REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 2977 OF 1993

KURIA N MBUGUA & OTHERS T/A.....PLAINTIFF/RESPONDENT

GATH CONSULTING ENGINEERS

VERSUS

THE CENTRAL BANK OF KENYA .....1ST DEFENDANT

HOWARD HUMPHERYS (K) LTD.....2ND DEFENDANT/APPLICANT

RULING

1. The application for consideration is the 2nd defendant's notice of motion dated 27th January 2021, brought under **Section 3A** of the **Civil Procedure Act Cap 21 order 17 Rule 2 of the Civil Procedure Rules** and all other enabling provisions of the law. The application seeks the following orders:

i. That the suit be dismissed for want of prosecution by the Plaintiff.

ii. That the costs of this application be provided for.

On the grounds that:

i. The suit filed on 6th June 1993 about 27 years ago and the claim relates to an alleged breach of contract.

ii. The suit was last in court on 10th of April 2019 when the court dismissed the 2nd Defendant's Application dated 16th July 2018, that had sought for the dismissal of the suit for want of prosecution.

iii. In issuing the ruling on 10th April 2019, the court ordered that the suit be prosecuted within 120 days from the date of the ruling.

iv. Despite the ruling and order by court, the Plaintiff has completely failed to prosecute the suit within the 120 days timeline provided by court or at all and have since abandoned the suit.

v. The failure by the Plaintiff to prosecute the suit is inordinate and inexcusable and the delay would cause grave injustice to the 2nd Defendant if this case were to be allowed to proceed notwithstanding the preceding delay on the part of the Plaintiff.

vi. The continued pendency of this suit is in abuse of the process of this Honourable court.

2. In opposition to the application, the plaintiff's managing director **Mr. Kuria Njogu Mbugua** swore a replying affidavit on 22nd of February 2021.He deposed that the 2nd defendant's application is incurably defective, bad in law and an abuse of process for want of an affidavit supporting the factual grounds upon which the motion is predicated.

3. The plaintiff/respondent referred to a similar notice of motion dated 16th July 2018 where the 2nd defendant sought to have the plaintiff's suit dismissed for want of prosecution. The same was opposed and reasons for the delay in prosecuting the suit given. Upon conclusion of the hearing of the application the trial court directed that a ruling would be delivered on notice.

4. The respondent avers that by a letter dated 4th of September 2019 the deputy registrar of the High Court and whose receipt was

acknowledged on 6th September 2019, the counsel on record informed the court that the plaintiff was yet to receive the notice of delivery of the Ruling and requested to be duly notified when the same would be ready. To date they have not received the notice of delivery of the ruling and in the circumstances there is no way they would have been expected to comply with what was unknown to them.

5. He has deponed that his advocate exercised due diligence and obtained the ruling from the Kenya Law Report website on the basis of his reference to a ruling delivered on 10th April 2019. He deposed that he was keen to prosecute the suit and was only prevented from doing so by the pendency of the ruling whose outcome has a bearing on the suit. This is because he had already filed and served all the witnesses statements and documents that he intends to rely on at the hearing of the suit.

6. Further, he avers that he is ready and willing to take the earliest date for trial so that this dispute can be heard and determined expeditiously. His prayer is that the motion which was founded on an erroneous basis be disallowed and parties be directed to prepare and set the suit down for hearing.

7. The Application was argued orally. Mr. Kuyo learned counsel for the applicant submitted that this matter was last in court on the 10th of April 2019 when a similar application was rejected. The court directed the respondent to prosecute the case within 120 days since it was an old case. This has not been done.

8. Counsel argued that the notice for the ruling was issued and served as can be borne by the record. He contended that the responsibility to prosecute the suit lay with the respondent as clearly provided for under the Evidence Act Section 107 which states:

> ***1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist?***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

9. He further submitted that if a court may exercise discretion, it must be done consciously and that the continued pending of this matter is prejudicial to the applicant's workers who were related to this matter and have since left the organization. He therefore urged the court to allow the application.

10. In rebuttal, M/s Nyaga for the plaintiff/respondent submitted that she noted that the motion was defective as its not supported by an affidavit. Counsel contends that the factual matters put up by the 2nd defendant are from the bar and should not be considered by the court. The plaintiff relied on the following authorities:

> ***a) Skair Associates architects vs evangelical Lutheran church of Kenya & 4 others (2015) eKLR.*** The Court held that***;***
>
> ***"Every notice of motion shall state in general terms the grounds of the application, and <u>where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served</u>."*** *(emphasis Court)*
>
> ***b) Samuel Kazungu Kambi & another vs independent electoral & boundaries commission & 3 Others (2017) eKLR:***
>
> The court held that;
>
> ***13…Counsel for the 2nd Petitioner, in my view, was spot on when he submitted that the application not having been supported by an affidavit is a pleading without evidence."***

11. She further submitted that there was no ruling notice served upon their firm or the plaintiff/respondent. That despite their letter to the Deputy Registrar (KM1) there was no notification. She relied on the case of ***Mugambi Mungania & Co. Advocates Vs. John Kungu Kiarie (2020) eKLR*** where it was held that:

