REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 248 OF 2011

LUCY NJOKI GATHIRIMU AND

MARTHA WANJIRU GATHIRIMU

(Suing as legal representatives of

RAPAHEL GITHUI KAGOTHO-Deceased)..............................PLAINTIFFS

-VERSUS-

DR. GEOFFREY ALA MAGADA.......................................1ST DEFENDANT

SUSAN MAGADA...2ND DEFENDANT

NICHOLAS WARUTERE...3RD DEFENDANT

RULING

1. Before me is a Notice of Motion brought by the defendants under Article 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act and Orders 17, Rule 2 (3) and 51, Rule 1 of the Civil Procedure Rules, 2010. The aforesaid Motion is supported by the grounds set out on the body thereof and the sworn affidavit of *Paul Ngigi Karomo*. The following orders are sought therein:

i) THAT this Honourable Court be pleased to dismiss the plaintiffs' suit for want of prosecution.

ii) THAT the costs of the suit and application be borne by the plaintiffs.

2. The deponent, Paul Ngigi Karomo, stated inter alia that the plaintiffs filed the suit on 4th July, 2011 following which, the defendants entered appearance through their advocates on record and filed their statement of defence on 15th August, 2011 and 24th August, 2011 respectively. That the suit was last scheduled for hearing on 18th April, 2017 but the same was not listed and since then, the plaintiffs have not taken any steps to prosecute the same. The deponent also averred that the pendency of the suit continues to hinder the defendants' right to a fair trial.

3. The application is unopposed since no response has been filed by the plaintiffs.

4. In view of this, I have considered the Motion and the affidavit in support thereof. The issue to be determined is whether or not the suit ought to be dismissed for want of prosecution. The germane principles surrounding dismissal of such nature have been well articulated in numerous authorities. I shall draw specific guidance from ***Mwangi S. Kimenyi v Attorney General & another [2014] eKLR*****.**

5. The first principle relates to inordinate delay in prosecution of the plaintiffs' suit. It has already been established that the suit was filed on 4th July, 2011. Thereafter, parties attended court on various occasions and at one point, the plaintiffs' then advocates on record filed two (2) separate applications seeking reconstruction of the court file. Upon reconstruction of the file, the matter came up in court on a number of occasions.

6. That notwithstanding, a notice to show cause was issued by the court on 3rd September, 2018 pursuant to *Order 17, Rule 2* of the Civil Procedure Rules thereby indicating that the matter was last in court on 16th March, 2017. When the parties appeared before the court on 28th September, 2018 the plaintiffs' advocate sought the indulgence of the court for the reason that the parties were attempting an out-of-court settlement.

7. However, when the matter came up in court as scheduled on 3rd December, 2018 for purposes of recording a consent, the court noted that neither of the parties were in attendance and without excuse. Consequently, the file was returned to the registry.

8. Having set out the above background, I have no doubt that this is a fairly old matter for which there has been a delay. The delay prompted the issuance of the notice to show cause, which it would appear was lifted by the court upon the plaintiffs' request made on 28th September, 2018. The question of negotiations by the parties has not at all been disputed by the defendants and I am therefore inclined to believe that such negotiations were in place. To my mind therefore, whereas there is evidence of delay in the matter, I find the same not to be inordinate in the circumstances of this case.

9. This brings me to the next issue on whether the delay is intentional and hence inexcusable. Since it is clear that the plaintiffs did not file a response to the Motion before me, I am left to rely solely on the court record. It was indicated that the court file previously went missing and a reconstruction was sought. I have also noted from the said record that the plaintiffs' advocates made attempts at inviting the defendants to fix dates at the registry in addition to attending court on a number of occasions. In his supporting affidavit, *Paul Ngigi Karomo* acknowledged that at one time, the matter was not listed as scheduled; this was through no fault of the parties. In my view therefore, the plaintiffs made some effort to keep the suit active and I am not convinced that they intentionally delayed the matter.

10. The third principle concerns whether or not the delay is an abuse of the court process. I am alive to the overriding objective to ensure expeditious disposal of matters. I therefore concur with the defendants to the extent that the prolonged pendency of the suit would inevitably impede the overriding objective. However, the defendants have not shown the manner in which the plaintiffs have abused the court process and hence offering no basis for me to find that there was an abuse of the court process.

11. In respect to the substantial risk or prejudice that the defendants stand to suffer, it is imperative for them to demonstrate the manner in which this will occur. The defendants in this instance argued that they risk losing vital documents and witnesses in addition to the hindrance of their right to a fair trial. In response thereto, I am of the opinion that this is not sufficient evidence of prejudice. I base my arguments on Justice Gikonyo's holding in *Mwangi S. Kimenyi* (supra) that:

> ***"…the Defendant must show he suffered some additional prejudice which is substantial and results to 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant. It must also be shown that the delay has worsened the Defendant's position in the suit. It will not, therefore, be sufficient to just make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out herein above."***

12. On the other hand, I am required to examine whether the plaintiffs stand to suffer prejudice. In doing so, I place reliance on ***Allen v Alfred McAlphine And Sons Ltd (1968) CA*** and other relevant judicial authorities which set out factors to be considered on this limb. In this instance, we have a fatal accident claim wherein compensation is sought by the plaintiffs. Should the suit be dismissed, the plaintiffs will be locked out of the courts of justice and in this way, suffer prejudice. Under the circumstances and to avoid a miscarriage of justice, it would only be fair for the said plaintiffs to be given the opportunity of being heard on merit.

13. Last but not least is the issue of discretion of the court *vis-à-vis* the interests of justice. I do admit that there has been a delay in the prosecution of the suit. Suffice it to say, the suit emanates from a fatal accident claim and to completely deny the plaintiffs the chance to prosecute their case would in essence be to deny them justice.

14. In the end, I find no merit in the application and dismiss the same with no order as to costs. However, the plaintiffs shall prosecute the suit within 12 months from the date hereof, failure to which the suit shall stand dismissed.

Dated, signed and delivered at NAIROBI this 7th day of February, 2019.

L. NJUGUNA

JUDGE

In the presence of:

………………………………. for the Plaintiffs/Respondents

………………………………. for the Defendants/Applicants