REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 115 OF 2018

WHISPERING PALMS ESTATE LIMITED.....1ST PLAINTIFF/ RESPONDENT

AFRISON EXPORT IMPORT LIMITED.....2ND PLAINTIFF/ RESPONDENT

HUELANDS LIMITED.....3RD PLAINTIFF/ RESPONDENT

FRANCIS MBURU MUNGAI.....4TH PLAINTIFF/RESPONDENT

VERSUS

RADIO AFRICA GROUP LIMITED.....1ST DEFENDANT/APPLICANT

JAMES MURIMI.....2ND DEFENDANT/APPLICANT

FELIX OLICH.....3RD DEFENDANT/APPLICANT

JAMES MBAKA.....4TH DEFENDANT/APPLICANT

RULING

1. The notice of motion dated 11th March 2021 by the defendants is brought under Order 17 Rule 2 (3) and Order 51 (1) of the Civil Procedure Rules 2010, Section 1, 1A, 3 and 3A of the Civil Procedure Act. The application seeks to have the suit herein dismissed for want of prosecution with costs. The main ground is that it's been a year since the plaintiff/respondents took steps in prosecution of the suit and that they are not interested in prosecuting their claim.

2. The application is also supported by the affidavit of Ms. Linda Musita the legal officer of the 1st defendant/applicant. She has averred that the plaintiffs instituted this suit by filing a plaint on 28th May 2018 as well as a notice of motion under a certificate of urgency on even date. That the defendants entered appearance and filed their statement of defence on 20th November 2018 and their replying affidavit to the aforementioned application on 19th September 2018. Both parties filed their submissions.

3. She avers that a ruling for the said application was delivered on 14th December 2018 in favour of the plaintiffs who have remained inactive in the matter since then. She further avers that it has been a year since the plaintiffs took any step towards preparing this suit for hearing and /or prosecuting the same.

4. It is counsel's averment that the plaintiffs' neglect and/or failure to take any action in this matter is attributed to the subsisting order of permanent injunction pending the hearing and determination of this suit as was issued by the court in the said ruling. She believes that the failure to take action in this matter amounts to an abuse of the court process. That it would be just and expedient that this suit be dismissed with costs for want of prosecution.

5. A replying affidavit sworn by Mr. Nicholas Reuben Nyamai counsel for the plaintiff/respondents on 19th April 2021 was filed in opposition to the application. He averred that this application is an afterthought, mischievous and not brought in good faith. That the same was made to ambush the plaintiff/respondents in that after the suit herein was filed the defendant/applicants admitted the claim. Annexture NRN 1 dated 4th May 2018 is a copy of the admission of the claim. One Mr. Francis Mburu Mungai who took over the out of court negotiations from them is currently hospitalized and they have not been able to get a report on the progress of the negotiations. The covid 19 pandemic interruptions have also interrupted the said negotiations.

6. He therefore urges the court to dismiss this application as the plaintiff/respondents are ready and willing to proceed with the prosecution of the suit herein if the defendant/respondents are not ready to settle it out of court.

7. In the further affidavit sworn on 10th May 2021 by Ms. Linda Musita, avers that the letter dated 4th May 2018 by the defendants was a response to the plaintiffs' demand prior to the institution of the suit. That since the institution of this suit no out of court negotiations have been undertaken between the parties and the plaintiffs have not expressed any interest in pursuing the same.

8. In the further replying affidavit sworn on 18th May 2021 by Mr. Francis Mburu Mungai, avers that on three occasions before filing of the suit herein he had engaged the 1st defendant in an out of court settlement discussion and that the lady he spoke to introduced herself as Linda. That the allegations that they never engaged the defendants is an afterthought. He further avers that when the covid 19 crisis set in he did not pursue the out of court settlement since he has been having health challenges which led to a major surgery during the month of April 2021.

9. He deposed that the plaintiff/respondents are ready and willing to proceed with prosecution even if the defendant/applicants are not ready to settle it out of court. He therefore pleads with this honourable court to allow them to proceed with the suit to its logical conclusion.

10. Directions were given for the application to be disposed of by way of written submissions, which was complied with by both parties.

11. Learned counsel for the defendants/respondents-Ms.Gichoya in her submissions gave brief facts of the matter and cited Order 17 Rule 2(3) of the Civil Procedure Rules, 2010 which provides that a party may apply for the dismissal of a suit if a year passes without any step being undertaken. That in this case no application has been made or steps taken towards prosecution of the suit for a year. She submits that it is therefore the defendants right under the said Order to apply for dismissal of the suit.

