REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 708 OF 2009

EDWARD GICHUJI WAMBIRI..... PLAINTIFF/APPLICANT

VERSUS

HANNAH NJERI THUBE.....DEFENDANT/RESPONDENT

RULING

1. This suit relates to a notice of motion application dated 22nd June 2018, brought under the provisions of; order 51 Rule (1) and (15) of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. The Applicant is seeking for orders; That the court be pleased to set aside the orders made on 23rd May 2014; dismissing the Plaintiff's suit; reinstate the suit and the costs of the application be in the cause. The application is premised on the grounds on the face of it and an affidavit in support sworn by the Applicant, Edward Gichunji Wambiri.

3. The Applicant deposes that, his Advocates on record filed an application dated 25th September 2009; seeking for an interim injunction to restrain the Respondent from disposing off or interfering with the suit land herein pending the hearing and determination of the suit. The application was heard on 12th February 2010, and a ruling dated 12th February 2010 delivered, whereby the application was dismissed, with an order that; the hearing of the matter would proceed only on the award of damages and not the claim over the suit land.

4. The Applicant being aggrieved by the ruling, instructed his Advocates to file an appeal. The notice of appeal dated 8th March 2010, was filed and copies of proceedings requested for from the Deputy Registrar. However, the typed proceedings were availed after the time allowed to file the record of appeal. As a result, an application for extension of time to file an appeal was filed, thus delaying the hearing and determination of the appeal.

5. The Civil Appeal No. 187 of 2013 was filed and heard in the year 2016. The judgment was delivered on 22nd September 2017, wherein the ruling dated 12th February 2010 was set aside and an temporary injunction issued and direction given that the substantive suit be heard and disposed of. On 12th March 2018, his Advocates attended the Court of appeal for settling terms of the order; so as to obtain the final orders of the Court.

6. The Applicant further avers that he is seeking for transfer of the suit property from the Respondent who took possession of the part thereof as a purchaser but has failed to complete paying the purchase price. However, she has taken possession thereof; fenced and leased out part of it f and is in the process of constructing buildings and other permanent structures thereon, thus continuing to benefit therefrom to his detriment.

7. That has suffered substantial loss in terms of the quiet and vacant possession of his land as well as his right to benefit economically from the land. Therefore, he prays that this suit be reinstated and heard on merit, as he has no other way of recovering the suit land from the Respondent. That the grant of the prayers sought will not occasion any prejudice to the Respondent, that cannot be compensated by costs. It is in the best interest of justice to allow the application.

8. However, the application was opposed by the Respondent who filed a replying affidavit she swore dated, 18th July 2018. She concurred with the facts that, indeed the Applicant filed an appeal against the decision rendered on the 12th February 2010 which dismissed the application for temporary injunction pending hearing and determination of the suit, with orders that the suit would proceed only for hearing for damages and not the claim over the land. However, the Respondent only requested for the typed proceedings in the year 2013.

9. The Respondent refuted the allegations that, she failed to complete the purchase price. That, in reality, she paid the full purchase price as agreed and it's the Applicant who failed to pick the banker's cheque from her Advocate on record at that time. Therefore, the allegations are

intended to hoodwink the court into sympathizing with him. That contrary to the averments by the Applicant, the suit property legally belongs to hers as the ownership and possession of the same was legally transferred to her by the Applicant.

10. Further, the Applicant's has erected shanties and illegal structures on part of her property, undermining the value of the property; affecting her business and causing the County Government of Nairobi; to issue several notices as these structures extensively occupy part of the road reserve. Her efforts to resolve the issue has been frustrated by the Respondent in cahoots with compromised county government officials.

11. That, attempts to survey and erect beacons on the property have been rendered futile as the Applicant has blatantly and negligently denied the surveyors access to the property. Further, the county government of Nairobi advised that, the consent for subdivision of the property to be granted, she had to build a permanent structure on the property. Thus she has invested heavily in the property and that the Applicant's actions are infringing on her constitutional right enjoy property as stipulated under Article 41 of the Constitution of Kenya.