> ***"All rulings and/or judgments should only be delivered when they have been listed on the Cause lists but if not listed as aforesaid, they should only be delivered with the consent of the parties to avoid complaints from a party who does not attend. The importance of notice to a party cannot be understated because time is normally of essence for a party who is dissatisfied with a decision."***

12. It was counsel's submission that the 120 days given by the court in order for them to proceed with the matter can only run from the date given i.e. 15th February 2021 when they were served with the notice of motion. It is her contention that the plaintiff/respondent is keen on prosecuting the suit and should be allowed to do so as no evidence has been placed before the court to show the witnesses who had left the defendant/applicant's organization. She therefore urged the court to dismiss the application and issue directions for the expeditious disposal of the suit.

13. Mr. Kwako for the 1st defendant informed the court of his client's election not to participate in the application.

Analysis and Determination

14. Upon considering the notice of motion, both affidavits, annextures, authorities and the oral submissions by the counsel, I find this application to be raising the following issues for determination by this Court;

a) Whether the application is defective as it's not supported by an affidavit.

b) Whether the dismissal of the suit will give rise to substantial risk to fair trial or cause serious prejudice to the plaintiff.

c) Whether the plaintiff has offered a reasonable explanation for the delay and if there has been inordinate delay on their part in prosecuting the case.

15. It is not disputed that the notice of motion dated 27th January 2021 is not supported by any affidavit.

The case of ***Simon Muteti Mutune vs Co-operative Bank of Kenya Limited [2015]eKLR*** that was relied upon by the plaintiff/respondent is distinguishable from the facts of this case as the same had sought injunctive orders in which affidavit evidence was critical before the court could establish whether or not the plaintiff therein was entitled to the orders he had sought.

This is equivalent to Order 2 Rule 15 (2) of the Civil Procedure Rules which provides as follows:-

> ***"No evidence shall be admissible on an application under sub rule 1(a) but the application shall state concisely the grounds on which it is made."***

16. In this matter all facts pertaining to this application are on record. An affidavit may not have added any value.

17. In assessing any prejudice caused to the defendant by the delay, the court should also assess the likely prejudice the dismissal of the suit will cause the plaintiff/respondent. See **Allen vs Alfred Mcalphire & sons [1968] 1ALL E.R. 543, Agip Kenya Ltd vs Highlands Tyres Ltd [2001] KLR 630 & Birket vs James [1978] A.C 297.** It follows that the prejudice to the plaintiff/respondent may only be ascertained by looking at the following among others: the nature of the case e.g. public litigation or representative suit; importance of the claim or subject matter, legal capacity of parties, rights of the parties in the suit etc.

18. The unavailability of witnesses leading to the derailment of a case is a key factor. There is no evidence that was placed before this court to establish that. That in itself would convince the court of the prejudice the defendant/applicant would suffer by not calling essential witnesses who may have left the organization.

19. On whether there has been inordinate delay on the part of the Plaintiff in prosecuting the case, the record speaks for itself. Is the delay justifiable? Considering the fact that this is an old matter of 1993 in itself confirms undue delay. The fact that the plaintiff/respondent has continued to follow the deputy registrar over the ruling shows their interest in the matter. The court in ***IVITA –VS- KYUMBA (1984) KLR 441*** stated thus:-

> ***"The test applied by 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 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 ...."***

20. The plaintiff had given the reasons for the delay being that they had not been notified of the ruling and pointed out that the 120 days they had been given should ideally run as from 5th of February 2021 when they were served with this application and notice. In **UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS VS NIC BANK & ANOTHER [2014]eKLR** the court stated that:-

> ***"... whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case ... caution is advised for courts not to take the word inordinate in its ordinary meaning ..."***

21. The issue of notification of the ruling of 10th April 2019 has not been resolved. Besides the deputy registrar stating that the notice was issued there is nothing on record to support that. A copy of the notice should have been placed in the file to support the deputy registrar's assertions. Even the record of 10th April 2019 nowhere shows that the respondent was served but was absent. This coupled with the fact that the plaintiff/respondent has continued to follow up the matter through the deputy registrar shows he is still keen on having the case determined by the court.

22. There is also no evidence that upon delivery of the ruling the 2nd defendant/applicant or the 1st defendant served the plaintiff/respondent with the ruling even if they had failed to turn up in court. This supports the applicant's assertion that they were not aware of the requirement to have the suit finalized within 120 days.

23. The upshot is that the application dated 27th January 2021 lacks merit and is dismissed. Costs to be in the cause. I also order the parties to take a hearing date and the case should be heard and finalized within the next 180 days. I have given this period bearing in mind the impact of the covid 19 pandemic on the hearing of cases.

Orders accordingly.

Delivered, signed and dated this 13th day of April, 2021 in open court at Milimani, Nairobi.

H. I. ONG'UDI

JUDGE