REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 441 OF 2012 (O.S)

IN THE MATTER OF THE ADVOCATES ACT, LAWS OF KENYA

BETWEEN

PATRICK AYISI INGOI.....1ST PLAINTIFF

FLORENCE NZOERA MULAMA.....2ND PLAINTIFF

Versus

MADHAV BHALLA t/a TAIBJEE & BHALLA ADVOCATES.....DEFENDANT

AND

MAHMOOD KHANI alias KAKA MAHMOOD KAHN.....1ST THIRD PARTY

DINA MAHMOOD KHAN.....2ND THIRD PARTY

RULING

Dismissal of suit

[1] The Third Parties herein have applied for this suit to be dismissed for want of prosecution. They argue that over twelve months have passed by without the Plaintiff taking any step to set down the suit for hearing. The application is dated 18th March, 2014 and is expressed to be brought under Order 17 Rule 2 of the Civil Procedure Rules. Order 17 rule 2 of the Civil Procedure Rules, 2010 provides that:

> ***1. In any suit in which no application or step has been taken by either party for more than 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 of the court, it may dismiss the suit.***
>
> ***2. If cause is shown to the satisfaction of the court, it may make such orders as it thinks first to obtain expeditious hearing of the suit.***
>
> ***3. Any party to the suit may apply for its dismissal as per rule (1).***

[2] The Defendant supported the application by the Third Parties and a replying affidavit sworn on 16th September, 2014. The Defendant supported the dismissal of the suit for the reason that the suit is a prejudice to the Defendant as well as he does not owe the Plaintiff any money. Therefore, the delay herein is just another source of prolonged anxiety. To the Defendant, the delay has not been explained and is inexcusable. They cited the case of **Salkas Contractors Ltd v Kenya Petroleum Refineries Ltd (2004) e KLR,** where the Court of Appeal indicated:-

> ***"The principle that pervades these decisions is that the court has to be satisfied that the ordinate delay is excusable and if so satisfied, then the court has to consider whether justice can be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done then it will be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution."***

[3] A preliminary issue has arisen-that the third parties cannot apply for the plaintiff's suit to be dismissed. The Plaintiff posits that it has no claim against the third parties and it did not join them in the suit. They were joined by the defendant and so they can only apply for dismissal of the suit by the party who joined them. The third parties and the defendant are of a different persuasion. They submitted that according to Order 17 rule 2 (3) of the Civil Procedure Rules, any party to the suit may apply for dismissal of suit for want of prosecution. The appropriate subrule states as follows:-

> ***(3) Any party to the suit may apply for its dismissal as provided in Sub-rule 1.***

[4] I am in agreement with the submissions by the Third Parties and the Defendant on this issue. Any party to the suit, including a third party, may apply for dismissal of the suit under Order 17 rule 2 of the Civil Procedure Rules if ***no application or step has been taken by either party for more than one year.*** The application by the third parties for dismissal of this suit is, therefore, perfectly in order and competent. It does not offend the law. Consider that position of the law within the conception that Order 17 rule 2 of the Civil Procedure Rules answers to a higher constitutional principle of justice in Article 159 of the Constitution which follows after the well-known adage that justice delayed is justice denied, for, a suit which remains unresolved for unreasonably long period is a source of and is real injustice to the parties sued. The order therefore embodies the principle of finality of litigation; to bring litigation to an end. By removing the offending proceedings, the rule assists in a sense the overriding objective to attain expeditious and proportionate resolution of disputes-either the suit is dismissed or the court orders it to be prosecuted expeditiously within specified time. Looking at the purpose of Order 17 rule 2 of the Civil Procedure Rules, the arguments by the plaintiff that the third parties cannot apply for dismissal of a suit do not hold. I will now determine the merit of the application.

The threshold

[4] I do not have to re-invent the wheel on this subject of dismissal of suit for want of prosecution. I am content to cite a statement in the case of **Jimmy Wafula Simiyu v Fidelity Commercial Bank Limited [2014] eKLR** that:-

> ***No doubt the court has discretion to excuse a delay as long as it has been explained to the satisfaction of the Court. The satisfaction will come from the explanation given and the fact that the delay causes no substantial prejudice to fair trial or one of the parties or other or both. Therefore, the fact of delay per se does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay 1) is inordinate and inexcusable; and 2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. The Court will be interested in the nature and importance of the case, the right of the Plaintiff to be heard and the fact that summary dismissal of a suit drives away the Plaintiff from the seat of judgment; an arbitrary and draconian act comparable only to the proverbial ''sword of the Damocles''. And, for the Defendant, in order to***

complete the balancing, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice and Articles 48, 50 and 159 of the Constitution are the relevant guide here. Ultimately, as Chesoni J (as he then was) stated in the case of Ivita Vs Kyumbu, the Court should ask itself, whether, despite the delay, it is still possible to do justice for all the parties.