12. She averred that, after the Applicant failed to stick to his end of the bargain and follow through with the sub division, both parties entered into an agreement dated 14th December 2006 and that the Applicant was to transfer the entire property to her name and she would pursue sub division of the same. However, the Applicant went against clause 5 of the sale agreement in which the property was to be sold with vacant possession and free of any encumbrances.

13. Be that as it were, she argued that, the directions for his case to be heard afresh by the Court of Appeal were given in September 2017 and the summons to enter appearance served upon her in the month of May 2018, a whole eight months later, a clear indication that, this suit is abuse of the court process, misconceived, lacks merit and a calculated move to cajole and harass her and therefore it ought to be dismissed with costs.

14. However, the Applicant filed a supplementary affidavit he swore dated 2nd August 2018. He deposed that, he instituted the suit through a plaint dated 25th September 2009 seeking orders of a permanent injunction against the Defendant's possession and interference with the suit property and for the Defendant to be compelled to transfer the suit property to him among other orders.

15. That his Advocates requested for copies of proceedings from the Deputy Registrar vide a letter dated 8th March 2010, produced as annexure "EGW4" in his supporting affidavit sworn on 22nd June 2018. That there was a delay of 442 days in the preparation and delivery of proceedings and a certificate of delay issued by the Deputy Registrar. Further, his Advocates filed an application dated 14th July 2011, before the Court of Appeal seeking for extension of time to file the record of appeal, which came up for hearing on; 16th July 2013, to which the parties recoreded a consent allowing the application.

16. Further, his Advocates complied with the orders of the Court of Appeal issued on 16th July 2013 and filed the record of appeal on 7th August 2013, which remained unheard until 30th November 2016 when parties were given leave to file written submissions. That contrary to the claims made that, he failed to complete paying the purchase price as agreed in the two agreements entered between the parties, it is as a result of the Respondent's breach, that he rescinded the two agreements in a letter dated 31st December 2008.

17. That he transferred the suit property to the Respondent pursuant to the further mutual agreement to the sale dated 14th December 2006, on the condition that she would complete paying the balance of the purchase price and further, sub-divide the property and retransfer 0.02 hectares of it to him. However, despite complying with the agreement and transferring the suit property to her, she refused and/or failed to pay the balance of the purchase price and retransfer 0.02 hectares of the suit property to him and he resorted to rescinding the two agreements and instituting this suit to recover the property, as she holds the same illegally.

18. That he has always been willing to prosecute this suit to completion and the delay to do so was occasioned by the ruling and orders of 12th February 2010, which gravely hindered his ability to pursue the claim over the suit property on the basis of breach of contract and rescission of contract as provided in the Plaint dated 25th September 2009. The Respondent has not suffered in any way by the delays caused in prosecuting this suit as she has been in continuous possession and use of the suit property.

19. The parties disposed of the application by filing submissions. The Applicant submitted that, the suit was dismissed, pursuant to Order 17 Rule 1 of the Civil Procedure Rules, without notice either him nor his Advocates on record. Therefore, he did not have an opportunity to be heard and explain the delay. He relied on the case of; *Ibrahim Athman Said vs Ibrahim Addille Abdullah & Another ELC No. 663 of 2009*, where the ruled that, before making an order pursuant to; Order 17 Rule 1, the Court has to make inquiry and h be satisfied that, indeed the notice issued was served on the parties. That the essence of requiring a notice to be given is so that; a party may be able to appear and if he is able, demonstrate and show cause to the court why the suit should not be dismissed.

20. The case of; *Utalii Transport Company Limited & 3 Others vs NIC Bank Ltd & Another, Civil Case No. 32 of 2010, eKLR*, was also cited where the court established the test to be applied in determining whether or not to dismiss a suit for want of prosecution, and observed that; "prolonged delay alone should not prevent the court from doing justice to all the parties. 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 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 in fair trial in that it is not possible to have a fair issue in action or

causes or likely to cause serious prejudice to the defendant; and

(v) What prejudice will the dismissal cause to the plaintiff?

44. The applicant submitted that, in deciding whether or not he has been indolent in prosecuting the case, it is important to consider the circumstances surrounding herein, in particular, the ruling of 12th February 2010 and how it prevented the Plaintiff from proceeding with his suit.

