REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 597 OF 2002

NUREZ ZAHERALI KURJI……..……1ST PLAINTIFF

RAHIM SADRUDIN KURJI……...……..…2ND PLAINTIFF

HUSSEIN ZAHERALI KURJI…….3RD PLAINTIFF

ABDULLAI AKBERALI KURJI…….…….4TH PLAINTIFF

VERSUS

ANEER KASSIM LAKHA…….……1ST DEFENDANT

AMIR REHEMUTA…...…….……... 2ND DEFENDANT

SHIRAX ABDULAHI KARIM KURJI……...……..3RD DEFENDANT

ALTAF ABDULAHI KARIM KURJI…...……...4TH DEFENDANT

MINAZ SHOKATALI KARIM KURJI……...……....5TH DEFENDANT

FIAS SHOKATALI KARIM KURJI……...…….6TH DEFENDANT

RIAZA SHOKATALI KARIM KURJI……...……..7TH DEFENDANT

NAWAZ SHOKATALI KARIM KURJI……...……...8TH DEFENDANT

KARIM SHOKATALI KARIM KURJI……...……...9TH DEFENDANT

ARIF SHOKATALI KARIM KURJI……...……...10TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs' Notice of Motion application dated and filed on 18th December 2015 was brought pursuant to Sections 1A, 1B and 3A of the Civil procedure Act, Cap 21, Laws of Kenya, and all the enabling provisions of law. It sought the following remaining orders:-

> **1. THAT the Honourable Court be pleased to set aside its Order made on 25th February, 2015 dismissing the suit for want of prosecution and reinstate the suit herein or hearing on merit.**
>
> **2. THAT the costs of the application be in the cause.**

2. Their Written Submissions were dated and filed on 24th January 2017 while those of the 5th, 6th, 8th, 9th & 10th Defendants were dated and

filed on 25th February 2019.

3. Parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE PLAINTIFFS' CASE

4. The Plaintiffs' present application was supported by the Affidavit of its advocate, Chacha Odera that was sworn on 18th December 2015. It was also supported by the Affidavit of Ronald Mwania, a duly licenced process server. He also swore his affidavit on 18th December 2015.

5. Their case was that they filed suit on 8th April 2002 and further filed the documents towards pre-trial formalities. Their advocate wrote to the Deputy Registrar on 11th December 2015 seeking a mention for purposes of obtaining directions on the suit but on presenting the said letter, their advocate's clerk was informed that the suit was dismissed on 25th February 2015 for want of prosecution.

6. Their advocates subsequently established that the suit had been listed for dismissal for want of prosecution in the Kenya Law website www.Kenyalaw.org which notice escaped the attention of the merged firms of Ms Oraro & Co Advocates and Ms Hamilton Harrison & Matthews incorporating Oraro & Co Advocates which were at the time operating from more than two(2) offices with the resultant effect that some files including the file herein, got mixed up and were misplaced in either of the two(2) offices This information was corroborated by the aforesaid Ronald Mwania.

7. They were keen to prosecute their case and thus urged this court to allow their application as prayed.

The 5th,6th,9th & 10th Defendants' case

8. In response to the present application on 9th November 2016, the 9th Defendant swore the Replying affidavit on his own behalf and that of the 5th,6th,8th & 10th Defendants.

9. They averred that the suit was filed over twenty three (23) years and that trial was no longer possible in a normal, **(sic)** manner as it would prejudice them as the 1st Defendant who was the arbitrator is now 80 years old and the 2nd Defendant, the other arbitrator migrated to Canada and the 3rd Defendant migrated to Britain. In addition, the memory of all the witnesses was more likely than not be greatly impaired.

10. They pointed out that in their Defence they raised the issue of limitation because the suit was filed approximately nine (9) years after the family agreement that was made in 1993.

11. They contended out that even if the Plaintiffs' advocates never saw the notice of dismissal of suits for want of prosecution there was extraordinary delay of about thirteen (13) years at the time the application herein was filed and hence the Plaintiffs' conduct was inexcusable in law.

12. They were emphatic that there was no clear intention on the part of the Plaintiffs to prosecute their case and thus urged this court to dismiss the present application.

