REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 160 OF 2015

LAFFEY CONSTRUCTION CO. LTD.....PLAINTIFF/RESPONDENT

-VERSUS-

PRISM INVESTIMENTS LTD.....DEFENDANT/APPLICANT

RULING

1. This ruling relates to a Notice of Motion Application dated 14th November 2017, filed by the Defendant (herein "the Applicant") It is brought under the provisions of Sections 1A, 1B, and 3A of the Civil Procedure Act, Orders 17 Rule 2 and Order 51 Rule 11 of the Civil Procedure Rules, 2010 and all the enabling provisions of the law. The Application is supported by an Affidavit dated the same date of the Application sworn by Jomo Nyaribo, the legal Counsel who has contact of the matter.

2. The Applicant is seeking that the suit be dismissed for want of prosecution and the costs thereof and of this Application be awarded to it. It is averred that the suit herein was filed on 27th March 2015, whereby the Plaintiff is seeking for various reliefs against the Applicant, as outlined under paragraph g (a) to (e) of the Plaint. That on the 18thAugust 2016, the Court delivered a ruling herein whereupon an order of injunction was issued in favour of the Plaintiff (herein "the Respondent") pending the hearing and determination of the case.

3. However, that since the 18th August 2016, being a period of over 15 months, the Respondent has not taken any steps to prosecute the suit, and as a result thereof the Applicant has been greatly prejudiced by the prolonged, inordinate and inexcusable delay in prosecuting the matter. It is averred that the Applicant requested that the Respondent show cause why the suit should not be dismissed for want of prosecution but was directed to file an Application for the same, hence the current Application.

4. The Applicant avers that the suit is an abuse of the Court process and should be dismissed, as prayed as the Applicant stands to suffer prejudice if the Application is not granted and litigation should come to an end. The Application was opposed by the Respondent vide grounds of opposition filed on 9th April, 2018.

5. The parties subsequently agreed to dispose of the Application by filing submissions, which I have considered herein. In a nutshell, the Applicant referred the Court to the provisions of Article 159(2) (b) of the Constitution of Kenya, and argued that justice should not be delayed.

6. Further reference was made to the case of: *Birket – vs- James (1978) A.C 297,* which sets down the principles that guide dismissal of the suit as follows:-

a) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;

b) Whether the delay is intentional, contumelious and, therefore, inexcusable;

c) Whether the delay is an abuse of the court process;

d) Whether the delay gives rise to substantial risk to fair trial or cause serious prejudice to the Defendant;

e) What prejudice will the dismissal occasion to the plaintiff/Respondent;

f) Whether the plaintiff has offered a reasonable explanation for the delay.

7. Finally reference was made to the Halbury's Laws of England Vol. 37, where it is stated that;

> *"The power to dismiss an action for want of prosecution, without giving the Plaintiff the opportunity to remedy his default, will not be exercised unless the Court is satisfied:-*
>
> *a) That the default has been intentional and contumelious; or*
>
> *b) That there has been prolonged or inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have cause serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party."*

8. The Applicant further reiterated that, 15 months have gone by and no action has been taken in this matter and therefore there is inaction on the part of the Respondent, for over one year. Reference was made to the provisions of Order 17 Rule 2 of Civil Procedure Rules which provides for dismissal of a suit where more than 12 months have gone by and no action taken in the matter.

9. The Applicant submitted further though inordinate delay, is not measurable, it should not be difficult to ascertain. Reference was made to the cases of; *Mwangi S. Kimenyi –vs- A.G & Another [2014] eKLR*, where it was held that the litmus test is that it should be an amount of delay which leads to inescapable conclusion that, it is inordinate and therefore, inexcusable.

10. That public policy demands that the business of the court should be conducted with expedition (*Fitspatrick –vs- Batger & Co. Ltd) [1967] 1 All ER 657*. Further reference was made to the provisions of Order 40 Rule 6 of the Civil Procedure Rule, 2010, where it is provided that, an injunction granted in a case where no action has been taken over one year, lapses automatically unless for any sufficient reasons, the Court orders otherwise.

11. It was further argued that, the Respondent is duty bound under Section 1 A, (3) of Civil Procedure Act to assist the Court further the Overriding Objectives of the Act, by participating in the process of the Court and comply with the orders given. The Applicant reiterated that it will suffer prejudice as the project is heavily financed by third Party and the Applicant is making high monthly installments.

