REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 181 OF 2016

MOFFAT ACHOKI OMARE.....PLAINTIFF/RESPONDENT

VERSUS

SAFARICOM LIMITED.....1ST DEFENDANT/APPLICANT

LIBERTY AFRIKA TECHNOLOGIES LTD.....2ND DEFENDANT/APPLICANT

RULING

The application dated 24th February 2021 by the 1st defendant seeks the following orders: -

1. **THAT this Honourable Court be pleased to dismiss the Plaintiff's suit for want of prosecution.**

2. **THAT this Honourable Court to award the 1st Defendant the costs of the application and of the suit.**

The application is supported by the affidavit of **Daniel Ndaba** sworn on even date. The plaintiff/respondent filed a replying affidavit sworn by **David Gikunda Miriti** advocate on 5th May, 2021. Parties agreed to determine the application by way of written submissions.

Counsel for the 1st defendant/applicant submit that the sole issue for determination is whether the plaintiff's suit should be dismissed for want of prosecution. It is submitted that this matter has been inactive since February, 2018. No satisfactory explanation has been given in the replying affidavit as to why it has taken too long to prosecute the case. The fact that none of the parties have complied with pre-trial directions is not a good reason for the delay. Counsel relies on the case of **KWANZA SERVICES (2016) eKLR** where the court referred to the case of **MUKISA BISCUITS MANUGACURING CO. LTD –V- WEST END DISRIBUTORS LTD. (1969) E.A 699** where the court held:-

> **"….it is always the duty of the Plaintiff to bring his suit to an early trial, and he cannot absolve himself of this primary duty by saying that the Defendant consented to the position."**

It is submitted that the plaintiff cannot rely on the fact that the 2nd defendant has not prosecuted its application to join a third party as the reason for the delay. Counsel for the applicant contend that the long period of delay is causing injustice to the 1st defendant. Counsel relies on the case **NATIONAL INDUSTRIAL CREDIT BANK LTD. –V- FRESCHO INTERNATIONAL LTD. & 4 OTHERS, Nrb HCCC No. 593 of 2001** where Azangalala J (as he then was) held:-

> **"…the continued silence and inactivity on the part of the plaintiff was prejudicial to the interest of the 2nd defendant. Perpetual apprehension of the 2nd defendant to my mind is sufficient demonstration of the prejudice the 2nd defendant will suffer if this application is not allowed…."**

The second defendant supports the application by the 1st defendant. Counsel for the 2nd defendant submit that for a matter to be dismissed for want of prosecution under Order 17 rule 2, at least twelve (12) months must have passed without any action having been taken in the matter. The last action in the file was on 19th February, 2018 and this is a period of more than one and a half years. The replying affidavit does admit the position that for over one and a half years no action has been taken.

It is further submitted that the court has to consider whether there has been inordinate and inexcusable delay on the part of the plaintiff. Counsel referred to the case of **IVITA –V- KYUMBU (1975) eKLR** where the Court held:-

"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 defendant; so both parties to the suit must be considered and the position of the judge too, because it is no 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 that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its 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. Where 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 is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in *Allen v McAlpine*, at p 561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying, which will never wear out however often said that, justice delayed is justice denied."

According to counsel for the 2nd defendant, the plaintiff has not given sufficient reason for the delay of more than one and a half years. It is also submitted that the court has to consider whether the delay would cause grave injustice to the 2nd defendant. The case has been pending for over five (5) years and given that long period of delay, the 2nd defendant shall be prejudiced if the case proceeds to trial. Counsel urges the court to dismiss the suit for want of prosecution.

The plaintiff opposed the application. It is submitted that this matter has been delayed by the 2nd defendant who filed an application dated 27th July 2017 to join a third party but has failed to prosecute it. It is further urged that for a matter to be dismissed for want of prosecution under Order 17 Rule 2(1), it must be without action for one year. This matter was before the court on 11th April 2019 and the application for dismissal was filed prematurely on 24th February, 2020 before the expiry of one-year period.

The plaintiff maintains that there is no inordinate delay as the matter was active on 11th April, 2019 when it came up for hearing. It is further submitted that all the counsels in this matter are involved in another similar matters namely HCCC No. 193 of 2016 which has been referred to mediation and the results of that process would affect this case. None of the defendants would **suffer injustice**.

Analysis and Determination

The plaint herein was filed on 13th July, 2016 and it was meant to be a suit to be "first tracked." The two defendants filed their respective defences by 1st September, 2016. The 2nd defendant filed an application dated 22nd September, 2016 seeking to institute third party proceedings. A third party notice was issued on 30th March, 2017 to the **MUSIC COPYRIGHT SOCIETY OF KENYA**. This was after the 2nd defendant's application dated 22nd September 2016 had been heard ex-parte on 9th November 2016. The application was heard and granted. The matter was mentioned on 31st July, 2017 before the Deputy Registrar Hon. Sitati and was once again mentioned on 19th February 2018 before another Deputy Registrar, Hon. L. Mbacho, the record of that date partly reads

"Wanjiru Ngigi – The matter is coming up for directions. Mr. Kingati had filed an application for 3rd party directions dated 27/7/2017 and he is requesting for a hearing date for it.

