REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO.9 OF 1997

MERU MEDICAL STORES COMPANY LIMITED…….……..PLAINTIFF

Versus

STANLEY KABIRA MWITHIMBU……..…..…..…..1ST DEFENDANT

FRANCIS MUNG'ORI IMANENE……..…….…..….....…2ND DEFENDANT

GEORGE M MARANGU T/A SHELTER AUCTIONEERS.....3RD DEFENDANT

RULING

[1] I have before me a Notice of Motion Application expressed to be brought pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act in which the Applicant is seeking the following orders:

> **1. That this suit be marked as "dismissed" in terms of the court's ruling dated 3rd November 2011.**
>
> **2. That costs of this application and the suit be provided for.**

[2] The major reasons for applying are that; in a Ruling by Makau J delivered on 3rd November 2011, the judge ordered and directed the Plaintiff to set the suit down for hearing within the next 45 days, in default whereof the suit shall stand dismissed. But, since the said ruling was made, more than 877 days have passed by without the suit having been fixed for hearing. Therefore, the Applicant believes the said order was not obeyed and so this suit stands dismissed. The Applicant is convinced that, in the interest of justice, the said court order should be confirmed and the suit be dismissed.

[3] The Plaintiff opposed the application through a Replying Affidavit sworn by his Counsel. Counsel deposed *inter alia* that the Plaintiff complied with the order by Makau J made on 3rd November 2011 because it was clear from the court record that on 15th December 2011, parties clerks were in the registry where they fixed the matter by consent for hearing on 9th May 2012.

[4] Parties also filed written submission in support of their avowed standpoints as was directed by the court on 15th December 2015. The Applicant only added that by 2009 this case was in court only once prompting the application dated 27th March 2009 praying that the suit be dismissed for want of prosecution. And with the persistent disobedience of the court order the Plaintiff should be taken to have no interest in proceeding with this suit. Accordingly, despite the invitation of the defendant on 14th

December 2011 to fix the matter for hearing, and the ensuing date for hearing scheduled for 9th May 2012 did not mean that the matter was heard within 45 days as directed by the court.

[5] On the other hand, it was submitted for the Plaintiff that the application herein was an attempt to gain unfair advantage through untenable technicalities of procedures which have been pushed by the 1st defendant consistently from 30th March 2009 when he filed exactly similar application to dismiss the suit for want of prosecution. It was further submitted for the Plaintiff that this application is a misinterpretation of a court order of Justice Makau in his ruling of 3rd November 2011. Consequently, the Plaintiff urged that the application was frivolous and vexatious and a total abuse of the process of court and ought to be dismissed with costs.

DETERMINATION

[6] Upon careful consideration of this application, the rival submissions by the parties as well as the law, I take the following view of the matter. Below is the specific order upon which this application is premised and was made by Makau J on 3rd November 2011 that:

> "***The Plaintiff should set the suit down for hearing within the next 45 days in default whereof the suit shall stand dismissed."***

[7] The key words in the above order are; *''set the suit down for hearing within the next 45 days''*. In my calculations, from 3rd November 2011 the 45 days allowed were to expire on 18th December 2011. From the record, on 15th December 2011 parties' clerk attended court registry and agreed by consent that the case be fixed for hearing on 9th May 2012. The Plaintiff may have complied with the order by Makau J. However, I note that on 9th May 2012 Mr. Otieno for Plaintiff applied for an adjournment because the Plaintiff was out of the Country. The adjournment was granted. Thereafter, the record shows that, for one reason or other this case has never taken off. These events made the Applicant to become impatient and filed the current application for dismissal of this suit. On my part, the Plaintiff should take steps to progress his case. And where he has failed to do so, the court may, either on application by a party or on its own motion dismiss the suit for want of prosecution. I must confess that this court is acutely aware that summary dismissal of a suit is a draconian act as it will drive the plaintiff away from the judgment seat without being heard. However, despite the unpleasant nature of summary dismissal of a suit, if it is the only appropriate course to take, courts of law should not hesitate to dismiss a suit so as to bring such offending litigation to an end especially where the owner of the suit is not interested in pursuing his cause of action. Such action would be in line with the principle of law that litigation must come to an end, thereby, avoiding parties litigating forever. On this subject, see what was stated in the case of **Allen v Sir Alfred Mc Alpine [1968] 1 All ER 543** that:-

> ***"To put right this wrong, we will in this court do all in our power to enforce expedition; if need be we will strike out actions where there has been excessive delay. This is a stern measure, but it is within the inherent jurisdiction of the court, and the rules of the court expressly permit it. It is the only effective sanction that they contain."***

[8] Although the Plaintiff seems to have complied with the initial order by Makau J, there is nothing to show that he was keen to progress this case. This case is about 19 years old, which by any standard is considerable period for a suit to be pending in court where no meaningful progress of the suit is being made. Of importance is that such suits by indolent suitors are not only creating backlog in court system, thereby, giving a bad impression of the judiciary, but are also an affront to justice; note the principle of justice in article 159 of the Constitution that; (1) ***justice shall be done to all;*** and (2) ***justice shall not be delayed.*** It is needless to remind that the Defendant is also a party in the suit and he must also receive justice by having litigation against him determined expeditiously. Notably, since 12th August 2014, these proceedings have been kept busy by this application for dismissal of suit rather than by meaningful progress by the Plaintiff towards the hearing of the suit: this is a sad state of affairs in any judicial litigation. Hitherto, there are enough reasons which would impel the court to dismiss this suit for want of prosecution. However, listening to the Constitution, the sixth sense of the court is whispering to my ear

that I should dispense substantive justice to parties herein. Towards that end, I will reluctantly give the plaintiff the last chance to prosecute his case. I will not leave this order open ended or with room for maneuver by the Plaintiff. Instead, I will assign the case a hearing date myself immediately upon delivery of this Ruling. And if on the appointed date the Plaintiff fails to prosecute his case, the suit will automatically stand dismissed- there will be no necessity of applying for its dismissal. The court will only endorse the dismissal. I hope the Plaintiff will not choose to obey these orders through default.

[8] In the circumstances of this case, the Plaintiff has prompted the filing of this application. Accordingly, I condemn the Plaintiff to pay throw-away costs of the application dated 17th April 2014; such cost to be agreed upon or taxed between the parties and payable on or before the next hearing date. It is so ordered.

Dated, signed and delivered in open court at Meru this 22nd day of February 2016

F. GIKONYO

JUDGE

In the presence of:

M/s. Mbaikata for Rimita advocate for defendant

M/s. Njanga advocate for Kioga advocate for plaintiff.

Mwanthi – Director of plaintiff present.

F. GIKONYO

JUDGE