REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

WINDING UP CAUSE NO. 1 OF 2003

IN THE MATTER OF: COMPANIES ACT CHAPTER 486 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: WINDING UP CANNON HOLDINGS LIMITED

BETWEEN

MOHANSONS (K) LTD.....PETITIONER/RESPONDENT

AND

CANNON HOLDINGS LTD.....RESPONDENT/APPLICANT

RULING

1. The application for determination before this court is dated **1st November, 2019** and filed on **4th November, 2019** by the Respondent Company's Advocate; **Messrs Daly & Inamdar Co. Advocates**. The application is brought under **Sections 1A, 1B & 3A** of the **Civil Procedure Act**, **Order 17 Rule 2(3)** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. By the application, the Respondent/Applicant seeks for the following orders;

a) That this Hounarable Court be pleased to order the Plaintiff to show cause why the suit herein should not be dismissed.

b) That if no cause is shown to the satisfaction of this court, the Hounarable Court be pleased to dismiss the Plaintiff's suit herein with costs for want of prosecution.

c) That the costs of this application be provided for.

2. The application is predicated on amongst other grounds, the following;

a) that the Petitioner has for a period exceeding one year failed to take any steps to prosecute this suit or set down the same for hearing;

b) the Petition has been overtaken by events as there have been far-reaching and substantial changes in the law as to the extend to which individuals and families can hold shares in Insurance Companies. These changes have resulted to the Petitioner's Company not being a shareholder of the Respondent/Applicant Company hence the averments in the Petition no longer bear any relevance;

c) allowing the Petition any further would thus be prejudicial to the Applicant for the reason that the Petitioner is now a dormant Company with no holding in Cannon Assurance Company, the Applicant.

3. These grounds were explicated in the **Supporting Affidavit** of **Inderjit Tawlwar,** the Applicant's Chairperson. He deponed that the suit was lastly in court on **17th June, 2009** before **Hon. Njagi** for hearing of an application and since then no step has been taken in the suit for a period of over ten years. However on **15th May, 2019** the Petitioner filed a **Notice of Change of Advocates** for the **Firm of Oluoch-Olunya Co. Advocate** to act on its behalf. The advocate for the Petitioner subsequently fixed the matter for mention on **27th June, 2019** and **30th July, 2019** but on both occasions the court was not sitting. Its averred that the recent actions by the Petitioner through the current advocates on record is a desperate attempt to cover up the indolent in prosecuting the case which does not explain or excuse the inaction for over ten years.

4. The Applicant further avers that the passage of time since the cause of action arose makes it difficult for it to successfully trace its witness and if so, it would be difficult to obtain any meaningful testimonies due to lapse of memory.

5. The Respondent opposed the application vide a **Replying Affidavit** sworn on **13th November, 2019** by **Sandeep Singh Kandhari**, its Managing Director. He averred that the Petitioner/Respondent instituted the instant Petition seeking the Applicant Company to be Wound Up and an official Receiver be appointed as Liquidator. Consequently, the Respondent made an application for **Appointment of Interim Liquidators** which application was allowed by this court on **27th October, 2003.**

6. It is averred that the Applicant then vide applications dated **26th March, 2004** sought for orders to set aside the earlier orders for Appointment of Interim Liquidators and further to have the Petition dismissed. That the application to have the Petition dismissed was then fixed for mention on **17th June, 2009**. The Petition was then pending the hearing and determination of the Application dated **26th March, 2004** which the Applicant failed to prosecute.

7. However, the Petitioner/Respondent's new advocates fixed the matter on various dates after they were appointed on **15th May, 2019**. As such, it is argued that the instant application by the Applicant is misconceived and is an attempt to deny the Petitioner justice because under **Order 17 Rule 2**, the Applicant ought to have made the application with a period of at least a year of no step being undertaken by the Petitioner/Respondent. It is argued that the Petitioner/Respondent stands to be prejudiced if the orders sought are granted and in the interest of justice, the matter should be set for hearing.

8. By Consent of the parties, the court directed that the application to be disposed by way of written submissions. Both parties have filed their submissions and I will proceed to set out each party's prospective stand as below.

