REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 140 OF 2011

HASSAN MOHAMED HUSSEIN &

SAID MOHAMED ABDI Both T/A WESTERN INVESTIMENTS.....PLAINTIFF

-VERSUS-

KENYA REVENUE AUTHORITY.....1ST DEFENDANT

KENYA PORTS AUTHORITY.....2ND DEFENDANT

RULING

1. The Applicant who is the 1st Defendant in this suit, seeks dismissal of the Plaintiff's **Notice of Motion** Application dated **4th April, 2018** for Want of Prosecution. It avers that the Plaintiff has not set the suit for hearing since **17th September, 2018** which is a period of over a year and one month. In the Application dated **4th November, 2019**, the Applicant seeks orders that the application dated **4th April, 2018** be dismissed and that the costs of the application be borne by the Plaintiff.

2. The Application is expressed to be brought under **Order 17 Rule 2(3)** and **Order 51 Rule 1**, both of the **Civil Procedure Rules 2010** and **Section 3A** of the **Civil Procedure Act** and is based on **Grounds 1 to 6** on its face. It is further supported by an **Affidavit** sworn by the 1st Defendant's Advocate **Nick Otieno Osoro** on **4th November, 2019**.

3. The Applicants case is that the Plaintiffs' **Notice of Motion** dated **4th April, 2018** was never set for hearing since **17th September, 2018** and as such, the Plaintiff has lost interests in prosecuting the said application hence the same should be dismissed as sought.

4. In a **Replying Affidavit** sworn by the Plaintiffs' Advocate, **Mr. Ahmeed Luqmaan**, he contends that the matter was previously being handled by **Mr. Tebino** who had failed to inform the Plaintiffs on the progress of the matter. That upon perusal of the record after **Mr. Tebino** left the Firm of Advocates, **Mr. Luqmaan** has established that the Plaintiffs' application which seeks to reinstate the suit that had been dismissed for Want of Prosecution on **8th July, 2015**. A hearing date for the application for reinstatement of the suit was then set for **3rd July, 2018** and **17th September, 2018** only for the Plaintiffs to realize that the Court was not sitting on both occasions.

5. It is further deponed that it is the Plaintiffs' erstwhile Advocate who lost track of the file and never fixed another date for hearing and therefore it cannot be said that the Plaintiffs had lost interest in prosecuting the matter. According to **Mr. Luqmaan**, the Plaintiffs should therefore not be punished for mistakes of his Counsel and urges the court to exercise its discretion by dismissing the instant application and allow the Plaintiffs to prosecute the matter to its conclusion.

6. On **2nd March, 2020**, parties were directed to dispose of the application by way of written submissions and both parties obliged with the

said directions. The 1st Defendant's/Applicant's submissions are dated **5th March, 2020** and filed on **9th March, 2020** whilst the Plaintiffs'/Respondents' submissions are dated and filed on the **26th May, 2020**. I have considered and thoroughly read through those submissions.

Analysis and Determination

7. I have considered the application, the rivalry submissions thereof and the entire record of the court. I note that the Plaintiffs instituted this suit by way of **Plaint** dated **27th May, 2011**. The 1st Defendant on **5th July, 2011** filed a Statement of Defence contesting all the allegations pleaded in the **Plaint**. Similarly, the 2nd Defendant filed a Statement of Defence on **16th September, 2011** to rebut the claims made against it.

8. On **5th March, 2014**, the court gave directions geared to ensuring compliance with pre-trial conference, *to wit*, the court directed that the parties were to file their respective witnesses' statements, paginate their documents, file the agreed issues and thereafter the case would be fixed for hearing. However, no steps were undertaken by the parties to fix the matter for hearing until it was dismissed by the court on its own motion on **8th July, 2015** for Want of Prosecution. Three years down the line, the Plaintiffs filed an application dated **4th April, 2019** seeking orders for the court to set aside and/or vary the orders issued on **8th July, 2015** dismissing the suit for Want of Prosecution under **Order 17, Rule 2** of the **Civil Procedure Rules, 2010**. Similarly, the Application has never been slated for hearing and now the 1st Defendant seeks the same to be dismissed for want of prosecution.

