REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R.MWONGO,J.)

CIVIL APPEAL NO. 26 OF 2018

ROSE MAKOKHA MTEKA.....APPELLANT

VERSUS

OSERIAN DEVELOPMENT CO. LIMITED.....RESPONDENT

(Being an Appeal from the judgment and decree (Hon. V. Chianda, SRM)

delivered on 16th April, 2018 in Naivasha CC No. 192 of 2011)

JUDGMENT

1. This is an appeal against the dismissal of a suit in the lower court for want of prosecution. The brief facts are that the appellant brought a claim for general damages under the Work Injury Benefits Act and the Occupational Safety and Health Act for an accident suffered whist in the Respondent's premises vehicle.

2. The appellant/plaintiff alleged negligence by the Respondent in that on 24th May, 2008 whilst being transported in motor vehicle KAG 781T within the Respondent's property in the course of employment the back door of the vehicle suddenly flung open. The Appellant fell out sustaining serious injuries, loss and damage. The Respondent filed a defence denying the appellant's claim and particulars of negligence. The Respondent blamed the accident on the appellant solely.

3. The respondent thereafter applied for dismissal of the suit for want of prosecution. After hearing the parties, the court by a ruling dated 6th December 2016 dismissed the suit. On 29th September 2017, the appellant filed a an Application to reinstitute the suit set aside and the consequential setting aside of all orders emanating from the ruling. The same was not granted precipitating this instant appeal.

4. The appellant contends that due to the dismissal he was denied justice; that the legal framework for dismissal and the mandatory one year threshold stipulated under Order 17 rule 2 was not met; that the last time the matter had been actively in court was on 1st July, 2016; and 6 months later on December 2016, the matter was dismissed.

Issues for determination.

5. The sole issue for determination in this application is whether the plaintiff's suit should be dismissed for want of prosecution.

Analysis & Determination

6. **Order 17 Rule 2(1)** of the **Civil Procedure Rules**, which governs dismissal of suits for want of prosecution, provides as follows:

"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."

Further **Order 17 Rule 2(3)** of the **Civil Procedure Rules**, states thus:

"Any party to the suit may apply for its dismissal as provided in sub-rule 1"

7. Clearly, the statutory threshold set out under **Order 17 Rule 2** of the **Civil Procedure Rules** is that a suit qualifies to be dismissed for want of prosecution: **if no application has been made or no step has been taken in the suit by either party for at least one year *preceding the presentation of the application seeking dismissal* of the suit.**

8. In **Argan Wekesa Okumu vs Dima College Limited & 2 others [2015] eKLR** the court considered the principles for dismissal of a suit for want of prosecution and stated as follows:-

"The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of Ivita –vs-Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

9. Whether to exercise the power of dismissal for want of prosecution under **Order 17** is, however, a matter that is within the discretion of the court. In its decision in **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR**, the court stated as follows:

"11. Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of Ivita vs Kyumba [1984] KLR 441 espoused that:

"The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the 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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

10. In **Naftali Opondo Onyango v National Bank of Kenya Ltd [2005] eKLR**, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows:-

"However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff."

... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate." (Emphasis added)

11. My perusal of the lower court proceedings and file discloses the history of this matter as follows: that after the filing on 17/5/2013 of a statement of agreed issues by the parties, they then appeared in court on 31st May, 2013, and agreed that a date for

Pre-trial hearing be fixed in the registry. Fourteen months later, the defendant filed a motion for dismissal for want of prosecution. The defendant fixed a hearing date for the motion for 12/9/2014.

12. An affidavit of service filed on 11//9/2014 by the respondent showing that the application was served on the plaintiff is on record. It is shown to have been received on 12/8/2014 by the plaintiff's counsel by virtue of a receipt stamp of that date. There is no record of a reply to the application after its receipt.

13. At the hearing the application for dismissal for want of prosecution was allowed ex-parte, as the plaintiff did not attend the hearing, despite evidence of being served. The dismissal was on 12/9/2014.

