REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL SUIT NO. 17 OF 2017

NZOIA SUGAR COMPANY LIMITED.....PLAINTIFF

VERSUS

WEST KENYA SUGAR LIMITED.....DEFENDANT

RULING

1. The application to be determined is dated 7th July 2020. It is brought at the instance of the defendant, West Kenya Sugar Limited, seeking dismissal of the suit for want of prosecution. The gist of the application is that the suit was filed in August 2017, and that has been three years since, and the plaintiff has taken no steps to prosecute the same.

2. The defendant contends that it has been prejudiced, in the sense that the delay in prosecution of the suit has led to indefinite abeyance and that there is a likelihood of loss of memory, and difficulty of tracing witnesses in the matter, as some of them have since left their employment in search of greener pastures. It terms the delay unreasonable, inexcusable and inordinate.

3. The application is opposed. The plaintiff, on its part, terms the application as unmerited and lacking legal basis. It states that its operations have been paralyzed since 2018, and its employees sent on leave.

4. The application is premised on Order 17 Rule 2 of the Civil Procedure Rules, which provides:

> *"Notice to show cause why suit should not be dismissed;*
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> *(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.*
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> *(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.*
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> *(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.*
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> *(4) The court may dismiss the suit for non-compliance with any direction given under this Order."*

5. The exercise of the power to dismiss a suit for want of prosecution under Order 17 is a matter that is within the discretion of the court. In *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs. MD 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. Kyumbu [1984] KLR 441 espoused that:*
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> *"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."*

6. In *Invesco Assurance Co. Ltd vs. Oyange Barrack* [2018] eKLR, regarding the exercise of discretion, the court stated:

"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."

7. What then is the threshold? 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, where it 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."

8. In *George Gatere Kibata vs. George Kuria Mwaura & another* [2017] eKLR**,** the court stated:

"My understanding of the framework contained in Order 17 Rule 2 is that a court may suo moto dismiss a suit for want of prosecution. Within the same framework, the court may dismiss a suit on the same ground on the application of either party to the suit.

9. Besides the legal framework set out in Order 17 Rule 2, the guiding criteria 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.""

9. The court went on to say:

"Determination

11. I have carefully considered the affidavits in support of and against the Application, the submissions by counsel for the Applicant, the legal framework and the guiding jurisprudential principles on dismissal of suit for want of prosecution.

12. In my 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.

13. In answering the three questions set out in the opening paragraph of this Ruling, the court is to be guided by the legal framework in Order 17 Rule 2 and the guiding jurisprudential principles on dismissal of suit on account of want of prosecution. The court should also carefully and critically examine and evaluate the court record, the explanation tendered by the respondent in response to the application for dismissal, the general prevailing circumstances within the judicial system at the time of the alleged inaction, and the grounds put forth by the applicant in advancing the view that he would be exposed to grave injustice if the suit were to proceed to trial."

10. In *Mwangi S. Kimenyi vs. Attorney General and Another, (2004) eKLR,* the court stated:

"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."

11. In *Ecobank Ghana Limited vs. Triton Petroleum Co Limited & 5 Others* [2018] eKLR**,** the court observed:

"…it is well settled that in considering whether to dismiss a suit for want of prosecution the courts will consider the following guiding principles; whether the delay is inordinate, and if it is, whether the delay can be excused and lastly, whether either party is

likely to be prejudiced as a result of the delay or that a fair trial is not possible as a result of the delay."

12. On whether the delay is inordinate and inexcusable, the court in *Mwangi S. Kimenyi Vs. Attorney General & another* (supra) considered what constitutes inordinate delay, and said as follows:

> "*There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable...Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases."*

13. In the present case, a period of two years had lapsed between the filing of the suit and the filing of the present application. Order 17 Rule 2 provides that a matter should have been pending for twelve months before the court, either on its own motion or on the application by a party, makes an order for its dismissal for want of prosecution. The last time the instant matter was in court was on the 31st October 2017, when the court dismissed the plaintiff's application for temporary injunction. The plaintiff has not offered any reason as to why the suit has never been prosecuted save for the fact that they are no longer in operation, averments which have not also been proved. It is, therefore, my finding and holding that the delay is inordinate and inexcusable. See *Jimmy Mutuku Kiamba vs. Nation Media Group Limited & 2 others* [2020] eKLR.

14. With regard to prejudice on the part of the defendant, the defendant says it stands to suffer in terms of availing witnesses and building up their defence in the matter, while the plaintiff has not made any submissions on the same.

15. The courts have previously held that in an application for dismissal, such as the one presently before me, an applicant is expected to demonstrate, in specific terms the prejudice he, she or it stands to suffer. In *Mwangi S. Kimenyi* (supra), where it was said:

> "*… the Defendant must show he suffered some additional prejudice which is substantial and results to 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant. It must also be shown that the delay has worsened the Defendant's position in the suit. It will not, therefore, be sufficient to just make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out herein above."*

16. In *John Harun Mwau vs. Standard Limited & 2 others* [2017] eKLR**,** it was observed:

> "*But, the appellant's complaint was that in arriving at this conclusion, the learned judge failed to consider whether indeed the respondents had suffered prejudice, as no evidence was tendered to support the findings that the respondents' witnesses had suffered a memory loss or ill health.*
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> *The case of Ngwambu Ivita vs. Akton Mutua Kyumbu (supra) makes it clear that:*
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> "*The Defendant must however satisfy the court that he 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."*
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> *While it is true that the learned judge appreciated the respondents' assertion that the nature of the suit required that it be promptly prosecuted when the evidence was fresh and the witnesses were available and able to clearly recollect the facts of the case, this conclusion was reached without the benefit of any evidence in support**.** Nothing was shown by the respondents to demonstrate what prejudice they suffered due to unavailability of witnesses, or that due to the prolonged delay, a key witness had suffered memory loss or did not have a clear recollection of the events leading to the suit. Without evidence to show that the prolonged delay was prejudicial to the respondents' case, such that a fair trial was thereby rendered impossible, we are not persuaded that the two requisite tests for dismissal were sufficiently fulfilled. We are also cognizant that justice is better served by having matters determined on their merits, unless delay and inaction has resulted in intolerable prejudice.*
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> *In view of the above, we are not satisfied that the learned judge took into account all the pertinent matters in dismissing the appellant's suit for want of prosecution. We therefore allow the appeal."*

17. In the instant suit, it should be noted that there is no statement of defence filed in the matter. The defendant has also not filed any list of witnesses or witness statements. it is clear, therefore, that the defendant has failed to prove prejudice on its part.

18. Balancing the positions of the two parties, I take the view that delay of two years in prosecuting a matter is inordinate and unreasonable. The plaintiff has not explained it. The mere fact that the defendant has not demonstrated prejudice is not sufficient to sustain a suit that the plaintiff has shown no interest in prosecuting for the two years before the application for dismissal was made. It would appear that the suit was filed for the sole purpose of obtaining injunctive orders, and once the same were denied the plaintiff lost interest in the matter.

19. Parties should file suits in court with a view to prosecute them. It should never be the case that suits are filed for the sake of it. They should not remain parked in the court's registry, filling space and creating a false sense of backlog of cases. A suit should be prosecuted, failing which it should meet the fate of dismissal for want of prosecution.

20. I have not been persuaded that the plaintiff has any interest in the prosecution of the suit before me. I am persuaded that I should grant

the application before me, dated 7th July 2020 which I hereby do with costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT ATKAKAMEGA THIS.....18th……...DAY OF .....December.....2020

W MUSYOKA

JUDGE