12. Finally it was argued that the Respondent has failed, neglected and refused to give a reasonable explanation in the grounds filed, as to why they did not prosecute the case. Reference was made to the case of; *Moses Mwangi Kimari vs Shammi K Thomas &2 Others (2014)eKLR;*

13. However, the Respondent in response submission stated that, the Application lacks merit for reasons that, while there has been a delay of over one year, it was not intentional, and neither does it amount an abuse of the Court process. Reference was made to the case of; *Ivita –vs- Kyumbu [1975] eKLR,* where it is stated that, in exercising the discretion to determine an Application as herein, the Court should be guided by the principles laid down therein, being that;

> *"So 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 the Defendant; so both parties to the suit must be considered and the position of the judge too"*

14. That the aforesaid test followed in the case of; *Utalii Transport Co. Ltd & 3 Others – vs- NIC Bank & Another [2014] eKLR.* Similarly, whereas it is admitted that the Respondent has not taken steps to progress the suit, the Applicant is equally guilty of failing to take steps to progress the suit, as it has not complied with the Practice directions.

15. Further the Applicant has not demonstrated in the Affidavit in support of the Application, the prejudice it will suffer which cannot be compensated by an award of damages, if the suit is not dismissed. Reference was made to the case of; *Baiklinyua Enterprises Ltd – vs- Standard Limited & Another [2016]eKLR* and the case of; *Utalii Transport Company limited & 3 others (supra)*, where the Court held as follows;

> *"Nothing was placed before the Court which suggests that the delay herein amounts to abuse of the process of Court. The Defendant did not show that the delay is being used or is contrived to afford the Plaintiff collateral advantage over the Defendant."*

16. The Respondent argued that, it is ready to prosecute the suit, as evidenced by the fact that, it hurriedly took steps to comply with Practice directions, with a view to fixing the matter for Case Management Conference. That even in the given circumstances, the case can still be determined on merit and justice be done. That if the suit is dismissed the Respondent will suffer prejudice having performed a service for which they have not been paid an amount of Kenya Shillings Twenty Seven Million (Ksh.27,000,000.00).

17. The Respondent argued that the authorities cited by the Applicant are distinguishable in that in the case of; *Jane Muthoni Kinyua & 8 others* (supra) the delay was for a period of 10 years and three application for dismissal had been filed, and in the case of; *Music Copyright Society of Kenya* (supra) the Plaintiff had not complied with practice directions which the Respondent herein has so far done.

18. The Respondent urged the Court accord it a second and last chance to prosecute the suit, in deference to the dictates of substantive justice which is one of the Constitutional principles enunciated under Article 159 of the Constitution and is also enacted under Section 1A and 1B of the Civil Procedure Act; the right to a fair and public hearing enshrined in Article 50 (1) of the Constitution of Kenya and which requires that as far as possible, cases should be determined on their merits, after hearing all the parties to a dispute.

19. I have considered the Application, the Affidavit in support and the grounds in opposition thereto. I have also considered the respective

submissions by the parties and the authorities cited therein. I note that the Court delivered a ruling in this matter on 18th August 2016, whereby an interim injunction order was issued to restrain the Applicants from disposing off the subject sued properties.

20. It is clear from the records that no action was taken in the matter thereafter until the 14th day of November 2017, when the Applicant sought for the dismissal of the suit and subsequently filed the subject Application. I have considered the grounds in opposition to the Application advanced and I agree with the Applicant that generally nothing much falls on them.

21. However I do note that subsequently, the Respondents have listed the matter for Case Management Conference filed Reply to defense, supplementary list of documents and a supplementary witness statement. In the given circumstance they seem to have redeemed their conduct of delay. Be that as it were, it should be appreciated that any delay however short lived, will obviously cause prejudice to the opposite party. It should not be dismissed casually as being capable of being compensated with an award of damages. It was surprising to hear the Respondent purport to attribute blame to the Applicant!

22. However, I have also considered the averment in the Plaint and the prayers therein and find that it will be in the interest of substantive justice to allow the Respondent an opportunity to approach the seat of justice and prosecute its Claim. I also note that, generally from the year 2015 to the time in which the Court delivered its ruling in the year 2016 the matter has been active in Court. It is against this background that I make the following orders:

a. The Plaintiff to comply with the pre-trial direction's within Two (2) weeks of this order;

b. If the Defendant have not complied they, should also comply within the same period of time;

c. Thereafter the matter should be mentioned before the Hon. Deputy Registrar for confirmation of compliance. In that regard Case Management Conference shall be conducted before the Hon. Deputy Registrar;

d. The default case automatically dismissed with costs after Two (2) weeks.

e. Thrown away costs of Kshs20,000.00 is awarded to the to the Defendant payable on or before 12th July 2018.

23. Those then are the orders of the Court.

Dated, delivered and signed in an open Court on this 26th day of June 2018, at Nairobi.

GRACE L. NZIOKA

JUDGE

Delivered in the presence of;

Ms. Waititu ----------for the Plaintiff/Respondent

Mr. Nyaribo----------for the Defendant/Applicant

Mr. Fred..... Court Assistant