[11] I will apply this test. But, first, let me give a little and useful background information. This suit was filed on Jul, 11, 2012. During the mention of the case on December 3, 2012, the defendant was granted leave to issue and serve a third party notice upon the third parties herein within 14 days from the said date and that parties were at liberty to apply for further directions. On January, 2013 the third parties filed and served their memorandum of appearance. No directions which have been given under order 1 rule 22 of the Civil Procedure Rules. At this point, I should resolve the arguments on whether a third party is required to file a defence, witness statements and documents upon entry of appearance. The rules do not make it mandatory for filing and within a given time of defence, witness statements and documents by a third party upon entry of appearance as would be the case with the defendant who has been served with summons and plaint. Order 1 rule 22 only provided that the party issuing the notice may apply to court for directions, and if the court is satisfied that there is a proper question to be tried as to liability of the third party, it will order the manner the said liability will be tried, at or after the trial, or may even order judgment to be entered in favour of the defendant against the third party. By that procedure, it seems that, if any defence is to be filed by the third party, it will be upon the directions of the court to that effect after it is satisfied there is a proper issue to be determined between the third party and the person issuing the notice. Therefore, the argument that there has been failure by the third parties to file and serve their respective defence, witness statements and documents is untenable. The said argument is not available to the Plaintiff as an explanation of the delay in taking action in this suit. In any case, the alleged failure by the third parties to file papers has not been shown to be the reason why the Plaintiff did not set down the suit for hearing. Again, I am not able to accede to the argument that the absence of the directions put the Plaintiff in a dilemma as the case cannot be certified as ready for hearing. The law under Order 11 of the CPR places individual obligations on parties which must be so discharged. The Plaintiffs did not apply for the suit to be certified as ready for hearing. It would be different, if the plaintiff after complying fully with their obligations applied for the suit to be certified ready for hearing but was told it could not be so certified for one reason or other. If that were the case, I would see a reasonable explanation for delay. I, therefore, decline to treat these arguments as plausible explanation of the delay. Let me now examine the other reasons advanced by the plaintiff.

[12] The Plaintiffs averred that they were reliably been informed by their advocates on record that they made inquiries in the registry on the availability of hearing dates from the last year, only to be informed that the court diary for 2014 had been closed and no hearing dates were available. The Plaintiffs urged that the court runs its diary and neither the plaintiffs nor their advocates have control over it. In the circumstances, the Plaintiffs are convinced the suit cannot be dismissed for want of prosecution. They affirmed that they have been and still are desirous in proceeding with the case but that desire has been frustrated by the unavailability of hearing dates in the registry. They cited the case of **Ivita v Kyumbu (1984) KLR 441** to persuade the court to exercise its discretion and spare the suit.

[13] Even if time was to be computed for the purpose of ascertaining delay herein, the Plaintiffs asserted that it must commence from 29th January, 2014 which was the last time the third party filed its memorandum of appearance- approximately 13 months to the day of application. The Plaintiff did not consider a period of 13 months to be inexcusable in view of the explanation given by the plaintiffs. They could not write any letters to invite the other party for fixing a hearing date and so they have none to exhibit to court. Despite the delay, the Plaintiffs are convinced that it is still possible to do justice in the case without causing any injustice to the applicants. See the case of **Erastus Adero Gogo v Nicodemus Waite Muaraguri & 2 others (2009) eKLR, Lesiit J**, quoted with approval the principle in **IVITA VS KYUMBU (supra).**

[14] Despite the explanations given by the Plaintiffs, there is a delay in the prosecution of this case. But as I stated earlier, the test is whether despite the delay, it was still possible to do justice. Pendency of a case for a prolonged period is quite unpleasant and may cause anxiety as well as prejudice to the defendant. The third parties and the Defendant are right in so asserting. But, the prejudice to the Plaintiff on losing his cause of action arbitrarily should be considered when determining the prejudice to the defendant. In this case, there is no specific prejudice, hardships or change in position on the part of the third parties and the defendant which has been shown to have been occasioned on them by the delay. This case will still be capable of prosecution without cause substantial prejudice to fair trial or to the third parties and the defendant. I am also mindful of the operations of the court registry and most years, the diary for the current year is closed too early in the year due to the enormous number of cases in the court system. See what Lesiit J observed on this issue in the case of **Erastus Adero Gogo v Nicodemus Waite Muaraguri & 2 others** that:-

> ***"Knowing the tradition of this court, once the diary is closed, parties have to wait until the following year for it to be re-opened in order to take a date. The record herein shows that the applicant filed the instant application within the period the diary was closed…. And in the circumstances the plaintiff had no further chance to set the suit down for hearing."***

On that basis I will give the benefit of doubt to the Plaintiff and sustain the suit. However, I make the following specific order on the matter: The Plaintiffs shall set the suit down for hearing within 45 days from today which failing the suit will stand dismissed without the necessity of any party applying in that behalf. I should state here that, unless a suit is a clear demurrer or plain eye-sore the court will not consider the merits or prospects of the case in an application for dismissal of suit under order 17 rule 2 of the CPR. The upshot is that the application dated 18th March, 2014 is hereby dismissed. The third parties acted in accordance with the overriding objective and so I award them thrown away costs on the application.

Dated, signed and delivered in court at Nairobi this 24th day of November, 2014

F. GIKONYO

JUDGE