REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 192 OF 2004

ARGAN WEKESA OKUMU……PLAINTIFF/RESPONDENT

VERSUS

DIMA COLLEGE LIMITED.....….....1ST DEFENDANT/RESPONDENT

MUNDIA GATERIA……..2ND DEFENDANT/ RESPONDENT

NATION MEDIA GROUP……3RD DEFENDANT/RESPONDENT

RULING

1. The Application before me is a Notice of Motion dated 25th March, 2013 brought under Order 17 Rule 2(3) and Order 51 of the Civil Procedure Rules. The 3rd Defendant sought for the dismissal of the Plaintiff's suit for want of prosecution. The application is based on the grounds on the face of the application supported by the affidavit and supplementary affidavit of Watson Kagucia Burugu sworn on 20th March, 2013 and 12th September, 2013, respectively.
2. It was contended that the Plaintiff had filed this suit on 27th February, 2004 after which the 3rd Defendant entered appearance and filed a defence on 7th April, 2004. The 3rd Defendant further admitted that there were several interlocutory applications since the suit was filed which were either settled, allowed or marked as withdrawn. Accordingly it was deponed that the only pending application was the 3rd Defendant's Notice of Motion dated 28th February, 2005 filed on 2nd March, 2005. That the same was an application for dismissal of suit for want of prosecution that had been listed for hearing on 25th October, 2005. However, it was averred that before the hearing of the same, the 3rd Defendant filed a Preliminary Objection to the main suit which proceeded for hearing on the aforementioned date instead of the Notice of Motion application dated 28th February, 2005. That the Preliminary objection was thereafter dismissed vide a court ruling dated 21st February, 2006. It was the contention of the 3rd Defendant that by virtue of the Preliminary Objection, the Notice of Motion dated 28th February, 2005 was automatically overtaken by events. That therefore there was no good reason advanced by the Plaintiff for not fixing the matter for hearing.
3. In his submissions, Learned Counsel to the 3rd Defendant Mr. Burugu stated that there has been delay on the part of the Plaintiff in prosecuting the matter which had not been explained satisfactorily. He further pointed out that since the instant suit was filed in 2004, compliance of order 3 Rule (2) of the Civil Procedure Rules 2010 was not mandatory for pre-2010 matters and that consequently the Plaintiff could not rely on the non -compliance of the above-mentioned

provision by the Parties as a reason for not setting down the suit for hearing. Further, it was the 3rd Defendant's submission that the Plaintiff filed his documents and witness statements as a reaction to the application for the dismissal of the suit for want of prosecution. It was also argued that though there was a pending application, the law does not disentitle a Defendant for applying for a dismissal for want of prosecuting. Mr. Burugu relied on the case of **Nairobi HCCC no. 774 of 2005 Frank Choge –vs-Hezron Shikanda & Another** in support this argument. Accordingly the 3rd Defendant submitted that the Plaintiff had no good explanation for the inordinate delay in prosecuting the case. Mr. Burugu therefore urged the court to allow the application and dismiss the suit for want of prosecution.

4. The 1st and 2nd Respondent did not file a response to the application. However, through their learned counsel Ms. Minjire, they associated themselves with the submissions of the 3rd Defendant.
5. The Application was opposed by the Plaintiff through his Replying Affidavit sworn on 18th June, 2013. The Plaintiff refuted the claim that he had lost interest in his case. He stated that the delay in setting his case down for hearing was occasioned by the multiplicity of applications by the Defendants and it was not clear whether all the applications had been dealt with. Further, it was contended that he could not set the matter down for hearing before all the parties involved had complied with Order 3 rule (2) as well as Order 11 of the Civil Procedure Rules. That therefore, the Applicant should have first complied with Order 3 Rule (2) before bringing an application for want of prosecution. It was also the Plaintiff's assertion that either party to the suit could also set down the suit for hearing and this duty was not only left to the Plaintiff.
6. In his submissions, Mr. Nyakundi, Learned Counsel for the Plaintiff, stated that any delay on prosecuting the matter was occasioned by the conduct of the 3rd Defendant. That there was a pending application dated 28th February, 2005 by the 3rd Defendant that was yet to be determined. Mr. Nyakundi argued that the 3rd Defendant should have listed the same for hearing instead of filing a fresh application. Further, it was submitted that the Defendants had also failed to comply with Order 11 of the Civil Procedure Rules. In the foregoing, it was the Plaintiff's submission, that though there was inordinate delay, the same was excusable given the facts of the case. Learned Counsel to the Plaintiff relied on the cases of, inter alia, **Eastern Produce (K) Limited –vs-Rongai & Transporters Limited & Another (2014) eKLR** and **Siso Tuta Mwabia –vs-Kabansora Company Ltd (2014) eKLR** in support of his submissions. Mr. Nyakundi therefore urged the Court to dismiss the application and allow the Plaintiff prosecute his suit.
7. I have considered the affidavits of the respective parties as well the oral submissions of the learned counsel together with the cases relied on. The applicable law for the dismissal of a suit for want of prosecution is Order 17 Rule 2(1) which provides as follows:

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

Further Order 17 Rule 2(3) states thus:

"Any party to the suit may apply for its dismissal as provided in sub-rule 1"

It is therefore clear that in exercise of the power conferred by Order 17 Rule 2(3), the 3rd Defendant has brought this application to have the instant suit dismissed for want of prosecution. I also have to state that the purpose Order 17 Rule 2 (3) of the Civil Procedure Rules is derived from the policy that court cases must be heard and disposed of expeditiously. This calls for the vigilance of the parties. See the Cases of **Sheikh vs. Gupta and Others Nairobi HCCC No. 916 of 1960 [1969] EA 140** and **Eliud Munyua Mutugi –v- Francis Murerwa (2008) eKLR.**

8. The Principles governing applications for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in

seeking the dismissal of the Plaintiff's case for want of prosecution see the case of **Ivita –vs-Kyumbu (1984) KLR 441.** Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same. See the case of **Naftali Opondo Onyango Vs National Bank of Kenya [2005] eKLR.** Bearing these principles in mind, has the 3rd Defendant met the threshold required in persuading the court to dismiss the Plaintiff's suit for want of prosecution?

9. On inordinate delay, it is not denied that the suit is still in its nascent stages even though it was filed in February, 2004. The record shows that the matter has listed for hearing on several occasions but due to various interlocutory applications the same was not heard. This can be summarised as follows: -

A chamber summons application dated 12th May, 2004 seeking to strike out the 1st and 2nd Defendant's defence. Upon consideration of the same by the Court, the application was marked as withdrawn by the consent of the parties on 27th November, 2007; A Notice of Motion dated 28th February, 2005 by the 3rd Defendant for the dismissal of the suit. The same was never heard nor determined. This was followed by a Notice of Preliminary Objection dated 24th October, 2005 which was dismissed by the Court vide a ruling by Osiemo J dated 21st February, 2006. In April, 2006, the 1st and 2nd Defendant lodged a Chamber summons dated 10th April, 2006 for consolidation of the instant suit with another suit known as **HCCC No. 213 of 2004 John Kamau & 3 Others –vs-DIMA College Limited & Another**. The same was however, marked as withdrawn on 13th May, 2010. There was also another application by the 1st and 2nd Defendant filed on 27th November, 2007 seeking an extension of time to serve their Memorandum of Appearance and Defence. The same was allowed by consent of the parties. Finally, the 1st and 2nd Defendants' Chamber Summons dated 17th December, 2007 for amendment of their Defence was allowed on 18th February, 2008. The matter was last in court on 13th May, 010 when the application dated 10th June, 2006 was withdrawn.

10. From the foregoing, it is obvious that delay in this matter has been established. When such delay is established, unless it is well explained, it becomes inexcusable. In **Agip (Kenya) Limited-v-Highlands Tyres Limited [2001] KLR 630, Visram J** stated of inordinate delay as follows: -

"Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay."

11. Has the Plaintiff in this case offered any plausible reason for his failure to fix the suit for hearing since13th May, 2010? In paragraph 5,6, 7 and 8 of his Replying Affidavit, the Plaintiff goes into the rigors of explaining that there were a multiplicity of applications in the instant suit and that it's unclear whether they have all been dealt with. The Plaintiff further faults the Defendants by stating that he could not fix the matter for hearing since the parties were yet to comply with Order 11 of the Civil Procedure Rules 2010.
12. As previously noted there were a number of applications made by the parties. The same were dealt with by the Court or withdrawn by the consent of the parties. All these application were dealt with. However, the application dated 28th February, 2005 by the 3rd Defendant is still on record and yet to be determined. The 3rd Defendant, however contends that the same was overtaken by events by virtue of its Notice of Preliminary Objection dated 24th October, 2005. I have examined the said the preliminary objection which was based on the point of law that the Plaint and the Plaintiff's application dated 12th May, 2004 was incurably defective and bad in law. The said objection was however dismissed by Osiemo J. Further, I note the contents of the Ruling and find that the court did not indicate the fate of the 3rd Defendant's application dated 28th February, 2005. It is therefore my view that the said preliminary objection did not dispose the 3rd Defendant's

application as contended by the 3rd Defendant. The same is still pending and should have been listed for hearing by the 3rd Defendant at the earliest. However, this was not done.