46. However the Respondent submitted that; in the case of; *Professior Mwangi S. Kimenya vs The Attorney General & Another, Civil Suit No. 720 of 2009*, the court stated there is no mandatory requirement under; Order 17 rule 2 of the Civil Procedure Rules that; a notice should be given to the Plaintiff before a suit which offends the order is dismissed for want of prosecution. The court also held that; -

> *"Equally, Order 17 rule 2 of the Civil Procedure Rules uses the word "give" and not "sure". To give notice is not the same thing as to serve notice within the context of the Civil Procedure. The distinction between the two terms is important because both are legal as well as technical but bear different meanings and entail different mechanisms albeit, however, both are intended to bring the matter at hand to the notice or attention of the party to be affected by the pleading. "Give" in the context of Order 17 rule 2 of the Civil Procedure Rules denotes "to impart or confer by a formal act" whereas in the legal sense denotes "to make legal delivery of the court process." See Black's Law Dictionary, Ninth Edition on this. My own view, therefore is that a notice under Order 17 Rule 2 of the Civil Procedure Rules is deemed to have been given by the court when it is placed in the official website of the Judiciary or in the cause list. Accordingly, notice for dismissal of this suit was given by the court through its website and the cause list for 29th February 2012."*

49. The Respondent further relied on the case of; *Fran Investment Limited vs G4S Security Services Limited, Civil Suit No. 466 of 2009*, where the court held that; Order 17 Rule 2(1) of the Civil Procedure Rules, does not require service of notice; it uses the word "give notice". Thus the court may give notice of dismissal through its official website or through the cause-list and those mediums will constitute sufficient notice for purposes of Order 17 Rule 2(1) of the Civil Procedure Rules.

50. That the legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of civil suits and founded on Article 159(2) (b) of the Constitution that justice shall not be delayed. Equally, Section 3A of the Civil Procedure Act gives the courts unlimited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. Further under Section 63(c) of the same Civil Procedure Act, which is the statutory basis for all interlocutory applications, courts are assigned the unfettered discretion where it is so prescribed, in order to salvage justice from defeat, to make such interlocutory orders as appear to the court to be just and convenient.

51. Similarly, the courts are also empowered by Sections 1A and 1B of the Civil Procedure Act to ensure that the overriding objectives of the Civil Procedure Act and Rules are attained in the administration of justice in a just, fair and expeditious manner. Finally, the procedural underpinning to the above substantive provisions of the law is; Order 17 Rule 2 of the Civil Procedure Rules which allows the court on its own motion or on notice to the parties, where no action in a suit has been taken for one year to either have the suit set down for hearing or apply to have it dismissed for want of prosecution.

53. That in the case of; *ET Monks & Company Ltd vs Evans (1985) 584*, the court made it clear that; public policy interest demands that the business of the court be conducted with expedition. The flipside of it was as held in the case of; *Agip (K) Ltd vs Highlands Tyres Ltd (2001) KLR 630*. Visram J. (as he then was) stated;

> *"it is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. It is therefore not possible that the rules committee intended to leave the plaintiff without a remedy and to take away the authority of the court when it made Order IVI Rule 5 of the Civil Procedure Rules."*

54. That the decision no doubt echo the provisions of; Article 48 of the Constitution that access to justice should not be impeded, as well as Article 50(1) of the Constitution on the right to a fair hearing.

55. Nonetheless, the discretion to dismiss the suit or otherwise 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. That 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."*

56. Further, subject to Order 40 Rule 6 of the Civil Procedure Rules 2010, interlocutory orders lapse after 12 months from the date they are issued, furthermore, part of the orders issued by the Court of Appeal were that the Appellant to take appropriate action and have the substantive suit heard and disposed of as soon as possible. The Applicant cannot thus purport that his reasons for not proceeding with his case were because of the orders of February 2010, orders of which had already lapsed. Therefore, he has always been indolent in prosecuting his case and the delay is inordinate and inexcusable.