12. Counsel referred to the case of **Utalii Transport Limited & 3 Others v NIC Bank Limited & Another (2014) eKLR** where Justice F. Gikonyo set out the guiding principles which the law developed to guide the exercise of discretion by the court in an application for dismissal of suit for want of prosecution. They were as follows:

a) *Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case*

b) *Whether the delay is intentional, contumelious and, therefore ,inexcusable*

c) *Whether the delay is an abuse of the court process*

d) *Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendants*

e) *What prejudice will the dismissal occasion to the plaintiff.*

f) *Whether the plaintiff has offered a reasonable explanation for the delay;*

g) *Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?*

13. On the first principle, counsel submitted that the plaintiffs have not taken any steps to fully comply with Order 11 of the Civil Procedure Rules 2010 by having this matter fixed for pre-trial conference. That it is now close to two (2) years since the matter was last in court which is inordinate delay on the part of the plaintiffs.

14. On this counsel placed reliance on the case of **Moses Mwangi Kimani v Shammi Kanjirapparambil Thomas & 2 Others (2014) eKLR** where Justice F. Gikonyo defined inordinate delay as follows: -

"*There is no precise measure of what amounts to inordinate delay as that would differ from case to case depending on the circumstances and facts of each case; for instance, the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word ''inordinate'' in its dictionary meaning, but to apply it in the sense of excessive as compared to normality."*

15. She further relied on the case of **Jeremiah Ng'ayu Kioni v Standard Media Group Limited & 11 Others (2015) eKLR** where the court held that:

"*The relevant provision in which most of the Defendants cited is order 17 Rule 2(3) of the Civil Procedure Rules. Under the aforesaid provision, a party may apply for the dismissal of the suit if a year passes and no step has been taken to list the suit for hearing. I have already stated that pleadings closed on 15.7.2013. The Plaintiff and his legal advisers are enjoined by law to give an explanation as to why they have not taken any step to have the suit fixed for hearing for more than a year. Pleadings closed about 24 months ago. This court can only infer that the Plaintiff has lost interest in prosecuting this case. With respect, I agree with the Defendants that it is just and equitable in the circumstances to have the suit dismissed for want of prosecution.*"

16. On the second principle, counsel submitted that the plaintiff/respondents have not taken any initiative in fixing the matter for pre-trial conference long after the defendants filed their statement of defence. The reasons given by their advocate for the delay is that there has been ongoing negotiations between the parties which the defendants have vehemently denied. Therefore, the burden of proof lies with the

plaintiff/respondents to demonstrate that the delay was occasioned by ongoing negotiations between the parties.

17. To support this submission counsel relied on the case of **Auto Xpress Ltd v Securex Agencies (K) Ltd (2020) eKLR** which held as follows:-

> *"The Plaintiff only states that there were ongoing negotiations but there is no single proof tendered to affirm the same. It is trite law in evidence that he who asserts must prove his case. In such cases, the burden of proof lies with whoever would want the court to find in his favour in support of what he claims. No evidence for the negotiations was adduced by the Plaintiff/Applicant.* ***Section 107 of evidence Act*** *succinctly states:*
>
> > *"Whosever 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.*
>
> *And* ***Section 108 of Evidence Act****, further states thus:*
>
> > *"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."*
>
> ***……****This court finds that there is no reasonable and or plausible excuse for the inordinate delay which has been provided by the Plaintiff/Applicant.*

18. On the third principle, counsel submitted that the plaintiffs' failure to take any action on this matter with a view of setting it down for hearing amounts to an abuse of the court process given the backlog of cases pending in court. He urges the court to dismiss this suit to give way for other more interested litigants to prosecute their cases.

19. On the fourth principle, he submitted that pendency of this suit has subjected the defendants to unwarranted anxiety, escalating legal costs. He adds that it will undoubtedly be impossible to have a fair trial after a long time since some of the witnesses have been resigning from the 1st defendant's company over time and eventually becoming unreachable.