LEGAL ANALYSIS

13. The Plaintiffs argued that the right to be heard is a constitutional right under Article 50 of the Constitution of Kenya and that suit having been filed in 2010, the case herein was subject to compliance with the provisions of Order 11 Civil Procedure Rules.

14. They pointed out that the Defendants never took the initiative to fix the matter for hearing. They placed reliance on the case of **Austin Securities vs North Gate & English Stores Ltd [1969] I WLR at Page 529** where it was held that the court will look at the conduct of both parties and if a defendant had contributed to the delay or has agreed to it, the suit will seldom be dismissed.

15. They also relied on the case of **Utalii Transport Co Ltd & 3 others vs NIC Bank & Another [2014] eKLR** where it was held that before a court dismisses a suit without hearing the parties, it must consider:-

a) whether the delay was inexcusable;

b) whether the delay was an abuse of the court process;

c) whether the delay causes prejudice to the other party;

d) whether the dismissal will cause prejudice to the plaintiff;

e) whether the plaintiff offered a reasonable explanation for the delay.

16. They submitted that the case was dismissed during the service week when the judiciary for the first time posted thousands of cases on the

website of Kenya Law.Org for dismissal and which method of giving notices had not gained traction.

17. They also referred this court to several cases one of **Kenya Commercial Bank vs Samson Keengu Nyamweya [2019] eKLR** to the effect that no party should be penalized due to the mistakes of his counsel.

18. On their part, the Defendants relied on Article 159(2) (c) of the Constitution of Kenya that provides that there shall be no delay in dispensing justice. They added that Section 1A of the Civil Procedure Act stipulates that the overriding object of the Civil Procedure Rules is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

19. They acknowledged that under Order 17 Rule 2 of the Civil Procedure Rules, the court is bound to give notice and not serve notice. In this regard, they relied on the case of **Mwangi S Kaimenyi vs Attorney General & Another [2014] eKLR** where Gikonyo J held that under Order 17 Rule 2 of the Civil Procedure Rules, the court was deemed to have given notice when it placed in the official website of the Judiciary, the cause list. It also referred to the case of **Evan Investments Ltd vs G4S Security Services Ltd [2018] eKLR** where a similar holding was made.

20. They relied on the cases of **Peter Ndungu Njoroge vs Lazaro Mugo Munyi [2014] eKLR, Nilani vs Patel [1969] EA page 341, Pyrethrum Board of Kenya vs Samuel K Kihiu & 3 Others [2014] eKLR** amongst others where the common thrust was that it was the responsibility of a plaintiff to prosecute his case expeditiously and that the delay in prosecution of a suit prejudices a defendant which then leads to the court dismissing a suit for want of prosecution.

21. It also placed reliance on the case of **Charles Muiruri Njeri & Others vs Violet Wangui Kimui [2012] eKLR** where the court stated that as long as the threshold of one (1) year delay in prosecuting the case had been met, then the suit was subject to dismissal.

22. It referred this court to the case of **Eliud Munywa Mutungi vs Francis Murerwa [2014] eKLR** where the Court of Appeal upheld the High Court's decision not to reinstate a suit that had been filed twenty (20) years before.

23. They took issue with the Plaintiffs for having asserted that the Pre-trial Conference had not been conducted because its purpose was to expedite trial but not delay it.

24. They therefore submitted that it would be unjust to reinstate the suit as no justice can be done after more than twenty four (24) years.

25. After carefully perusing the parties' respective Written Submissions and the cases they relied upon, it was clear that both sides presented very strong cases. This is because their respective fundamental rights were enshrined in the Constitution of Kenya.

26. On one hand, the Plaintiffs were protected by Article 50(1) of the Constitution of Kenya. The same provides as follows:-

> **"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."**

27. On the other hand, the 5th, 6th, 8th, 9th & 10th Defendants' fundamental right to have a speedy resolution of their dispute could be found in Article 159(2) of the Constitution of Kenya. The same stipulates as follows:-

> **"Justice shall be administered without undue regard to procedural technicalities."**

28. This court wholly concurred with the holdings in **Mwangi S Kaimenyi vs Attorney General & Another** (Supra) that under Order 17 Rule 2 of the Civil Procedure Rules, all that a court is required to do is to **"give notice"** and not **"serve notice"** as was correctly pointed out by the 5th, 6th,8th 9th & 10th Defendants.