Anyoka – We were served with the application. We have filed our replying affidavit filed on 21/11/2017. We have no objection for it being heard but I propose we file written submissions.

Court: Parties to take a hearing date of the application dated 27/7/2017 in the registry before a Judge.

Signed

19/2/2018"

The file was placed before Hon. Justice Githua on 19th November, 2018. Only Miss Odhiambo for the 3rd party appeared and urged the court to dismiss he 2nd defendant's application dated 27th July 2017. The court declined that request and directed that another date be taken at the registry.

On 30th September 2020 the file was placed before Githua J for hearing of the current application dated 24th February 2020. The same did not proceed as the application was not in the court file.

The plaintiff contend that part of the delay is caused by the 2nd defendant who has not prosecuted his application for third party proceedings. In my view, that explanation cannot be sufficient and satisfactory cause of the delay. It is the plaintiff who brought this suit and its prosecution should not be dependent on the actions of the defendants. Upon closure of pleadings, the plaintiff is expected to take action and pursue the hearing of his case. Ina the case of **SAMORA WIRE & NAIL WORKS LTD –V- SHREEJI ENTERPRISES KENYA LTD(2005) 2 KLR, 127,** Justice Ochieng held:-

"In the absence of any legal provision for the striking out of an application on the ground that the applicant was not prosecuting it, the only recourse available to the respondent is to have the application listed for hearing and if the applicant does not turn up to prosecute it, it could be dismissed."

Order 17 Rule 2(1) of the Civil Procedure Rules, 2010 states 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.**

Under Order 17 rule 2(3), any party to the suit may apply for the dismissal of a suit which has been pending in court with no action being taken for a period of one year. The current application was filed on 17th March, 2020. On 3rd September 2020 the application was fixed for hearing on 30th September 2020. The last time the case had been placed before a Judge was on 19th November 2018. There was no action between 19th November 2018 to 30th September, 2020. In short, there was no action on the matter for the entire period of 2019 and this period alone covers the twelve months inaction period under Order 17. I do find that there is no good explanation for the delay in prosecuting the matter.

In the case of **NILANI –V- PATEL AND OTHERS (1969) E.A. 340,** the court stated as follows at page 341:-

> **"There can be no doubt that every adjournment was at the instance of the plaintiff and for about five years since the adjournment in 1963 he did nothing to set down the case for hearing. Counsel for the respective defendants quite rightly in forcible language criticized the plaintiff for this inordinate delay and strenuously urged that the suit be dismissed for want of prosecution. It is only too trite to say that, as in every civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the court towards that end as soon as it is convenient by either applying for its dismissal or setting down the suit for hearing."**

In the case of **PROTEIN AND FRUITS PROCESSOR LIMITED -V- CREDIT BANK LIMITED (2004)2KLR 409,** the Plaintiff's case had been dismissed in his absence for want of prosecution. The claim had been dormant for a period of four years. He applied for review of the dismissal order. Emukule J (as he then was) dismissed the application but made the following statements:

> **"The philosophy of Order XVI rules 2(1), 5 and 6 of the Civil Procedure Rules is that:-**
>
> **a) the rules of court devised in the public interest to promote expeditious dispatch of litigation must be observed;**
>
> **b) a plaintiff should not ordinarily be denied an adjudication of his claim on its merits because of procedural default which causes no prejudice to his opponent for which an award of costs cannot compensate;**
>
> **c) the Court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the close of pleadings has caused a real risk of prejudice to the defendant."**

Although there has been delay in prosecuting the case, given the record of the trial court, I do find that there has been some activity on the matter. This is not a case that was filed and simply parked in the court registry with no action taken. There is also the plaintiff's contention that a similar matter has been referred to mediation and the results may have an impact on this case. The plaintiff's claim ought to be heard and determined on its own merits. I have read the plaint and I am satisfied none of the defendants cannot claim that crucial witnesses who were conversant with the dispute have since left their employment. No prejudice will be suffered by the defendants if the suit is fully heard and determined. The underlying objective of litigation is to have matters brought before the court heard on their own merit. The discretionary power to dismiss a suit for want of prosecution should be exercised cautiously. I am alive to the fact that the judicial officers cannot hear all the cases filed within the period of one year as provided under Order 17. The court has to be convinced that the plaintiff has been guilty of extreme indolence before dismissing a claim. The case has undergone the normal pre-trial process. The 2nd defendant's application to enjoin a third party came up for hearing before a Judge. I do find that this matter is not for dismissal.

The upshot is that the application dated 24th February, 2020 lacks merit and the same is dismissed. Parties shall meet their own costs of the application.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF SEPTEMBER, 2021.

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S. CHITEMBWE

JUDGE