REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 31 OF 2018

SHAIWAZ SADRUDIN JIWA.....PLAINTIFF

VERSUS

RAJAB BARASA OLEMUTEKE.....1ST DEFENDANT

LUCY OPURU.....2ND DEFENDANT

R U L I N G

Order 17 Rule 2(1) to (4) of the **Civil Procedure Rules** provides that: -

> ***2(1) "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 it's satisfaction, may dismiss the suit."***
>
> ***(2) "If cause is shown to the satisfaction of the Court it may make such orders as it thinks fit to obtain expeditious hearing of the suit."***
>
> ***3 "Any party to the suit may apply for it's dismissal as provided in sub – rule 1."***
>
> ***(4) "The Court may dismiss the suit for non – compliance with any direction given under this order."*** Emphasis added.

Citing the provisions of **Order 17 Rule 2 (3)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**, the defendants moved to this Court by their Notice of Motion dated 2nd June 2020 seeking the following orders: -

> **(a) That this Honourable Court be pleased to dismiss this suit against the defendants for want of prosecution.**
>
> **(b) That the costs of this application and the entire suit be awarded to the defendants.**

The application is anchored on the grounds set out herein and supported by the affidavit of **MR SIMIYU MAKOKHA** Counsel for the defendants.

The gravamen of the application is that the plaintiff having instituted this suit on 20th June 2018 has failed to prosecute it for over one year. That the suit was last in Court on 4th April 2019 and it is in the interest of justice that it be dismissed for want of prosecution since litigation must come to an end.

The application is opposed and **MR OMUNDI BW'ONCHIRI** Counsel for the plaintiff filed a replying affidavit dated 22nd October 2020 in which he averred, inter alia, that on 14th November 2018 both he and **MR SIMIYU MAKOKHA** agreed that this suit be stood over to await the ruling in **BUNGOMA ENVIRONMENT AND LAND CASE No 52 of 2018**. That the said ruling was delivered on 27th May 2020 and being aggrieved by the said ruling, the plaintiff has preferred an appeal to the Court of Appeal. That this application is therefore founded on falsehoods and should be dismissed because the plaintiff has never failed to prosecute this suit.

With the consent of the parties, the application was canvassed by way of written submissions. Those were duly filed both by **MR SIMIYU MAKOKHA** instructed by the firm of **MAKOKHA**, **WATTANGA & LUYALI ADVOCATES** for the defendants and by **MR OMUNDI BW'ONCHIRI** instructed by the firm of **OMUNDI BWONCHIRI ADVOCATES** for the plaintiff.

I have considered the application, the rival affidavits and the submissions by Counsel.

From the record herein, on 14th November 2018 and in the presence of both **MR MAKOKHA** and **MR BW'ONCHIRI**, the following order was recorded: -

> **"By consent, this matter to await the ruling in ELC No 52 of 2018"**

The ruling in **BUNGOMA ELC No 52 of 2018** was subsequently delivered on 27th May 2020. Therefore, for purposes of **Order 17 Rule 2(1) of the Civil Procedure Rules**, the one-year period could only start to run from 27th May 2020 and not earlier. This is because the parties had by consent agreed to stay the proceedings herein pending the ruling in **BUNGOMA ELC No 52 of 2018**. In his submissions, Counsel for the plaintiff has stated that: -

> ***"Our humble submission is that the plaintiff has not shown any sufficient cause why the instant suit has been (sic) set down for hearing. There is no consent in the Court file that indeed this suit was to await the ruling in ELC No 52 of 2018. And if that was the case, the ruling was delivered on 27th May 2020 and no reasons has been given why the same has not been listed down for hearing."***

It is not true that there is no consent in the file. As I have already stated above there is a consent recorded on 14th November 2018 staying these proceedings to await ruling in **BUNGOMA ELC No 52 of 2018**. The said ruling having been delivered on 27th May 2020, the plaintiff can only be said to have violated the provisions of **Order 17 Rule 2(1)** of the **Civil Procedure Rules** after 27th May 2020. This application is clearly premature.

Besides, even if the plaintiff had failed to take action towards prosecuting this suit for over one year, the law gives a discretion to the Court to determine whether or not the plaintiff's suit should be dismissed. It is not mandatory that any violation of the provisions of **Order 17 Rule 2(1)** of the **Civil Procedure Rules** must lead to dismissal of a suit. That is why the provision uses the word ***"may."*** Among the issues that the Court will take into account in deciding whether or not to dismiss a suit for want of prosecution were laid out by **CHESONI J** (as he then was) in the case of **IVITA .V. KYUMBU 1984 KLR 441** when he said: -

> ***"So, the test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant; so, both parties to the suit must be considered and the position of the Judge too because it is not easy task for the documents, and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the Court that he will be prejudiced by the delay or even the plaintiff will be prejudiced. He must show that justice will not be done in the case due to prolonged delay on the part of the plaintiff before the Court will exercise it's discretion in his favour and dismiss the action for want of prosecution. Thus, even if 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 notwithstanding the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."***

Therefore, in applying the provisions of **Order 17 Rule 2** of the **Civil Procedure Rules** which permits for the dismissal of a suit in which no action has been taken for one year, the Court must not lose sight of the provisions of **Article 50 of the Constitution** which protects the rights of parties to have their disputes resolved by the application of the law in a fair hearing. I am further reminded of the decision in **SEBEI DISTRICT ADMINISTRATION .V. GASYALI & OTHERS 1968 E.A 300** where **SHERIDAN J** adopted the words of **AINLEY J** in **JAMNADAS .V. SODHA HEMRAJ 1952 7 U.L.R 11** and said: -

> ***"…… it should always be remembered that to deny the subject a hearing should be the last resort of a Court."***

Clearly therefore, for a party to be entitled to orders for dismissal of a suit under **Order 17 Rule 2 of the Civil Procedure Rules**, a party must go further than just proving that the other party has not taken action in the suit for one year. The party seeking dismissal of a suit must also demonstrate that due to the delay, he is no longer in a position to mount any defence to the claim against him because he no longer has his witnesses or evidence and will therefore be prejudiced particularly where there has been a delay which is inordinate, un – explained, and deliberately contrived by the other party with the sole purpose of scuttling a fair trial of the dispute. I have not heard the defendants allege any of the above. They have only alleged, which as is now clear is not infact the correct position, that the plaintiff has failed to set down the suit for hearing for more than one year.

The up – shot of the above is that the defendants' Notice of Motion dated 2nd June 2020 is devoid of merit. It is accordingly dismissed with costs.

Boaz N. Olao.

J U D G E

18th January 2021.

Ruling dated, signed and delivered at BUNGOMA this 18th day of January 2021 by way of electronic mail in keeping with the COVID – 19 pandemic guidelines.

Boaz N. Olao.

J U D G E

18th January 2021.