29. Order 17 Rule 2(1) of the Civil procedure Rules states that:-

> **" 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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."**

30. The Plaintiffs did not appear to have been averse to this interpretation. Their argument was, however, that whereas notice for dismissal of suit for want of prosecution was given, it was given in a medium that was ordinarily not used to notify parties of the dismissals.

31. This court took judicial notice that the court normally served parties with Notices under Order 17 Rule 2(1) of the Civil Procedure Rules. It was not therefore unreasonable for the Plaintiffs not to have known that their suit had been listed for dismissal for want of prosecution on the website for Kenya Law. It is not sufficient that a notice is issued, a party must be aware that the same was issued.

32. This is not withstanding the fact that the Plaintiffs took almost thirteen (13) years since suit was filed. This court holds the school of thought that in dismissing cases, courts should be guided by doing substantive justice to the parties. It is not only about clearing the backlog, which is however, very important.

33. The 5th, 6th, 8th , 9th & 10th Defendants did not present any evidence before this court to demonstrate that there was an ongoing campaign that matters would be listed for dismissal for want of prosecution in the www.Kenyalaw.org.

34. However, assuming that there was a spirited campaign that matters would be dismissed for want of prosecution, this court had to consider whether it was really fair for the Plaintiffs to be punished for the omissions and/or negligence of their advocates.

35. Right at the outset, this court came to the firm conclusion that no party should be penalised for the mistakes of his counsel as was aptly held in the case of **Shah vs Mbogo [1967] EA 116** that:-

> **"Apply the principle that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice, the motion should be refused.**

36. It was unfortunate that this case had taken about thirteen (13) years in courts before it was dismissed. As was rightly submitted by the 5th,6th,8th, 9th & 10th Defendants, they had been greatly prejudiced because some of them had migrated to other countries and there was likelihood of witnesses' memory fading.

37. Be that as it may, this court noted that the crucial witnesses were still alive. Even if they were to remain in their respective countries, technological advancement would facilitate the taking of their evidence. Indeed, the courts now have facilities for video conferencing and the witnesses need not come to Kenya to testify.

38. Accordingly, weighing the aforesaid two (2) fundamental rights, this court came to the firm conclusion that although the Plaintiffs had delayed in prosecuting their case, the delay was inordinate and inexcusable and the same had caused the 5th, 6th,8th ,9th and 10th Defendants great prejudice, there would be greater prejudice if the Plaintiffs were denied an opportunity to ventilate their case on merit.

39. If a wrong can be remedied or compensated by way of costs, then it would only be fair and in the interests of justice to allow an applicant to remedy the wrong and compensate his opponent by way of costs.

40. In the recent case of **Nurez Zeherali & Others vs Ammer Kaseem Lakha** (Supra), the Court of Appeal set aside orders dismissing a suit for want of prosecution on the ground that the appellant therein did not have prior notice that the suit was to be dismissed for want of prosecution and that appellants' advocate chanced on the matter on the cause list for the day.

41. The circumstances were more or else similar to this case in that the Plaintiffs did not have prior notice that the suit had been listed for dismissal for want of prosecution.

42. Having obtained guidance from the said Court of Appeal decision, this court took the view that it would be best to give the Plaintiffs another opportunity to prosecute their case because their keenness to prosecute the same was demonstrated by the filing of the present application to reinstate the suit without undue delay.

DISPOSITION

43. For the foregoing reasons, the upshot of this court's decision was that the Plaintiffs' Notice of Motion application dated and filed on 18th December 2015 was merited and was hereby allowed in the following terms:-

> **1. THAT the orders that were issued on 25th February 2015 dismissing the suit herein for want of prosecution be and are hereby set aside. The effect thereof is that the suit herein is hereby reinstated.**
>
> **2. THAT the matter be mentioned before the Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division on 3rd December 2019 for directions on fixing a date for Pre-Trial Conference.**
>
> **3. THAT the Plaintiffs to pay the 5th, 6th,8th,9th & 10th Defendants throw away costs in the sum of Kshs.100,000/= for having failed to prosecute the matter for over thirteen (13) years before its dismissal.**
>
> **4. THAT costs of the application to be in the cause.**

44. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of November 2019

J. KAMAU

JUDGE