The Applicant's Submissions

9. **Mr. Kinuthia**, learned Counsel for the Applicant submitted that no sufficient reason has been advanced by the Petitioner as to why this suit should not be dismissed given that the suit is over 16 years old since it was filed and inordinate delay has been exhibited. It was his submissions that the Petitioner was duty bound to expeditiously prosecute its case with diligence and the argument that the Respondent/Applicant failed to prosecute its application to have the Petition dismissed cannot lie. In any event, the learned Counsel asserts that the delay in filing the instant application does not prejudice its success nor does it explicit the Applicant's waiver to institute the application.

10. It was **Mr. Kinuthia's** case that the Applicant's right to fair hearing and fairly defend the suit will be prejudiced because witnesses can hardly be traced and therefore justice can only be achieved if the case is dismissed. In support of this line of argument, the Counsel relied on a number of Judicial precedents including the cases of **Ivita…Vs…Kyumbu [1984]KLR 441, Mukisa Biscuit Manufacturing Company Ltd…Vs…West End Distributors Ltd [1969] EA 696** and **Fitzpatrick…Vs…Bather & Company Ltd[1967] 2 All ER 657.**

The Petitioner/Respondent's Submissions

11. **Mr. Olunya's** Submissions on behalf of the Respondent are fairly straight forward. In his submissions dated the **15th July, 2020** and filed on **16th July, 2020**, he submitted that any party has a right under **Order 17 Rule 2(1) &(3)** of the **Civil Procedure Rules**, to apply for dismissal of a suit if no steps have been taken by either party within a year to prosecute the case. However, in the instant case, the Petitioner/Respondent undertook steps to prosecute the suit by fixing the matter for mention for purposes of taking directions on **27th June, 2019**, **30th July, 2019** and **4th November, 2019**. Since the instant application was filed on **1st November, 2019**, then the Applicant is precluded from asserting that no steps were whatsoever undertaken by the Petitioner/Respondent to prosecute the matter. According to the Counsel, if anyone has to bear any blame, then it is the Applicant who failed to prosecute its application which has been pending over years before the court and therefore the instant application is just but an afterthought.

Applicant's Supplementary Submissions

12. **Mr. Kinuthia** filed further submissions in response of the Petitioner's submissions as elicited above. He majored on whether delay is considered from the date of the last action made by the Petitioner or in the context of delay as a whole during the entire proceedings. Under this head, he argued that the wording of **Order 17 Rule 2** is to be construed to mean the last date when a party made a positive substantive act by way of either an application or step taken. According to **Mr. Kinuthia**, by filing Notice of Change of Advocates as well as fixing the matter for mention does not amount to ***"an application"*** or a ***"step in the action"*** within the meaning of **Order 17 Rule 2**. He submitted that the court in its inherent jurisdiction should take into account all the period of the delay including delay before the action. In support of thereof, the Counsel relied on the cases of **Njoki Gachugu & 3 Others…Vs…Francis Githi & 3 Others [1977]eKLR, Trill…Vs... Sacher [1993] 1All ER 961, Abdul & Another…Vs…Home and Overseas Insurance Company Ltd [1971] EA 564** and **Nilesh Premchand Mulji Shah & another T/a Ketan Emporium…Vs… M.D Popat & Others [2016]eKLR**.

13. According to **Mr. Kinuthia**, the court can further invoke the provisions of **Article 159** and the **O_2 Principle** under **Sections 1A** and **1B** of the **Civil Procedure Act** which enjoins the court to administer justice without any unreasonable delay and ensure expeditious disposal of suits. The learned Counsel averred that in the instant case no satisfactory explanation for the delay which is 12 years has been adduced by the Respondent and as such, the suit stands eligible for dismissal by this court.

14. Finally, **Mr. Kinuthia** reiterated that the failure by the Applicant to prosecute their two applications cannot absolve the Petitioner/Respondent from the delay since it was incumbent upon the Petitioner to expeditiously prosecute its case unless the Respondent has acquiesced in the Petitioner's delay which is not the case here. In support of this line of argument, the Counsel relied on the cases of **Argan Wekesa Okumu…Vs…Dima College Ltd & Others [2015]eKLR** and **Delphis Bank Ltd…Vs..Allied Wharfage Limitted [2014]eKLR.**

