REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 5245 OF 1992

MUMWE INVESTMENTS LIMITED…….....……..1ST PLAINTIFF

E.KARIUKI…….....…2ND PLAINTIFF

MARY KANYI KIMANI…….....……..3RD PLAINTIFF

VERSUS

KENYA NATIONAL CAPITAL

CORPORATION LTD……....….....……...1ST DEFENDANT

INDUSTRIAL DEVELOPMENT BANK

LIMITED…….....….....……..…..2ND DEFENDANT

R U L I N G

1. This suit was instituted by the Plaintiffs against the Defendants vide a Plaint dated 29th December, 1992. The Plaintiffs and the Defendants had a financier-borrower relationship in which the Defendants advanced various loan facilities to the 1st Plaintiff. The 2nd and the 3rd Plaintiffs were the directors of the 1st Plaintiff. The said loan facilities were secured by charges in favour of the Defendants over various properties owned by the Plaintiffs. A dispute arose between the Parties with regard to the extent of the Plaintiffs indebtedness. The firm of KAMAU KURIA & KIRAITU ADVOCATES (hereinafter referred to as "the firm") was then on record acting for the Plaintiffs and had filed the instant suit on behalf of the Plaintiffs. The Plaintiffs subsequently changed their Advocates whereby a Notice of Change of Advocates was filed on 30th November 2000 by Messrs Wanjama & Co. Advocates. The Parties to this suit thereafter compromised the suit through an out of Court Settlement Agreement dated 27th November 2000 ("settlement agreement") and filed in Court on 21st February 2001, amid protests by the Firm on the ground that Messers Wanjama & Co. Advocates were not properly on record for the Plaintiff. This culminated in the Firm filing an Application dated 14th March, 2001 challenging the appointment of Messrs Wanjama & Co. Advocates as the Plaintiffs' Advocate and the settlement agreement between the Parties therein.
2. On the basis of that application, the Court stayed the proceedings in **High Court Misc.**

Application No. 42 of 1997, Ndung'u, Njoroge & Kwach Advocates –vs-Kamau Kuria & Kiraitu Advocates pending the hearing and determination of that Application. Those proceedings involved the enforcement of professional undertakings given by the Firm to the Defendants' then advocates, Ndungu, Njoroge & Kwach Advocates .

