REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL SUIT NO. 131 OF 2009

JIM RODGERS GITONGA NJERU.....PLAINTIFF

VERSUS

AL-HUSNAIN MOTORS LIMITED.....1ST DEFENDANT

JANEROSE MUGAMBI.....2ND DEFENDANT

S.S. MEHTA & SONS LIMITED.....3RD DEFENDANT

R U L I N G

A. Introduction

1. The plaintiff filed an application dated 11th April 2018 seeking the following orders:

a) That this Honourable court do issue an order reinstating Civil Suit No. 131 of 2009 which was dismissed on 21st July 2015 for reason of want of prosecution.

b) Costs of the Application be provided for.

2. The 3rd respondent filed grounds of opposition dated 4th June 2018 to the plaintiff's application on the grounds that;

a) The reasons advanced in support of the application are not convincing.

b) The court has held that existence of moratorium orders should not bar prosecution of suits held against insureds of such insurance companies.

c) There has been inordinate delay in prosecuting the suit and filing this application.

d) Reinstating the suit will be prejudicial to the 3rd defendant who has already paid its advocates fees and closed its file.

e) ***The application lacks merit.***

3. Mr Ithiga who represented the 2nd defendant in the lower court on the instructions of Blue Shield Insurance told court that Blue Shield Insurance had been wound up and that he had no instructions to represent the 2nd defendant in the current suit.

4. Parties agreed to settle the matter by way of written submissions.

B. Plaintiff's Submissions

5. The Plaintiff submitted that he was not served with a notice to show cause as provided by Order 17 Rule 2(1) of the Civil Procedure Rules and that this was against the plaintiff's right to a fair trial. He relied on the case of **Associated Warehouse Co. Ltd & Others v Trust Bank Ltd HCCC No. 1266 of 1999 (unreported)** as quoted in **Ibrahim Athman Said (suing in his capacity as administrator ad litem) v Ibrahim Abdille Abdullah & Another [2014] eKLR.**

6. The applicant further submitted that the insurer for the 2nd defendant was under receivership and that there was a court order staying actions against them.

7. The applicant further submitted that the delay in prosecuting the matter was inadvertent and due to an error of the plaintiff's advocate and as such, the same mistake should not be visited on the plaintiff who was a layman wholly dependent on his advocate. He relied on the case of **Belinda Murai & Others v Amos Wainaina [1978].**

8. The applicant further submitted that it was in the interest of justice that the suit be reinstated. He relied on the overriding objective and the constitutional and statutory framework on civil procedure to achieve substantial justice.

3rd Defendant Submissions

9. The 3rd defendant submitted that the court was not obligated to send a notice under Order 17 rule 2 of the Civil Procedure Rules. He relied on the case of **Jason Mungai Kamau v Jane Kamau & 4 Others [2008] eKLR.**

10. They further submitted that the plaintiff was not barred from prosecuting the suit and further that the order annexed to the plaintiff's application did not give any indication that there was a stay of proceedings against the company's insured. They relied on the case of **Muthuri Ntara & Another v Francis Mworia Igweta [2016] eKLR** that stated that a moratorium issued to protect the insurance company whose fortunes had dwindled did not operate as a stay of execution of decrees against the insured.

11. They further submitted that it was not enough for the plaintiff to blame his advocates for the inadvertent delay. He relied on the case of **Teacher Service Commission v Ex-parte Patrick M Njuguna [2013] eKLR** and **Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002.**

12. The 3rd defendant further submitted that they would suffer great prejudice as it had already closed its file and paid its advocate and further that some of its witnesses had left its employment and that some of its documents had been lost or misplaced.

C. The Determination

13. I have carefully considered the application as presented and the submissions made by counsel for both the plaintiff and the 3rd defendant. In my view, the only issue for determination is whether the plaintiff has satisfied this court to move it to reinstate the suit.

14. It is within the general discretion of the Court to set aside any order issued by it ex parte, so long as sufficient cause has been shown for the exercise of such discretion. Although Learned Counsel, in their written submissions urged the Court to consider the application from the prism of whether there has been inordinate delay; or whether the delay was inexcusable.

15. It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation. I say so because in the case of **Ivita vs. Kyumbu [1984] KLR 441** the said principles were set out thus:

> ***"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff 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. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time***. (Emphasis supplied)

16. Thus, I find instructive the expressions of the Court in **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173** that:

> ***"In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order… was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."***

17. Accordingly, the Court would be interested in finding out the Plaintiff's explanation for not attending Court to defend the Notice to Show Cause; and whether any prejudice will be suffered by either the Plaintiff or the Defendants should the ex parte orders be set aside and the suit reinstated to hearing and disposal on the merits. To this end, the Plaintiff averred, in his Supporting Affidavit, that there was a moratorium staying all claims against the insurer and as result, the matter could not be fixed for hearing.