9. In explaining the delay, the Counsel for the Plaintiffs attributed the same on the part of an **Associate Advocate** who was handling the matter on behalf of the Plaintiffs. It is averred that the said Advocate lost track of the matter and never updated the Plaintiffs on the progress of the matter. To that end, it is submitted that no inordinate delay has been shown by the Plaintiffs and the mistakes of an Advocate should not be visited on the Plaintiff. According to the Plaintiffs, the application cannot be dismissed on the basis of Want of Prosecution since the 12 months requirement has not been satisfied.

10. The 1st Defendant on the other hand, reiterates that no plausible explanation has been offered to cover the delay and the fact that courts have embraced the ideal that a mistake of an Advocate should not be visited against a client, which principle is not automatic and should not be applied in every case.

11. Therefore, the sole issue for determination, in this application is whether or not the Plaintiff's application date 4/4/2018 seeking to reinstate the suit should be dismissed for want of prosecution.

12. **Order 17 Rule 2(1)** of the **Civil Procedure Rules**, which governs the 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."***

13. Since the instant suit was dismissed on **8th July, 2015** for Want of Prosecution, in my view **Order 17 rule 1** is not the appropriate provision for consideration in dismissal of an application for Want of Prosecution. The court has to be guided by underlying principles in exercising such discretion which include;

> ***a) where there is reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;***
>
> ***b) a party who seeks dismissal of the application has the burden of laying a basis, to the satisfaction of the Court;***
>
> ***c) Whether there will be any prejudice suffered by the respondent, if the application is dismissed;***
>
> ***d) Each case depends on its own facts.***

14. In the case of ***Al Amin Agency…Vs…Sharrif Omar & Another MSA 272 OF 1996, MARAGA J.*** *(*as he was then,*)* set out what he believes to be factors and principles that would guide a court in considering such an application as in the instant case. These are:-

> ***1) Dismissal of a suit for want of prosecution like the striking out of pleadings should be regarded to be a draconian action which should only be taken in exceptional cases because such an action deprives the plaintiff of his cause of action against the defendant and in some cases where the issue of limitation arises leaves them with no remedy at all. Such an action should therefore be taken down on laid down principles.***

2) The test to be applied in applications such as this is whether there has been prolonged inordinate and inexcusable delay in having the case heard and if there has been such delay whether justice can nonetheless be done.

3) That even though there is prolonged or in ordinate delay if the court is satisfied with the plaintiffs excuse for delay and justice can still be done to the parties the suit will not be dismissed and will instead be ordered to be set down for hearing as soon as possible.

4) The suit will not also be dismissed if it is shown that the defendant waived or acquiesced in the delay. But mere in action on the part of the defendant cannot however amount to waiver or acquiescence. There must be some positive action on the part of the defendant which intimates that he agrees that the case should proceed thus inducing the plaintiff to do further work and incur further expenses in the prosecution of the case.

5) Should however be further series delays on the part of the plaintiff after the defendants acquiescence in or waiver of the earlier delay, the whole history of the case may be taken into account in deciding whether or not the case should be dismissed.

6) There is no fast or hard rule as to what amounts to delay. In some cases a few months will amount to inordinate delay. In others it will be a period of years. Intentional and contumelious delay even though short will be inexcusable.

7) Each case depends on its own facts.

8) Also to be considered is whether there has been disobedience of a pre-emptory order of the court. If there has been it is regarded as intentional and contumelious and the suit will be dismissed.

9) It is of the greatest importance in the interest of justice that cases should be brought to trial within reasonable time. When they are delayed there is a risk of denying justice not just to defendants but even to the plaintiffs as well because

i. ***where a case is one in which at the trial disputed facts will have to be proved by oral testimony and there is prolonged delay, there is a risk that witnesses may die or disappear.***

ii. The recollection on those that remain of events that happened several years back may have grown dim and in such case there will be a substantial risk that a fair trial of the issues is no longer possible.