13. Be that as it may, under order 17 Rule (3) the burden of expeditious prosecution of a suit lies with the Plaintiff and not the Defendant. The pendency of that application did not prevent the Plaintiff from taking steps to prosecute his suit. Neither did it prevent him from undertaking pretails and simplying with order 3 Rule 2 of the Civil Procedure Rules. He cannot pass the blame onto the Defendants. The case of **Mobile Kitale Services –v- Mobil Oil Kenya Limited and Anor**, is instructive where **Warsame J** cited the case of **Nilani –vs- Patel (1969) EA page 341**, observing that;

"it is only too trite to say that as in every civil suit, it is the Plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a Defendant ought to invoke the process of the court towards that end as soon as is convenient by either applying for its dismissal or setting down the suit for hearing……Delay in these cases is much to be deplored. It is the duty of the Plaintiff's advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died…documents may have been mislaid, lost, destroyed and the memory tends to fade" (emphasis supplied)

14. I am in agreement with these observations. The Plaintiff by all means had a duty to prosecute the suit that had been filed in court. Although the Plaintiff in this case accuses the Defendants of contributing to the delay by filing multiple applications and not complying with order 11 of the Civil Procedure Rules, the burden is always on the Plaintiff to ensure the expeditious conclusion of his case. It was therefore the duty of the Plaintiff to move the court for directions on any pending application. The same holds true with regard to the Defendants non-compliance of Order 11 of the Civil Procedure Rules 2010. The Plaintiff should have also sought the Court's direction on any pre-trial procedures and whether the same were necessary. In my view the Plaintiff should not have sat back and waited for the lapse of two (2) years and ten (10) month to be jolted into action. Further, I note that though the Plaintiff has complied with the pre-trial procedures and is purportedly ready to prosecute his case, the same was only filed after and in reaction to the application for dismissal that was filed by the 3rd Defendant. The filing of the witness statements, list of witness and bundle of documents all dated 18th June, 2013 was probably intended to give the illusion that the Plaintiff was still interested in prosecuting the suit. The question then becomes why the Plaintiff had to wait for nearly three (3) years to demonstrate such willingness. I therefore find that there has been undue laches on the part of the Plaintiff and a portrait emerges of a lethargic litigant disinterested in the prosecution of the instant suit.

15. In paragraph 22 of the Supplementary Affidavit by the 3rd Defendant, it was stated that the 3rd Defendant had been prejudiced by the delay in the prosecution of this case as the suit continues to hang over it due to the inaction on the part of the Plaintiff. Even though I find that it is prudent to save a suit if justice will be done to the parties, it must be noted that justice delayed is justice denied. This court is enjoined by **Article 159 2(c)** of the Constitution of Kenya to determine disputes and render justice without undue delay. Failure to do so will infringe upon the legitimate expectation of a Defendant that the dispute against it will be determined timeously. This is the view taken by **Ochieng J** in **Venture Capital and Credit Ltd. v Consolidated Bank of Kenya Ltd (2006) eKLR** when the quoting from the case of **Allen v Sir Alfred McAlpine (1968) 1 All ER 543** at page 546 as follows:

"Lord Denning MR captured, in the following words, the fundamental reason why courts do dismiss suits for want of prosecution:

"The delay of justice is a denial of justice ……To no one will we deny or delay right or justice. Over the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3. Sc. 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, C.1). To put right this wrong, we will in this

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

16. Cases cannot remain in courts forever. They are for determination. There have been no action between 13th may, 2010 until the present application was filed, and this suit is for dismissal for want of prosecution. Accordingly, I find the 3rd Defendant's application to be meritorious. I will therefore allow the Application dated 12th March, 2013 by the 3rd Defendant and order that the suit be and is hereby dismissed with costs to the Defendants.

Dated and delivered at Nairobi this 23rd day of January, 2015.

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A MABEYA

JUDGE