3. On 26th October 2010, the Defendants filed a Notice of Motion which sought that dismissal of the application by the Firm for want of prosecution. The grounds in support of the application were that the firm had not prosecuted the application over the years. It was also contended that there had been inordinate delay that was inexcusable. That in the foregoing, the applciants had suffered prejudice as a stay of proceedings was issued in **MISC. CAUSE No. 42 of 1997 (supra)** in which they were a party to and therefore interested in the conclusion of the same. The Application was supported by the Affidavit of Charles Njagi, Advocate for the Defendants, sworn on 26th October, 2010.
4. Mr. Ojiambo, learned Counsel for the Defendants submitted that Order 16 Rule 5 of the repealed Rules, (now Order 17 Rule 2 of the new Civil Procedure Rules 2010) provides for the dismissal of a suit if no steps are taken to prosecute it. He argued that the same provisions can apply to applications as this Court is empowered under Sections 89 of the Civil Procedure Act 2010 to apply the procedure set out for suits to applications as far as the same is practicable. It was further contended that the delay complained of is over 10 years. That further the instant suit had been used by the Firm as a holding ground to prejudice the Defendants given that the same had already been settled by the actual disputing parties. Counsel further submitted that the Firm was seeking remedies against two law firms, namely Ndungu, Njoroge & Kwach Advocates and Messrs. Wanjama & Co. Advocates who were not parties to the instant proceedings. He stressed that the Firm had the alternative of instituting separate proceedings against the aforesaid law firms instead of holding the Defendants at ransom. The Defendants therefore urged the court to allow the Application.
5. The Application was opposed by the Firm through a Replying Affidavit sworn by Gibson Kamau Kuria on 30th November 2010. It was contended that the instant application was brought in bad faith as its objective was to enable the enforcement of the settlement agreement which was illegal. It was contended that the firm instituted the instant suit on behalf of the Plaintiffs in 1992. That the settlement agreement between the Plaintiffs and the Defendants together with, Messrs. Ndungu, Njoroge & Kwach and Messrs. Wanjama & Co Advocates was entered into when the Firm was still on record for the Plaintiffs thus necessitating the filing of the Application dated 14th March, 2001. The Firm in addition, contended that any delay occasioned on the hearing of its application was occasioned by the fact that the Court file with respect to the Suit had gone missing. It was therefore contented that it was impossible to set the matter down for hearing. The Firm asserted that it had been prejudiced by the purported settlement agreement entered into by the parties as the Plaintiffs were trying to avoid their obligation to pay legal fees owed to the Firm.
6. Dr. Kamau Kuria, Counsel for the Firm, submitted that the Defendants in this case had not demonstrated to the Court that there was any inordinate and inexcusable delay in the matter. He cited the case of **Ivita –v- Kyumbu (1984) KLR at 441** in support of his contention that even when delay is inexcusable and inordinate, the court should not dismiss the application or suit if justice can still be done between the parties. He urged the Court to make an order to the effect that the application should be set down for hearing without any further delay. The firm therefore urged the Court to dismiss the Application with costs.
7. I have considered the Affidavits on record and the submissions of learned Counsels. The first issue is whether the motion is properly before court in view of the provisions under which the application was brought. It is clear that this application was brought under the provisions of the repealed Civil Procedure Rules as the application was filed before the 2010 Civil Procedure Rules, came into force. Order 16 rule 5 of the repealed Civil Procedure Rules, has the same effect as Order 17 Rule 2 of the Civil Procedure Rules 2010. The aforesaid rule provides for dismissal of suits if no steps are taken to prosecute it. I am inclined to agree with the Defendants submissions that Section 89 of the Civil Procedure Act does empower the Court to apply the procedure set out for suits to applications as far as it is practicable. I see no reason why the same should not apply in this case, given that the Defendants have cited the prolonged delay on the part of the Firm in prosecuting the Notice of Motion dated 14th March 2001.
8. I now turn to the merit of the Defendants' Application. The law on dismissal of suits for want of

prosecution is well settled. Order 16 rule 5 of the former Civil Procedure Rules provided that:-

"If within three months after-

a. ***the close of pleadings; or***
b. ***the removal of the suit from hearing list; or***
c. ***adjournment of the suit generally the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant(s) may either set the suit down for hearing or apply for its dismissal."***

In the case of **Naftali Opondo Onyango –v- National Bank of Kenya [2005] eKLR** the court held that the Defendant must meet the burden of proof when seeking a dismissal order for want of prosecution. Quoting **Salmon, L.J.** in **Allan-v-Sir Alfred McAlphine and Sons Ltd (1968) 1 ALL E.R. 543,** the Court noted;

"The Defendant must show:

i. ***That there has 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 prejudiced by the delay. This may prejudice at the trial of issues between themselves and the Plaintiff or between each 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."***

