance of the material in that replying affidavit is that there has been changes in the management of the plaintiff and that subsequently the new owner of the plaintiff was engaged in moving its headquarters. That movement could not allow the plaintiff to pursue this case. It was deponed that the plaintiff is now ready to proceed with the claim which was stated to now stand at over Kshs 50,000,000/=.

Order XVI rule 5(d) of the Rules provides as follows:

"(Order XVI rule) 5. If within three months after-

…

(d) the adjournment of the suit generally, the plaintiff, or the Court of its own motion on notice to the parties does not set down the suit for hearing, the defendant may either set down the suit for hearing or apply for its dismissal."

Mr Oduol vehemently argued that under this rule, the Court had no discretion but to dismiss the suit for want of prosecution. He said the language of the rule was couched in mandatory terms. He relied on the words "if within three months after….." He compared this rule to order XVI rule 2 of the Rules, which he argued gives the Court discretion. The relevant part of that rule provides as follows:

"(Order XVI rule 2(1)) In any suit in which no application has been made or any 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…"

This rule, Mr Oduol submitted, gives the Court discretion. The Court "may" as the rule says, require the parties to show cause why the suit should not be dismissed. There is no such discretionary language in order XVI rule 5(d). I cannot quite understand this argument. It does not have any basis in law. No case law was supplied to support. In an effort to do justice and to be fair to both counsels, I took the trouble to check up the case law on the subject.

If Mr Oduol's arguments were to be taken at face value, it would mean that every application by a defendant under order XVI rule 5 of the Rules would succeed automatically. The law and the practice of the Courts does not lend any support to such an argument. It is the function of the Court to determine whether the interests of justice would be achieved in allowing or refusing an application. In another aspect, it is clear that the process of our judicial system requires that all parties before the Court should be given an opportunity to present their cases before a decision is given.

Indeed that was the case here when I heard counsel for both parties. If it is incumbent upon me to hear both the parties, should I then decide this case on the basis simply of the fact that an application was filed? It is not possible that the Rules Committee intended to leave the plaintiff without remedy and to take away the authority to the Court when it made order XVI rule 5. Otherwise such a rule would by itself be void if its effect were to deny the Court an opportunity to hear and determine a case on merit. That would amount to interfering with the Court's inherent powers to do justice.

In *Rawal v Mombasa Hardware Ltd* [1968] EA 392, Sir Charles Newbold, P in dealing with a submission that where a rule has provided a remedy for the situation with which it deals the Court should not invoke its inherent jurisdiction so as to provide an alternative remedy said as follows:

"Now I think that any rule which purports to take away the inherent jurisdiction of the Courts should be looked at very carefully before it is construed in such a manner."

He then referred to sections 81 and 97 (now section 3A) of the Civil Procedure Act. Section 81 deals with the power to make Rules and says that the Rules shall not be inconsistent with the provisions of the Act.

Section 97 (now 3A) on the other hand provides that the inherent power of the Court to make orders for the ends of justice or to prevent an abuse of the process of the Court is not limited or affected by the provisions of the Civil Procedure Rules. That squarely answers Mr Oduol's basic objection as to whether this Court is entitled to go beyond the provisions of the rule in deciding the case – that is assuming that order XVI rule 5 denies this Court the discretion as argued. For my part, I think that the discretion is still found in the rule. If one considers the provisions of order XVI rule 2 of the rule relied on by Mr Oduol that view becomes even stronger. That rule deals with a longer delay than order XVI rule 5 of the Rules and yet it provides for an opportunity to show cause why the suit should not be dismissed in view of the delay. It can only follow that a shorter delay can also be explained away. That aside, a consideration of the principles to be applied in deciding whether or not a suit ought to be dismissed for want of prosecution, shows that an application by a defendant under order XVI rule 5 of the Rules is not automatic. Now, what are those principles?

The Court of Appeal of England in *Allen v Sir Alfred Mc Alpine & Sons* [1968] All ER established the following as the principles governing applications for dismissal for want of prosecution. It must be shown that:

(a) the delay is inordinate;

(b) the inordinate delay is inexcusable; or

(c) the defendant is likely to be prejudiced by the delay.

Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the Court should be lenient and allow the plaintiff an opportunity to have his case determined on merit. Finally the Court must consider whether the defendant has been prejudiced by the delay. To achieve justice, the Court must also consider the possible loss likely to be sustained by the plaintiff if his case is terminated summarily for a procedural default. Where a plaintiff has a *prima facie* case, to determine his rights by the summary procedure under order XVI rule 5 would result in great hardship to a plaintiff who has a reasonable excuse for his delay. In respect of these matters, Chesoni, J (as he then was) said as follows in *Ngwambu Ivita v Akton Mutua Kyumbu* HCCC No 340 of 1971 (unreported):

"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 … 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."

I agree with that statement fully.

It has already been seen that there was a delay of eight months in this case. The plaintiff's explanation is that there has been relocation of its offices and their counsel Mr Magan stated before me that they were willing to take an early hearing date. To begin with, I do not think that going by the practice of our Courts a delay of eight months is inordinate in the circumstances of this case. Mr Magan asked the Court to take judicial notice of the fact that 90% of the cases are not fixed for hearing within 90 days. Although Mr Oduol did not challenge this, I am unwilling to decide that point as it does not directly affect the decision of this Court in this application. I am satisfied that the plaintiff has offered a credible explanation for the

delay which in any event is not inordinate and should be given an opportunity to pursue this claim. I have also considered the general conduct of the plaintiff in this case. It has not been indolent and it would be unfair to punish it for an excusable delay. It has been vigilant in pursuing this claim upto this point as evidenced by its spirited effort to defend this application. I could stop there but I consider it necessary in the interests of justice to consider the matter of prejudice. Mr Oduol suggested in his argument that the amount claimed is irrelevant. I do not agree with him. The claim of the suit is very important in determining the matter of prejudice. The plaintiff's claim is for a substantial sum of money which is said to stand at about Kshs 50,000,000/=presently. This is not a simple claim that can be dealt with lightly. This Court would not be up to its duty if it were to drive the plaintiff out of the seat of justice because of an eight month delay. The Court has been reminded time and again to participate in sustaining suits than throwing them out on minor procedural defaults. Mr Oduol stated in his affidavit that his client stood to suffer prejudice. This is a matter of controversy and I do not think Mr Oduol was the right person to depone on such a matter and yet maintain his privilege at the bar. As an advocate, he is not entitled to depone to matters that are in controversy. On this question, my learned brother Ringera, J said as follows in *Kisya investment v Kenya Finance Corporation* Nairobi HCCC No 3504 of 1993:

"The applicant's counsel has deponed to contested matters of fact and said that the same are true and within his own knowledge information and belief. It is not competent for a party's advocate to depone to evidentiary facts at any stage of suit. By deponing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box. He is liable to be cross examined on his depositions. It is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case".

This statement was followed in *Small Enterprise Finance Co Ltd v George Gikubu Mbuthia* Nairobi HCCC No 3088 of 1994 (unreported) Ole Keiwua, J (as he then was) *Muthumu Farm Ltd & Another v National Bank of Kenya & Another*, Civil Case No 618 of 2000 and *Geoffrey Gathaiya v Fortune Finance Ltd* Nairobi HCCC No 249 of 1998 (unreported) Gacheche, Commissioner of Assize (as she then was).

In effect, there is no evidence to show that prejudice will be sustained by the defendant if its application is denied. Even if I were to consider Mr Oduol's affidavit, I do not think that the prejudice in this case is such that it cannot be compensated by an award for costs.

Counsel made some arguments as to the question of costs but I am of the view that these should be in the cause. As to the matter of advocate/client privilege, I think that it's not useful in this application.

I, therefore, dismiss the defendant's application dated 5th July, 2001. The case to be fixed for hearing on priority basis.

Dated and delivered at Nairobi this 15th day of November, 2001

A.R.M. VISRAM

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JUDGE