**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 316 OF 2016**

**KIBERENGE LUMBAS NGISIREI.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**MIDLAND CONSTRUCTION COMPANY.....DEFENADANT/APPLICANT**

**RULING**

***[NOTICE OF MOTION DATED 22ND JANUARY, 2019]***

**1.** The defendant moved the court through the Notice of Motion dated 22nd January, 2019 premised on **sections 1A, 3A of the Civil Procedure Act** and **Order 17 Rule 2 (3) of the Civil Procedure Rules, 2010** seeking for the following orders;

***(a) That this suit and the application dated 1.11.16 be and are hereby dismissed with costs for want of prosecution.***

***(b) That costs be borne by the Plaintiff.***

The application is based on the grounds that the defence, memorandum of appearance and grounds of opposition were filed and served on 16th January, 2017; no action or step has been taken for over one **(1)** year since then by the plaintiff to prosecute this suit; that the plaintiff has no interest in this case; that pendency of this case is prejudicial to the defendant and this application meets the ends of justice. The application is supported by the affidavit sworn by **DIVYESH KOTECHA**, a director of the defendant, wherein he deponed that the defendant's advocates filed and served the memorandum of appearance, defence and grounds of opposition on the 16th January, 2017 and for a period of over 1 year the plaintiff has not taken any step or action to prosecute the case. He deponed that the pendency of this case is prejudicial to the defendant and that the plaintiff has lost interest in this case. He deponed that the reliefs sought meets ends of justice and that the suit should be dismissed for want of prosecution.

**2.** That in response to the application, the plaintiff filed the replying affidavit sworn on the 28th November, 2019 wherein he deponed that he is still interested with the suit. That he is old and his advocates have been trying to reach him for purposes of signing the affidavit, and that his son who has been following up on the matter has been away on work related issues for the better part of 2019. That he should be given a chance to pursue his claim against the defendant.

**3.** That directions on filing and exchanging submissions were given on the 4th March, 2020. The learned counsel for the defendant filed their submissions dated the 20th March, 2020 on the 30th September 2020, while that for the plaintiff file theirs dated 27th May, 2021 on the same date.

**A.** That the defendant submitted that the suit was filed on **12th November, 2016** and the defendant filed and served the memorandum of appearance, defence and other documents on **16th January, 2017**. That since then, a period of over three **(3)** years has lapsed, without the plaintiff having taken any step or action to prosecute the suit by the time this application was filed on 20th June, 2019. That the plaintiff has not given any reasons for not taking any step or action to have the suit prosecuted.

**B.** That the Plaintiff submitted that the instant application has been a hindrance to his wish to have the matter proceed and that the same should be disallowed. That if granted a chance he shall proceed to seek leave of court to amend the plaint in order to reflect on the real issues to be determined by this court, and further file the supporting documents and list of witnesses. That no prejudice will be occasioned to the defendant if the application is disallowed to give room to the plaintiff to pursue his claim.

**4.** The following are the issues for the court's determinations;

***(a) Whether the defendant has shown that a period of over one year has lapsed without the plaintiff taking action or step to prosecute his case, and if so;***

***(b) Whether the plaintiff has presented reasonable explanation for the delay.***

***(c) Who pays the cost of this application?***

**5.** That I have considered the grounds on the application, affidavit evidence, submissions by the learned counsel and come to the following determinations;

(a) That **Order 17 Rule 2(1) of the Civil Procedure Rules**, which governs dismissal of suits for want of prosecution, 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."***

*That f*urther **Order 17 Rule 2(3)** states thus:

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

That there is no dispute with respect to the law on dismissal of suits for want of prosecution. However, the question whether to exercise the power of dismissal for want of prosecution under **Order 17 of the Rules** in a specific suit is a matter that is within the discretion of the court.

(b) That in the case of ***Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and Others & Another [2016] eKLR***, the court stated as follows:

> ***"11. Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice, regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of Ivita vs Kyumba [1984], KLR 441 espoused that:***

> ***"The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the 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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."***

That in the case of ***Argan Wekesa Okumu vs Dima College Limited & 2 others [2015] eKLR,*** the court considered the principles for dismissal of a suit for want of prosecution and stated as follows:

> ***"The principles governing applications for dismissal 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."***

And in the case of ***Naftali Opondo Onyango –vs- National Bank of Kenya Ltd [2005] eKLR,*** it was noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows:

> ***"However, in deciding whether or not to dismiss a suit under Rule 6, it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff."***

**That in the case of *Mwangi S. Kimenyi -vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009*, the court restated the test as follows:**

> ***"1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.***

> ***2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the***

***conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."***

(c) That in the present case, a period of almost two and half years had lapsed between the filing of the defence and the filing of the present application. That **Order 17 Rule 2** provides that a matter should have been pending for 12 months before the court, either on its own motion or on the application of a party, could consider making an order for its dismissal for want of prosecution. The plaintiff has not given any explanation for not taking steps to prosecute the claim, other than alleging without proof that he is ***"old enough to meet my advocates who have been trying to reach me"*** and ***"my son has been trying making a follow up of this matter has been away on his duties for the better part of this year, 2019."*** That if the plaintiff intended to tell the court that there were challenges communicating with his counsel due to old age, then he had the obligation under **section 106 of the Evidence Act Chapter 80 of Laws of Kenya**, to avail evidence, for example an affidavit from his counsel detailing the attempts made to contact him or vice versa. That further, there is no explanation why no follow ups were made in the whole of 2017 and 2018 as the son was only away in 2019. That from the foregoing, I am not satisfied by the reasons put forth by the plaintiff on the failure to set the matter down for hearing. That I do find that the delay has been inordinate and for the said reason, I can only conclude that the plaintiff has lost interest in prosecuting the suit. That further, there was nothing stopping the plaintiff from seeking leave to amend the plaint as well as to file the documents he has expressed an intention to file should the dismissal application not be granted.

(d) That the defendant having filed their memorandum of appearance, defence, and grounds of opposition, thereby signalling their determination to defend the suit, and further having been successful in this application, it is entitled to the costs under **section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

6. That in view of the foregoing, I find merit in the defendant's application dated the 22nd January, 2019. That the said application is allowed in the following terms;

*(a) That the suit commenced through the plaint dated 1st November, 2016 and filed on the 2nd November, 2016 and the notice of motion of even date are hereby dismissed with cost for want of prosecution.*

*(b) That the plaintiff to pay the costs of this application.*

Orders accordingly.

**DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF SEPTEMBER, 2021.**

**S. M. KIBUNJA**

**ENVIRONMENT AND LAND COURT JUDGE**

**IN THE PRESENCE OF**;

**PLAINTIFF: ABSENT**

**DEFENDANT: ABSENT**

**COUNSEL: MR. SONGOLE FOR DEFENDANT**

**CHRISTINE: COURT ASSISTANT.**