10) The defendant has not only to show that there has been inordinate or prolonged delay but also that because of that delay it is no longer possible to have a fair trial. He also has to prove that he is likely to be seriously prejudiced by the delay.

15. In the instant application, it is not in dispute that there has been delay since the Application dated **4th April, 2018** was fixed for hearing on **17th September, 2018** until the instant application seeking to dismiss it, was filed on **4th November, 2019**. The explanation given thereto places blame on the Plaintiffs' erstwhile Advocate by stating that the Advocate was not informing the Plaintiffs on the position of Application as indicated in the preceding paragraphs.

16. However, it is my considered view that, this suit herein belongs to the Plaintiffs/Respondents and not to its previous advocate and further that it was upon the Plaintiffs to follow up the progress of their suit with his then Counsel. There is no evidence that the Plaintiffs made any effort to see his advocate as concerns the matter. The Plaintiffs cannot therefore seek to explain the delay by blaming their Advocate. The Plaintiffs had a duty to ensure that action was taken in its case. In this regard I refer to the case of **Edney Adaka Ismail…Vs….Equity Bank Limited (2014) eKLR** thus:-

"However, it is not in every Case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court. In Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 Kimaru, J expressed himself as follows:-

"Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant. (emphasis added)"

17. Likewise, in the instant suit it is apparent that the if the Plaintiffs had been diligent litigants, they would have been aware that their application dated **4th April, 2018** seeking to reinstate the suit has been pending unprosecuted for more than a period of one year. For the Plaintiffs to be prompted to action by the Defendants' action seeking to dismiss its application date **4th April, 2018**, is an indictment of the Plaintiffs. The Plaintiffs had been indolent and taking into account their previous conduct in the prosecution of the main suit as illustrated under paragraph 8 herein above, it would be against the equitable maxim that equity will only aid the vigilant and not the indolent.

18. It is the finding of this court that the Plaintiffs have failed to provide a reasonable explanation as to why the Application dated **4th April, 2018** should not be dismissed. The delay of more than a year in prosecuting an interlocutory application seeking to reinstate a suit is inexcusable.

19. This court is also aware that the dismissal of a suit is a draconian action and that in considering such dismissal and whether or not there ought to be reinstatement of this case the most important consideration is the interest of justice. Justice cuts both ways as it is a double edged sword. The interest of justice must look at both sides. That is, the Plaintiffs' side and the Defendants' side. In my consideration of what parties have presented before me, I find that the interests of justice on the Defendants' part outweigh those of the Plaintiffs. It is the Plaintiffs who sued and thereby brought the Defendants to this court. The Plaintiffs had an obligation to ensure that this case, which was filed in the year 2011, was prosecuted with.

I will use the words of the case of South Australia which perfectly capture the facts of this case, that is **Beverage Bottlers (SA) Ltd (in liquidation) and ARVO…Vs…Abode Enterprises PYT let (2009) SASC 272,** where the Judge stated:

> ***"There must come a time when the party has so conducted the litigation that it would be appropriate to shut that party out of that party's litigation even if the point is arguable. Justice delayed can be justice denied. Both the Plaintiff and the Defendant are entitled to justice.***
>
> ***If the Plaintiff has conducted his or her case so that the Defendant has suffered prejudice or will suffer injustice in defending the case then the Defendant is entitled to justice, and justice can only be achieved by shutting the Plaintiff out of his or her case."***
>
> ***There comes a time when (the Defendant) is entitled to have some piece of mind and to regard the incident as closed.***
>
> ***The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose."***

20. The Defendant is entitled to peace of mind after four years of the dismissal of this. Accordingly, the application dated **4th April, 2018** is dismissed with costs for the reasons stated above.

Conclusion

21. In respect to the **Notice of Motion** dated **4th November,2019,** the same is allowed with costs to the Defendants/Applicants.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 7th day of October, 2020.

D. O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020,** this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

D. O CHEPKWONY

JUDGE