15. It is noteworthy that **Mr. Olunya** for the Petitioner/Respondent also filed further submissions in retaliation of the Applicant's submissions. His submissions anchored on an insinuation that the Applicant misinterpreted the *ratio decidendi* in the case of **Argon Wekesa Okumu…Vs…Dima College Limited & 2 Others (supra)** and should only be considered if the court finds that it has the jurisdiction to determine the instant application. Be that as it may, it was **Mr. Olunya's** submission that the court should only be interested in determining whether Justice can still be done if this court finds that there was inordinate and unexplained delay by the Petitioner/ Respondent in prosecuting its case. He argued that the court should not dismiss a suit where the delay is not intentional. He reiterated that the court should consider that there was an active effort by the Petitioner in fixing the matter for mention on **27th June, 2019** and **30th July, 2019** and the reason why the matter did not proceed was not by inaction of the Petitioner but for reason that the court was not sitting. In support of his submissions, the Counsel borrowed aid from the cases of **Naftali Opondo Onyango…Vs…National Bank of Kenya Ltd** and **Agip (Kenya) Limited…Vs…Highland Tyres Ltd(2001) KLR.**

Analysis and Determination

16. I have carefully considered the instant application, the rival submissions by both Counsels and the law. The issue for determination in this **Ruling** is whether or not the suit herein is liable for dismissal for **Want of Prosecution** within the framework of **Order 17 Rule 2** of the **Civil Procedure Rules**.

17. Under **Order 17 Rule 2 (1)** of the **Civil Procedure Rules,** this court has jurisdiction to dismiss a suit for **Want Of Prosecution** if no step has been taken by either party for one year. The section 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."***

18. Further **Order 17 Rule 2(3)** states thus:

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

19. 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. The guiding criteria that is to be applied in considering whether or not a suit should be dismissed for Want of Prosecution has been articulated and settled in a number of leading authorities, among them, the case of **Ivita…Vs…Kyumbu(1984) KLR 441,** where it is summarized as follows:

> **"The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay."**

20. In the case of **Mwangi S. Kimenyi…Vs…Attorney General & Another, Civil Suit Misc. 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;**
>
> **i. whether the delay has been intentional and contumelious;**
>
> **ii. whether the delay or the conduct of the Plaintiff amounts to an abuse of the court;**
>
> **iii. whether the delay is inordinate and inexcusable;**
>
> **iv. 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**
>
> **v. 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."**

21. On the foregoing and in my considered view, a defendant seeking dismissal of a suit on the ground of Want of Prosecution must satisfy the legal requirement of one year threshold stipulated in **Order 17 Rule 2** of the **Civil Procedure Rules**. After satisfying the one year threshold, he must also show that there was inordinate and inexcusable delay in the circumstances of the case. Thirdly, he must satisfy the court that he will be prejudiced by the delay if the suit were to be allowed to proceed to trial. Lastly, he must satisfy the court that owing to the delay, a fair trial cannot be achieved. In the **Ivita…Vs...Kyumbu case (supra)** the court echoed this view by stating as follows:

> ***"(the defendant) 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."***

22. Therefore, there are three key questions to be answered in the Ruling.

The first question is whether the Applicant has satisfied the statutory threshold set out under **Order 17 Rule 2** of the **Civil Procedure Rules.** The second question is whether there has been inordinate and inexcusable delay on part of the Petitioner. The third question is whether it would cause grave injustice to the Respondent/Applicant if this case were to be allowed to proceed to trial notwithstanding any preceding delay on part of the Petitioner.

23. In the chronology of activities and events in the instant suit as reflected in the court record it is clear that this suit was commenced vide a Petition dated **15th August, 2003**. The petition has never been heard in substance save for two application one **dated 26th March, 2004** which sought to set aside and discharge liquidators appointed **on 27th October, 2003**. The 2nd application dated **26th March, 2004** sought to dismiss the petition on the grounds that there were alternative remedies which the petitioner ought to have pursued. The applications were made by the Respondent who is the Applicant in the instant application. The applications were substantially argued by counsels for both parties until on **17th June, 2009** when the court directed that the matter would be mentioned on a further date for issuance of further hearing direction. No further action was undertaken by both parties until on **27th June, 2019** when the Petitioner's recent advocate unilaterally fixed the matter for mention on **2th June, 2019** for directions. Unfortunately the court was not sitting and when a further mention date was fixed for **4th November, 2019**, the Respondent/ Applicant had already filed the instant application.

24. The Applicant argues that the recent fixing of the matter for mention by the Petitioner's current advocate is an effort to cover the inordinate delay in prosecuting the matter which has been pending for over ten years. The court was invited to consider that the burden was always upon the Petitioner to prosecute the matter timely but not the Respondent hence the argument that the delay was due to pending applications by the Applicant cannot hold any water. Since the suit was filed close to 16 years ago, it is submitted that the Applicant will be prejudiced since it cannot locate some of its witnesses and in the event that such witnesses were found then no substantial evidence could be retrieved from there owing to lapse of memories.