57. I have considered the various arguments advance by the respective parties, the submissions tendered and the various legal principles cited in the many cases cited. I find that, although the main issue herein is whether; the Applicant has advanced satisfactory and/or adequate

reasons for the grant of the orders sought, the parties have extensively delved into the main substance of the matter. In that regard see; paragraphs 6, 7, 8 and 9 and 6, 7, 8, 9, 10, 11, 12, 13, 14 of the replying affidavit and paragraphs 9, 10, 11, 12, 14 of the supplementary affidavit. However, I shall however not descend into that arena.

58. Be that as it may, the brief history of the matter is that, this suit was commenced vide a plaint filed on 25th September 2009 alongside the chamber summons application of even date. The application heard and a ruling delivered on 12th February 2010. The notice of appeal was filed on 8th March 2010 and request for proceedings made on the same date. The memorandum of appeal dated 2nd August 2013, was lodged on 7th August 2013 and the appeal heard and determined on 22nd September 2017. Subsequently the notice of motion application to amend the plaint dated 18th May 2018 was filed on 24th May 2018.

59. The court record reveals that, after the ruling delivered on 12th February 2010, the matter remained dormant until the 23rd May 2014, when it was listed before Hon. Havelock J (Rtd) and dismissed for non-attendance by the parties. Apparently, it does appear that the court had issued the notice suo moto. Be that as it were, the next step in the matter was taken on 12th April 2018, when the Applicant fixed the matter for mention and subsequently filed this subject notice of motion application on 26th June 2018.

60. I have further perused the court file and noticed, a notice to show cause dated 29th April 2014, addressed to;

1. Njoroge & Musyoka Advocates,

Capital Hill Towers,

4th Floor, Cathedral Road

NAIROBI.

2. Hannah Njeri Thumbi,

Sian Tyre Center,

Ngong Road,

P.O. Box 20915-00200

NAIROBI.

NOTICE TO SHOW CAUSE WHY SUIT SHOULD NOT BE DISMISSED

(Order 17 rule 2 of the Civil Procedure Rules, 2010)

Whereas in this suit no application has been made or step taken by either party for over a year, you are hereby called upon to show cause by way of an affidavit why this suit should not be dismissed.

TAKE NOTICE that the matter is now listed for the aforesaid purpose on the 23rd May 2014 in court as shown on the cause list of the day .....Second Floor at 9.00am. If no sufficient cause is shown the suit will be dismissed.

Dated at Nairobi this 29th day of April 2014.

Signed

Deputy Registrar

Commercial & Admiralty Division, Nairobi

61. Of great significance is the fact that, there are three copies on the court file signed by the Hon. Deputy Registrar but there is no evidence of service thereof. Apparently, similar notices had been issued on; 21st January 2012, but were also not served as all the four copies are on the court file and do not reflect any service.

62. Therefore, it is possible and probable as deposed by the Applicant that, he and/or the Respondent was not served with the notice to show cause and as a result, none of the parties were in court on the date the matter was dismissed. Therefore, on that point alone, I shall give the Applicant the benefit of doubt. Similarly, it also suffices to note that, when the suit was dismissed on 23rd May 2014, the matter was still pending before the Court of Appeal, therefore the suit was erroneously dismissed. In that regard, the order for dismissal cannot stand.

63. However, the conduct of the matter and the Applicant in the expeditious disposal of the matter cannot be overlooked. It is noteworthy

that, the Judgment of the Court of Appeal was rendered on 22nd September 2017, and it took the Applicant over seven (7) months; to file the application dated 18th May 2018. That delay is not explained. Taking into account that, the matter has been in court for over ten (10) years, the Applicant is being indolent. However, on the saving grace of, the provisions of Article 159(2) of the Constitution 2010, Section 1A, and 1B of the Civil Procedure Act and in the interest of justice and for reasons stated above, I allow the application in terms of prayers (i), (ii) and (iii) as prayed.

It is so ordered.

Dated, delivered and signed in an open court this 29th day of August 2019.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Muchiri holding brief for Ms. Gichumbi for the Applicants

No appearance for the Respondents

Dennis ----------Court Assistant.