9. From the foregoing, the position is that the principles governing applications for want of prosecution is that, the Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the applicant is likely to be prejudiced by such delay. Further to this, it is clear that the decision on whether or not to dismiss a suit/application is purely discretionary. Such discretion should however not be exercised capriciously. Each case must ultimately 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. The purpose of Order 16 rule 5 of the former Civil Procedure Rules, as is Order 17 Rule 2 of the Civil Procedure Rules 2010, is to provide the Court with an administrative mechanism to disencumber itself of cases in which parties appear to have lost interest. See the Case of **Sheikh vs. Gupta and Others Nairobi HCCC No. 916 of 1960 [1969] EA 140.** On the foregoing, have the Defendants in this case met the threshold required in dismissing the Firm's application for want of prosecution?
10. On inordinate delay, Counsel for the Defendants stated in his affidavit in support that the Firm filed its application on 14th March, 2001 which to date has not been prosecuted. He further submitted that the delay complained of is of more than 10 years. He sought to persuade the Court that under the circumstances the Firm had not offered any plausible explanation as to the said delay. In rebuttal, the Firm argued that such a delay was due to the missing court file in respect to the suit. According to paragraph 20 of Gibson Kamau Kuria's Replying Affidavit, there had been many attempts on their part to set the matter down for hearing as evidenced by their annexures marked **"GKK 2".** The Firm therefore contended that the Defendants had failed to satisfy the requirement of dismissal for want of prosecution.
11. I have seen the Application dated 14th March, 2001. The same was filed in 2001, almost 10 years as at the date the present application was made. The same is yet to be determined on merit. Obviously 10 years is inordinate delay. I am therefore satisfied that there had been inordinate delay on the part of the Firm in setting the application down for hearing. With regard to whether the delay has been explained, I have seen and examined the annexures marked **"GKK 2"**. The same are letters dated 26th August, 2009, 23rd May, 2008, 12th May, 2008, 25th April, 2006 and 27th January, 2010. Upon closer scrutiny, the letters dated 12th May, 2008, 23rd May, 2008, 26th

August, 2009 and 27th August, 2008 stem from the Defendants then Advocates, Ndungu, Njoroge & Kwach Advocates, inviting the Plaintiffs Advocates to fix the application for hearing. The only letter I note to have emanated from the Firm attempting to fix the application for hearing was the one dated 25th April, 2006. In my view, the letters so produced by the Firm, do not aid the Firms position that the delay was occasioned by the missing court file. The same however illustrate that there was vigilance on the part of the Defendants to have the matter listed for hearing. I would have expected such vigilance on the part of the Firm since it was their Application that required prosecution. Further, the Firm has not produced evidence that there was an attempt to apply for the reconstruction of the Court File upon the realisation that the Court file was missing, if ever the file went missing as claimed. In my view, there has been failure to adequately pursued the Court that there was a reasonable explanation as to the delay in prosecuting the Application. He who alleges must prove. The Firm has failed to adequately discharge its burden of proving that it had attempted to resolve the issue of the missing file. The delay in my view is therefore inexcusable.

12. Having so held, I note that the Firm argued that even when a delay is inexcusable and inordinate, justice can still be done between the parties, as reliance would be placed on the courts own record and affidavit evidence. Counsel to the Firm, Dr. Kamau Kuria, submitted that the Application of 14th March, 2001 raised pertinent issues that hinged on the professional conduct of two law firms namely, Messers Wanjama & Advocates and Messers Ndungu, Njoroge & Kwach Advocates under Section 55 of the Advocates Act. That further, the said Application had sought to challenge an illegal Settlement Agreement that had led to the consent order of 21st February 2001 between the parties to this suit. The Firm was also averse to the change of Advocates by the Plaintiffs due to the fact that they had not been paid for their legal services.
13. Dr. Kamau also highlighted the fact that the Defendants' then Advocates, Messrs Ndungu, Njoroge & Kwach Advocates, had also sued the Firm in **MISC. CAUSE No. 42 of 1997 (supra)** for breach of undertaking that had flowed from the Plaintiffs instructions. That in the foregoing, the parties to this suit had reached an out of court settlement with regard to **MISC. CAUSE No. 42 of 1997 (supra)** without any reference to the Firm exposing it to great liabilities. In a re-joinder, the Defendants emphasized that the Firm's claim lay with the law firms of Messers. Wanjama & Advocates and Messers Ndungu, Njoroge & Kwach Advocates who were not party to the suit. That in any case, the Firm still had the opportunity to bring separate proceedings against the aforesaid law firms without holding the Defendants hostage.
14. I have perused the Application dated 14th March 2001 by the Firm and the Defendants response therein. Without necessarily delving into the merits of the said Application, I must say that the Firm had raised serious issues that required adjudication. Be that as it may, I find that given the weight of the application dated 14th March, 2001 it was incumbent upon the Firm to prosecute the same to its logical conclusion at the earliest. It was for the Firms benefit to do so. Further, I have considered the case of **Ivita –v- Kyumbu (Supra)** cited by the Firm, which proves instructive. The Court in that case was clear that it is only when a credible excuse is given with regard delay that the Court can embark on doing justice between the parties. In this regard **Chesoni J** stated thus;