25. The Petitioner/Respondent on the other hand argued that the court should not interpret **Order 17 Rule 2** to include the period between the last time an application was made in court in **2009**. It is argued that the court should appreciate that the Petitioner's current advocate fixed the matter for mention on **27th June, 2019** and **30th July, 2019** but unfortunately the court was not sitting. As such, the period of delay should be calculated from the period when the matter was fixed for mention on **30th July, 2019**. Consequently the Petitioner averred that the instant application has not met the one year delay **under Order 17 Rule 2.**

26. In interpreting the period of delay, this court is of the considered view that the entire action of the Petitioner since filing of the suit should be taken into consideration. It is not disputed that this suit has never been fixed for hearing since the date it was filed i.e on the **15th August, 2003**. The inaction between **17th June, 2009** and **27th June, 2019** when the matter was fixed for mention cannot be overlooked. No explanation has been proffered by the Petitioner for the inaction save for the argument that the matter was pending two applications by the Respondent. Even in the **Replying Affidavit**, the Petitioner has not shown to the court how it wishes to proceed with hearing of the matter to help the court discern if the matter would proceed for hearing without prejudicing the Applicant. I do find the inaction of about 10 years inordinate and cannot be overlooked for the reason that the Petitioner's recent advocate has recently fixed the matter for hearing. That is undue *laches*.

27. In any event, it is the duty of the Plaintiff to bring its/his/her suit to early trial and it/he/she cannot absolve itself/himself/herself of its/his/her primary duty by shifting it to the Defendant. Neither can a Plaintiff allege that the Defendant consented to that position. In a nutshell, it cannot lie in the Petitioner's mouth to state that the Respondent was equally guilty of indolence in the prosecution of this suit. It was the Petitioner who instituted the suit and it is its duty to prosecute it to its logical conclusion. It cannot be denied that the Petitioner has been less than diligent in the prosecution of the suit. The Petitioner has been evidently dilatory and indolent. The record shows that it has taken the Petitioner close to ten years to fix the suit for mention for purposes of taking directions in the matter. Under such circumstances, this court in its inherent powers is well entitled to dismiss the suit under **Order 17 Rule 2** of the **Civil Procedure Rules 2010** for inexcusable failure to prosecute the suit. In the totality of the evidence, the Petitioner has obstructed or delayed the course of justice.

28. In the **Fitzpatrick Case**, Lord Denning MR said at page 658;

> ***"…It is the duty of the Plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. Just consider the times here. The accident was on December 13, 1916… It is impossible to have a fair trial after so long a time. The delay is far beyond anything, which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution.***

29. The foregoing answers the first two questions set out for determination in this ruling. The only aspect which remains for consideration is whether justice can be done to both parties in spite of the delay. The Defendant has submitted that it will be prejudiced if the suit is sustained for the reason that its witnesses cannot be traced and in the event they are located then it would be hard to retrieve any evidence due to lapse of memories.

30. In my view, it is for the Respondent in this case as the applicant to demonstrate that justice cannot be administered after such prolonged delay. It is for the Respondent to demonstrate prejudice unless it can be reasonably be inferred from the circumstances of the case. In the instant case I have found that the **delay of 10 years has not been satisfactorily explained and do further find that delay is a source of prejudice to the Respondent as it affects the fair administration of justice. Article 47 of the Constitution of Kenya 2010 provides for the right to administrative action that is expeditious, lawful, reasonable and procedurally fair. Article 159 of the said constitution provides that justice shall not be delayed. Failure to set down the suit for hearing for 10 years was a clear infringement of Article 159 of the Constitution of Kenya, 2010 as the failure delayed justice in this matter.**

31. In conclusion, I find the application by the Respondent seeking to dismiss the Petitioner's suit for want of prosecution merited and accordingly allow it, dismissing the Petitioner's suit against the Respondent for want of prosecution.

32. Each party shall bear its costs since the court is of the impression that the Respondent was awakened to file the instant application by the Petitioner's current advocate efforts to fix the matter for mention.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MOMBASA** on this **23rd** day of **September, 2020.**

D. O CHEPKWONY

JUDGE

23/9/2020

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020,** this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

D. O CHEPKWONY

JUDGE

23/9/2020