14. In their supporting affidavit to their motion challenging the dismissal for want of prosecution and seeking setting aside of those orders in the trial court, the plaintiff exhibited correspondence allegedly written to the respondent – and copied to the Executive Officer – seeking the fixing of a hearing date for the suit. These letters are dated: 3/12/2-13; 11/3/2014; 14/4/2014; and 20/11/2014. They all have a court date stamp of 22/14/2014 and the deponent of the supporting affidavit Joyce Mshila, asserts that they were not filed in the court file because the registry was being re-arranged; or that the court file could not be traced.

15. The said affidavit also asserts that the plaintiff's counsel's court clerk attended court on several occasions but that the court file was either untraceable or that the registry was undergoing rearrangement. However, the said court clerk is not named in the affidavit and neither has he filed any affidavit himself regarding the said assertions.

16. That application remained unchallenged and was on 13/2/2015 allowed, hence the setting aside orders were lifted.

17. Thereafter, the plaintiff appeared at the registry to fix the matter for hearing on 14/8/2015, and in the absence of the defendant an exparte date was fixed for 11/12/2015. The court was unable to proceed on that day as service of hearing had not been effected..

18. The next significant date is 1/7/2016 when the plaintiff appeared in court exparte and stated that since the court was ion transfer, a fresh date could be taken at the registry.

19. The matter came up again on 6/12/2016 following a notice to show cause why it should not be dismissed. The plaintiff was absent. The respondent urged the court to dismiss the matter as it had never taken off. The court dismissed the suit.

20. On 2/10/2017, the plaintiff's application to reinstate the suit filed on 29th Sept 2017 came up. There was no appearance for the defendant. On 16/11/2017 parties agreed to dispose of the application by written submissions. These were filed by 22/1/2018. The trial magistrate in his ruling stated, inter alia:

" The court finding is that there is evidence of laches by the plaintiff in prosecuting the suit herein.

The instant application was made over 1 year after the impugned orders were made….

The plaintiff has filed scanty submissions and failed to substantiate why there was delay that prompted the issuance of the impugned orders…"

21. In his submissions in the lower court, counsel for the applicant argued in essence that the dismissal was premature, as a year had not passed since the matter was last in court. Instead the notice to show cause was issued only four months after the matter was last in court. He further argued that the plaintiff did all they could to have the matter prosecuted.

22. **In Mwangi S. Kimenyi v Attorney General and Another, Misc. Civil Suit No. 720 of 2009, the court restated the test as follows:**

"1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

23. Ultimately, taking the law and the facts into account, it is clear to me that this matter which commenced in 2011, has taken a long journey the in-expedition of which must be laid straight on the plaintiff's laps; it emanates from the indolence of the plaintiff. This indolence, disclosed in the analysis of the record of proceedings, shows a casual, disinterested and laid back approach of the appellant/plaintiff. To prosecuting the claim. For this conduct, it is only fair that the plaintiff/ appellant should be fully responsible for all the costs incurred by the respondent in this matter on appeal.

24. With regard to the substantive question whether the trial magistrate found that **Order 17 Rule 2** of the **Civil Procedure Rules** had been breached, I think it is clear that strictly speaking, twelve months had not elapsed from the time the last step had been taken. Only eight months, at most, had elapsed and there is a credible argument for charging them cost, which I hereby do.

25. However, since Order 17 of the **Civil Procedure Rules** was not complied with strictly, the same cannot stand as applied by the trial court.

Disposition

26. In conclusion, the proper orders to make are as follows:

a. The appeal succeeds and the trial court's decision is hereby set aside.

b. However, due to the indolent conduct of the applicant, the appellant is condemned to carry the costs of this appeal.

c. In allowing the appeal, the appellant is ordered to ensure that the suit is fixed for hearing within 30 days from the date hereof;

d. The hearing shall proceed expeditiously, and shall be concluded within three months of its commencement;

e. In the event that the appellant fails to comply with the terms of this order, the appeal shall stand abated and shall be dismissed, without further opportunity for extension of time.

27. Orders accordingly.

DATED AND DELIVERED AT NAIVASHA THIS 25TH DAY OF FEBRUARY, 2022.

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Kimacia for the Appellant

2. Waigwa for the Respondent

3. Court Clerk - Kamau