> ***"……even if delay is prolonged, if the Court is satisfied with the Plaintiff's excuse for the delay and justice can still be done to the parties notwithstanding the delay, the action will not be dismissed, but will be ordered that it be set down for hearing at the earliest available time. When the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay, the court will presume that the delay was not only prolonged but it was inexcusable and in such case the suit maybe dismissed" (emphasis added)***

I associate myself fully with the above findings. As noted earlier, the Firm has not adduced sufficient reasons as to the prolonged delay in prosecuting its application; as such the wheels of justice cannot come to the aid of the firm as justice delayed is justice denied. Justice is justice to both the Plaintiff and the Defendant, so both parties in the suit must be considered.

15. In any event, I am of the view that the Firm still has recourse for its claims. With regard to the Legal fees owed by the Plaintiff, I do not see why the Firm cannot proceed to tax its Bill of Costs with the taxing master. Further, on the issue of misconduct of Messers. Wanjama & Advocates and Messers Ndungu, Njoroge & Kwach Advocates, the Firm can still institute separate proceedings in connection to those allegations.
16. Finally, the Defendants did state that they have been prejudiced by the prolonged delay in the prosecution of the Application dated 14th March 2001. I have noted that **MISC. CAUSE No. 42 of 1997 (supra)** was stayed pending the hearing and determination of the Firm's application. I have also perused the pleadings with respect to the aforesaid suit. It is clear that the Defendants advocates were to receive proceeds from the sale of properties belonging to the Plaintiffs. Such proceeds were to be held by the Defendants' Advocates for the benefit of the Defendants and would go towards discharging the indebtedness of the Plaintiffs to the Defendants. Further, the said suit was also a subject in the settlement agreement under paragraph 4 and 6, whereby the Firm was to release the proceeds of the sale and respective balances of the sale of properties belonging to the Plaintiffs to the Defendants. Upon such receipt of the proceeds, the Defendants were in turn to instruct their advocates to withdraw **MISC. CAUSE No. 42 of 1997 (supra)**.
17. The Firm has outlined the reasons as to why it was averse to these particular clauses. One such reason was allegedly that the Parties did not involve the Firm in the negotiations of this paragraphs which in turn created certain obligations on its part. The other reason was on the issue of application of interest on the proceeds so held by the Firm. As stated earlier, the reasons given by the Firm for the opposition of the settlement agreement maybe merited, however the question that the Court should tackle at this stage is whether the Defendants have been prejudiced by the prolonged delay. Prejudice is a factual matter and not a matter of law. It is clear from the facts outlined that the Defendants have been deprived of proceeds that they are entitled to. Further and with regard to **MISC. CAUSE No. 42 of 1997 (supra),** it is also clear that they have an interest in the matter and would like to have the same concluded. Indeed it is trite that nobody enjoys the fact of a litigation hanging over one's head indeterminately. A prolonged delay in prosecuting cases invariably causes anxiety on the part of the persons who are to defend or have an interest in a suit, hence the need to expeditiously determine the same. I am therefore of the view that the fact that **MISC. CAUSE No. 42 of 1997 (supra),** was stayed pending the determination and outcome of the Application dated 14th March, 2001, which to date has not been determined has not only caused anxiety to but also prejudiced the Defendants.
18. The upshot of this is that the Application dated 26th October, 2010 by the Defendants has merit and is allowed as prayed.

DATED and **DELIVERED** at Nairobi this 28th day of June, 2013.

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A. MABEYA

JUDGE