REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 285 OF 2010

NILESH PREMCHAND MULJI SHAH

PREMCHAND MULJI SHAH

T/A KETAN EMPORIUM……. …….....PLAINTIFF

VERSUS

M.D. POPAT AND OTHERS ….……..…….....1ST DEFENDANT

DAYALAL BHANJI & SONS LTD…….....…..….2ND DEFENDANT

RULING

1. By an application dated 30th September 2015, the defendants/ applicants M.D. Popat & Others and Dayalal Bhanji & Sons Ltd seek from this court orders:-

a) That the plaintiff's suit be dismissed for want of prosecution.

b) That the costs of this application be provided for.

2. The application is brought under the provisions of Order 17 Rule 2(3) of the Civil Procedure Rules and Order 51 of the Civil Procedure Rule. The said application is premised on the grounds that:

a. The period of more than twenty (20) months has lapsed since close of pleadings and no steps have been taken to fix the matter for hearing by the plaintiff.

b. That the delay is inordinate and inexcusable.

c. That it is in the wider interest of justice that the orders sought be grounded.

3. The application is further based on the affidavit sworn by Jitenda V. Popat, the director of the 2nd defendant company and who deposed on 30th September 2015 that pleadings in this matter were closed on 22nd December 2010 when the plaintiff filed its reply to defence and defence to counterclaim. That from that time that pleadings were closed, the plaintiff had not taken any steps towards fixing the hearing date which delay is inordinate and the same amounts to an injustice to the defendants' case. Further, that the plaintiff must have lost interest in his case and the pendence of the case was causing the defendants unwarranted anxiety and expense and hence prejudicial to the

defendants; and that it was fair and just that the suit by the plaintiff against the defendants be dismissed as delayed justice is denied justice.

4. The record shows that the plaintiff's counsels on record were served with the subject Notice of Motion on 30th September 2015 as shown by the affidavit of service sworn by Peter Wandeto Njogu process server on 9th November 2015 and filed in court on 10th November 2015. However, as at 10th November 2015 when the application came up for hearing interpartes, no replying affidavit or grounds of opposition had been filed by the plaintiff/respondent and the court allowed the applicant to proceed and argue the application exparte. The defendants/ applicants' counsel argued the application, relying on the grounds and affidavit sworn by Jitenda Popat sworn on 30th September 2015 as reproduced above and maintaining that the plaintiff had not offered any explanation for the delay in prosecuting his suit hence the same should be dismissed for want of prosecution with costs, adding that the pendency of the suit created unnecessary backlog of cases in court. There was no response to the oral submissions by the defendant's/applicant's counsel.

5. I have carefully considered the application as presented and the oral submissions made by counsel for the defendants, Mr Muli advocate. In my view, the only issue for determination is whether the defendants have made out a case to warrant grant of orders sought for dismissal of this suit for want of prosecution.

6. The legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of Civil Suits and can be found in 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. Under Section 63 (e) 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.

7. 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.

8. The procedural underpinning to the above substantive provisions of the Constitution and 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.

9. In **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 **Agip (K) Ltd V 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 IV1 Rule 5 of Civil Procedure Rule."***

10. The above decision by Visram J (as he then was)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.

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 V 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."***

12. From the above decision, it is trite that the power to dismiss a suit or an action is a discretionary one which discretion must be exercised judiciously. In **Naftali Onyango v National Bank of Kenya [2005] e KLR**, the court reiterated the burden of proof a defendant seeking for dismissal of suit for want of prosecution must meet. Citing Salmon L.J. in **Allan V Sir Alfred MC Alphine and sons Ltd [1968] 1 ALL ER 543,** F. Azangalala J (as he then was) stated as follows:-

> ***"The defendant must show:***
>
> ***i. That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.***
>
> ***ii. That this inordinate delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.***
>
> ***iii. That the defendants are likely to be seriously prejudices by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between themselves and the plaintiff or between each of other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule the longer the delay the greater the likelihood of prejudice at trial."***

13. Examining the record herein, this suit was instituted on 4th June 2010 vide a plaint dated the same day. The plaintiff's claim against the defendant is for a declaration that the plaintiff is a tenant of the 1st defendant in premises LR No. 209/138/25 Nairobi and that the said tenancy is a controlled tenancy as defined by Chapter 301 Laws of Kenya; an order to direct the defendants or their servants, agents, and or licensees to give access and reinstate the plaintiff into the said premises unconditionally, and to allow the plaintiff to remain in quiet possession and occupation of the suit premises; general damages; special damages of illegal distress and loss of goods and business; costs and interest and any other relief the court may deem fit to grant.

14. The suit was filed simultaneous with an application under certificate of urgency on the same day seeking for temporary interim injunctive orders which the court per Rawal J (as she then was) did issue on 7th June 2010 pending interpartes hearing. The said orders were subsequently extended by Dulu J on 16th June 2010 until 27th July 2010, 5th October 2010, 3rd November 2010 and on 29th November 2010 Honourable Dulu J delivered a final ruling on the application which was canvassed interpartes by way of written submissions, dismissing the application by the plaintiff/applicant with costs to the defendant/respondent.

15. On 22nd December 2010 the plaintiff filed reply to defence and defence to the defendant's counterclaim lodged on 7th December 2010 and dated 6th December 2010 . From thence, no action was taken in the suit until 30th September 2015 when this application to dismiss the suit for want of prosecution was filed by the defendant.

16. The plaintiff has not filed any replying affidavit to this application explaining the reasons for the

inaction for nearly 5 years from the last date when the pleadings closed. That being the case, this court can only make an inference that the plaintiff has lost interest in the suit and is only out to archive the pleadings in court. The defendants have a counterclaim to prosecute. The delay in setting down the matter for hearing no doubt prejudices the defendant as justice delayed is justice denied. The plaintiff has not given any excuse for their inaction. The court is aware that the act of dismissing a suit is a draconian measure which should be exercised cautiously as it drives the party away from the judgment seat of justice. Nonetheless the court is bound to do justice to both parties without undue delay, which delay occasions injustice to the either party to the dispute and in this case, delay defeats equity.

17. The plaintiff filed suit, failed to get injunctive orders to preserve the status quo and went to slumber. He has not been vigilant or at all to have his suit heard and determined. The court shall therefore not hesitate to have the suit dismissed because the continued delay no doubt infringes on the defendants' rights and legitimate expectations that disputes against them should be resolved expeditiously. Albeit the defendants have a counter claim, they are not bound to prosecute the plaintiff's suit.

18. In the premises, and as the plaintiff failed to explain the delay, failure to grant the orders in the application by the defendant dated 30th September 2015 would in essence be a lavish exercise of discretion which this court is not prepared to engage in. In the end, I find the application by the defendant seeking to dismiss the plaintiff's suit for want of prosecution merited and accordingly allow it, dismissing the plaintiff's suit against the defendants for want of prosecution. I award costs of this application and the suit to the defendants.

I further order that the defendant do comply with all the pretrial requirements in the counterclaim within 45 days from the date hereof.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 20th day of January 2016.

R.E. ABURILI

JUDGE

20.1.2016

Coram Honourable Aburili J

C.A. Adline

Mr Karige holding brief for Mr Muli for 1st and 2nd defendants/applicants.

No appearance for the respondent.

Court - Ruling read and delivered in open court as scheduled.

R.E. ABURILI

JUDGE