18. From the proceedings of 21st July 2015, it is discernible that the Court moved suo motu. The 3rd respondent in their written submissions, urged the Court to reflect on the constitutional imperative under Article 159 thereof that cases be disposed of expeditiously. It was further submitted by the 3rd respondent that Order 17 Rule 2(1) of the Civil Procedure Rules does not require service of notice, and that it uses the

words "give notice in writing;" and the Court should take notice that service was then being effected through the Cause List and the websites of the Judiciary and the Law Society of Kenya. Thus, the Court was called upon to give effect to the Overriding Objective of the Civil Procedure Act as outlined under Sections 1A and 1B thereof; which include the use of suitable technology.

19. I agree entirely with the foregoing submissions and would accordingly endorse the expressions of the Court in the case of **Fran Investments Limited vs. G4S Security Services Limited [2015] eKLR** in which the Court had occasion to consider the aforesaid provision and held the view that:

> ***"Order 17 Rule 2(1) of the Civil Procedure Rules does not require service of notice; it uses the word "give notice". 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."***

20. However, there is no demonstration herein that notification herein was via the cause list of or the website. As has been stated herein above, upon the denial of service by the applicant, the defendants were put on notice to demonstrate that service was indeed effected. This, in my considered view, is not a matter for judicial notice, given its primacy to the application at hand. The defendants opted not to rebut the plaintiff's averments in this regard and therefore are deemed to have admitted those averments.

21. More importantly, in the Court Order of 21st July 2015, it is expressly stated that:

> ***"After the inordinate delay of 3 years since the last step was taken on 16/11/2011 with view to proceeding with the Suit, and service of Notice having been effected to show cause why this suit should not be dismissed and there being no satisfactory response, the Court in exercise of the powers conferred upon by Order 16 Rule 6 of the Civil Procedure Rules hereby orders this suit dismissed/closed."***

22. In view of the clear wording of the Order, there ought to have been proof of such service; which does not appear to be on the court file. This may be attributed to lapses in the internal registry operations of the Court, but it is nevertheless a mistake for which the Applicant should not be blamed. In this regard I would restate the words of Apaloo, JA in the case of **Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103** that:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."***

23. Accordingly, I would resolve the question of service in favour of the applicant.

24. On the question of prejudice, it was submitted on behalf of the applicant that the defendants would suffer no prejudice that cannot be adequately remedied by costs. On the other hand, counsel for the 3rd respondent submitted that the 3rd respondent stands to suffer prejudice that cannot be assuaged by way of costs if this suit is reinstated, in that "*... some of its witnesses even left its employment and documents that would have been relied on at trial have been lost and or been misplaced.*"

25. It is instructive however, that in the case of **Ivita vs. Kyumbu** (supra) it was made explicit that it is the duty of the defendant to demonstrate the prejudice alleged by it. The defendant must satisfy the court that it will be prejudiced by the delay by showing that justice will not be done in the case due to the prolonged delay on the part of the plaintiff. All there is herein are allegations in the written submissions filed by counsel for the defendants. There was no tangible proof that any of the witnesses has since left its employ or died; or even that any of the documents it purposed to rely on herein has since been destroyed; and it cannot be gainsaid that costs of litigation are costs that are recoverable. Indeed, with regard to irreparable or insurmountable trial prejudice, Lenaola, J had the following to say in the case of **Joshua Chelelgo Kulei vs. Republic & 9 others [2014] eKLR**, which I entirely agree with:

> ***"Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability."***

26. Accordingly, I would take the view that, in the circumstances hereof, no prejudice would befall the defendants which cannot be remedied by an award of costs; and that to the contrary, it is the plaintiff who would be greatly prejudiced by being driven from the seat of justice without a hearing, were his application to be dismissed.

27. The foregoing being my view of the matter, I would allow the application dated 11th April 2018 and set aside the dismissal order of 21st July, 2015 and order that the suit be reinstated for hearing and determination on the merits.

28. The plaintiff will meet the costs of this application Kshs. 20,000/= to the 3rd defendant within 30 days.

29. I hereby direct that this case be fixed for hearing or be settled within 30 days' failure to which these orders will be automatically vacated.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Mr. Megi for 3rd defendant