REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.174 OF 2012

ELIJAH MWANGI NGURE.....1ST APPELLANT

ESTHER W. MWANGI.....2ND APPELLANT

VERSUS

KENYA TEA DEVELOPMENT AUTHORITY.....1ST RESPONDENT

FRANCIS KAMAU.....2ND RESPONDENT

LUCY MUTHONI NGANGA.....3RD RESPONDENT

(Being an appeal from the Ruling of the Honourable L. Wachira Resident Magistrate

dated 13th of June 2006 in the Chief Magistrate's Court

at Thika Civil Suit No.485 of 10993)

RULING

1. The appellants herein filed a suit before the Chief Magistrate's Court at Thika. The appellants claimed that the 2nd respondent wrote to the 3rd respondent (both 2nd and 3rd respondents are employees of the 1st respondent) advising that the appellants' tea should not be accepted, weighed or delivered. The appellants contend that the refusal to accept their tea leaves was illegal and infringement on their rights. They alleged that as a consequence of the respondents actions their tea leaves have overgrown and have been destroyed thereby occasioning them great loss.

2. They sought a perpetual order directing the respondents to accept, weigh and record tea leaves delivered by the appellants, general damages and costs. The matter was set down for hearing and 1st appellant testified as PW1. On 15th August 2005 the respondent filed a notice of motion seeking to have the suit dismissed for want of prosecution on the ground that no steps were taken by the appellants to prosecute the suit. The trial court upon considering the application found as follows:

> "The application before this court by the defendant is for dismissal of the suit for want of prosecution. The ground is that in 1993 matter 10 years lapsed and no action taken (sic). Mr. Kugwa in reply for the plaintiff stated that he always attends court on behalf of his client. Upon perusal of the record, I see that true Mr. Kugwa has always been present in court by person or representation but the matter has not proceed for one reason or the other and mostly because his client does not attend. This is clear indication in absence of otherwise being stated that the plaintiff is not interested in his suit. The advocate has done his bit to the best that he could. I see no option other than to grant the application as prayed and dismiss the plaintiff's suit for want of prosecution."

3. The appellant aggrieved by the ruling filed a memorandum of appeal dated 3rd April 2012. The appeal was canvassed by written submissions.

4. In their written submissions filed on 20th August 2019 the appellants argued that the trial court erred in holding that the appellants had not taken any steps in the last 10 years. They contend that the parties were last in court on 4th April 2003 when the matter could not proceed due to pressure of work by the court. The matter was then before the court on 12th September 2005 for the respondents' notice of motion. They contend that the court ought to have considered whether the delay to fix the matter for further hearing between 4th April 2003 and 15th August 2005 was prolonged and inexcusable. They advanced that the court did not make consideration on whether the respondent would be

prejudiced. To support their position they cited the cases of George **Gatere Kibata vs George Kuria Mwaura & Another (2017) e KLR and Invesco Assurance Limited v Onyange Barrack (2018) eKLR.** They submitted that the trial court did not afford them the opportunity to file a reply to the application. They urged that their right to a fair hearing in terms of **Article 48 and 50 of the Constitution of Kenya** were infringed and the appellant thereby prejudiced. They cited the case of **Lucy Wambere Muthee v Samwel Githu Mburu (2016) eKLR** where the court held that the court has the discretion to hear the respondent's reasons for failure to file papers in time or for not filing them at all. The appellants claim that heir advocate at the time did not indicate to them about the hearing of the application seeking to dismiss their suit. They urged the court that the appellant should not be punished for a mistake occasioned by their counsel and cited the case of **Tana and Athi Rivers Development Authority v Jeremial Kimigho Mwakio & 3 others (2015) eKLR.**

5. In their written submissions dated 19th August 2019 and filed on 20th August 2019 the respondent contends that **Article 159 (2) of the Constitution of Kenya** provides that justice should not be delayed. They argued that there was inordinate delay to prosecute the matter and the delay was in excusable. They advanced that the legal frame work on dismissal of suits for want of prosecution is coined under *Order 17 Rule of the Civil Procedure Rules 2010.* They also advanced that the defendant is required to show that there had been inordinate delay; the said inordinate delay is inexcusable; and that the defendants are likely to be seriously prejudiced by the delay – **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporiuum v M.D. Popat and others and another (2016)eKLR.** They submitted that the appellant have dragged the matter for 26 years because they have likely lost touch with the evidence and facts of this matter.

DETERMINATION

6. Under Order 17 Rule 2 of the Civil Procedure Rules the court has discretion to dismiss a suit on the following ground;

> **"[Order 17, rule 2] Notice to show cause why suit should not be dismissed.**
>
> **2 (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."**

7. Under sub-rule (3) of Rule 2, any party to the suit may apply for its dismissal as provided in sub-rule 1. Pursuant to the above provisions, the respondent filed a notice of motion on 15th August 2005. Prior to the respondent's notice of motion, the matter was last before court on 14/4/2003 when it was listed for hearing and the court directed that it could not proceed with the case due to pressure of work. By consent of the parties the matter was stood over generally. On 12/09/2005 when the respondent had set down its application for hearing, the appellant through their counsel requested for more time to put in their response and it was agreed that the application be heard on 17/10/2005. When the matter came up for hearing the matter was adjourned at the request of the appellant who referred to the adjournment as *"the last chance"*. On the subsequent hearing date, there was no appearance by the respondent. On 24/01/2006 a preliminary objection was raised by the appellant but the trial court after considering the arguments of the parties, dismissed the preliminary objection. The application was yet again set down for hearing.

8. The reason why I have taken the trouble of setting out the order of events leading to the ruling dismissing the suit by the trial court is to displace the assertions by the appellant that they were denied the right to file a replying affidavit and thus their right to fair trial under **Article 48 and 50 of the Constitution** infringed. The trial court was justified to proceed with hearing and making a determination on the application.

9. What this court has to question is whether the trial court considered the principles for dismissal of suit under **Order 17 Rule 2 (1) and 2(3) of the Civil Procedure Rules. In MWANGI NEDANGI S. KIMENYI V ATTORNEY GENERAL & ANOTHER** the court restated the test as follows:

> **"1. When the delay is prolonged and inexcusable such that is 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 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 o f all the parties."**

10. In this case the applicant failed to respond to the respondent's application despite having been given the opportunity to put in their reply. In **Agip (Kenya) Limited –v- Highlands Tyres limited [2001] KLR 630** it was held that;

> "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. The court must also consider whether the Defendant has been prejudiced by the delay."

11. The appellant did not proffer any evidence or file their response before the trial court as to why the trial court should not dismiss the application. The applicants had not taken any step in the matter for 2 years and opted not to put their response to the application despite being given sufficient time by the trial court. The appellants did not show any cause as to why the suit ought not to be dismissed as required under Order 17 Rule 2 (1) of the Civil Procedure Rules.

12. In the end, this court does not find any reason to interfere with the Ruling on record and the appeal is hereby dismissed.

Dated and **delivered** at **Nairobi** this **27th** day of **February, 2020**.

A.K. NDUNG'U

JUDGE