20. She submitted that the court should make reference to the well-known maxim of equity being *"Equity aids the vigilant not the indolent"* and that the plaintiffs cannot purport to sleep on their rights and at the same time seek a second chance to prosecute their case. She referred to the case of **Argan Wekesa Okumu v Dima College Limited & 2 Others [2015] eKLR** where the court stated as follows: -

> *"Even though I find that it is prudent to save a suit if justice will be done to the parties, it must be noted that justice delayed is justice denied. This court is enjoined by* ***Article 159 2(c)*** *of the Constitution of Kenya to determine disputes and render justice without undue delay. Failure to do so will infringe upon the legitimate expectation of a Defendant that the dispute against it will be determined timeously."*

21. On the fifth principle, she submitted that the plaintiffs have deliberately delayed the hearing of this suit as they are no longer interested in the same and therefore will not suffer any loss or their status will not be affected by the dismissal of the suit. On the sixth principle, counsel submitted that the plaintiff/respondents have not exercised their burden of proof on the existence of the said negotiations in the pendency of the suit. That no reasonable explanation for the delay has been given by the plaintiffs or their advocates. On the same she reiterates the holding in the case of **Auto Xpress Ltd v Securex Agencies (K) Ltd** (supra).

22. Counsel urges this court to dismiss this case in the interest of Justice. She referred to the case of **Gideon Sitelu Konchella v Daima Bank Limited 2013 eKLR** where the court while authoritatively citing the case of **Mobil Kitale Service Limited v Mobil Oil Kenya Limited HCC No. 205 of 1990** (unreported) held that:

> ***""It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously" ….."The overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."***

23. Mr. Nyamai learned counsel for the plaintiff/respondents submitted that the alleged delay in prosecuting the suit herein is excusable and not inordinate and the defendant/respondents' application raises procedural technicalities and as such violates Article 159 (d) of the Constitution of Kenya which provides that;

> *"Justice shall be administered without undue regard to procedural technicalities"*

24. He contends that the plaintiff/respondents are ready and willing to proceed with the prosecution of the suit and therefore urges the court to allow them to proceed with the suit to its logical conclusion.

Analysis and Determination

25. I have carefully considered the notice of motion, both affidavits, annextures, the written submissions and authorities cited. I find the main issue falling for determination to be whether the plaintiff/respondents have offered a reasonable explanation for the delay in prosecuting

the case.

26. This suit was filed on 28th May 2018 together with a notice of motion. The said notice of motion was determined on 14th December 2018, when a permanent injunction was issued against the defendant/applicants. No action has been taken by the plaintiff/respondents since then. The present application dated 11th March 2021 was filed on 15th March 2021. It means for over two (2) years the plaintiff/respondents have taken no step to move this case forward. It is therefore clear that there has been delay in the prosecution of the case by the plaintiff/respondents. The issue is whether the delay is justifiable.

27. The defendant/respondents have explained the delay by stating that there was a move to have the matter settled out of court which did not materialize due to COVID-19 challenges and the indisposal of the 4th plaintiff/respondent. The defendant/applicants have vehemently denied there having been any move to settle the matter out of court. It is true that no evidence was placed before this court to confirm any out of court settlement attempt/attempts. The plaintiff/respondents did not however make mention of any sittings and/or recordings undertaken. Only this could have accorded tangible evidence of any such meeting/meetings.

28. In handling a raised issue of delay, the court should not only confine itself to the number of days, weeks, months and years. It should consider the period plus all other factors/circumstances of the case. Would there be any serious prejudice to either of the parties if the suit is dismissed or sustained? Factors to be considered would include: the nature of the case, importance of the claim or subject matter, legal capacity of parties and their rights. See **Allen v Alfred Melphine & sons [1968] IALLE.R 543**; **Agip Kenya Limited v Highlands Tyres Limited [2001] KLR 630**; **Birket v James [1978] A.C 207**.

29. If indeed there was any attempt for an out of court settlement, then it never worked well for both parties. They chose to have the matter heard for their own interest. The court in **Ivita –VS- Kyumba (1984) KLR 441** had these to say in such scenario: -

> "*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 ....*"

30. In the case of **Utalii Transport Company Limited & 3 Others vs NIC Bank & Another (2014) eKLR** the court held;

> "*.. 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 ...*"

31. I have considered the anxiety faced by the defendant/applicants as a result of the delay in the prosecution of this matter. It has also not escaped the mind of this court that processes in the courts of this country since March 2020 have not been the same. Several cases which were even ready for hearing are yet to be heard. This is all because of the covid-19 menace.

32. It is therefore clear that the plaintiff/respondents are not wholly to blame for the delay. They have expressed a serious interest in proceeding with the case. I therefore find it fair in the interest of justice to give them an opportunity to proceed with the matter. The application dated 11th March 2021 is therefore disallowed. Costs to be in the cause.

33. I direct both parties to file and exchange their relevant documents and any other documents within 30 days. Mention on 8th November 2021 before any Judge in the division to confirm compliance with Order 11 of the Civil Procedure Rules.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 7TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE