REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 17 OF 2014

SEAFRONT MULTIPURPOSE

COOPERATIVE SOCIETY LIMITED.....PLAINTIFF

VERSUS

LUCAS OWITI.....1ST DEFENDANT

LEWIS THORZELIUS GOGO MTEPE.....2ND DEFENDANT

CLEOPHAS BICHANGA

NYAMETA T/A NYAMETA & CO. ADVOCATES...3RD DEFENDANT

CORAM: Justice R. Nyakundi - J

H. N. Njiru for the Applicant

Mr. Nyongesa for Mr. S.M. Kimani for the 3rd Respondent

RULING

Background

This Court on 26th October 2018 delivered a ruling dismissing the plaintiff suit under **order 17 Rule 2** of the Civil Procedure Rules. The suit was filed on 3rd October 2014 and on several occasions no action had been taken to set down the case for inter-parties hearing. Soon after the dismissal on 11th December, 2018 learned counsel for the plaintiff filed a notice of motion seeking that the orders by this Court dismissing the suit for want of prosecution be vacated and set aside. That upon reinstatement the suit be heard on the merits.

The Application

The motion for restoration of the suit is expressed to be brought under **Article 48, 50, 159** of the constitution **section 1A, IB and 3A** of the Civil Procedure Act Cap 21 of the Rules of Kenya. The applicants have put up seven grounds in support of reinstatement of the suit

(1) That the order dismissing the plaintiff suit made on 26th October 2018 was made through no fault of wrongdoing on the part of the plaintiffs.

(2) That neither the plaintiff nor its advocates on record received the notice to show cause why the suit should be dismissed as stated under order 17 Rule 2 of the Civil Procedure Rules.

(3) That the said notice to show course was sent through Registered Post which was received when this matter had already been dismissed.

(4) That in the interest of justice, the said order ought to be reviewed and the suit herein reinstated.

(5) That the plaintiff be accorded an opportunity to be heard that the delay in this matter has not been occasioned by the plaintiff or the plaintiff's advocate.

In addition to the above grounds, there is an affidavit sworn by Seth Ongiri dated 7th October 2018. The only explanation given in the supporting affidavit for non-attendance is that the notice to show cause was received late and after the event of dismissal had occurred. Further, that the failure to attend court was not deliberate though highly regretted for that matter.

On the part of the 3rd defendant a notice of grounds of opposition dated 23rd March 2019 was filed objecting to the application. The third defendant also filed a replying affidavit dated 15th May 2019 alleging that the applicant has not shown why the suit was never prosecuted since 2014. Another upfront issued raised by the 3rd respondent was the very legal basis of the suit in view of the breach of the provisions under **order 5** of the Civil Procedure Rules on service of summons. To this end, the summons to enter appearance against the 1st and 2nd Respondent are deemed to have expired and no renewal had been granted to give life to the suit.

I have carefully examined the impugned order for dismissal dated 26th October, 2018 passed by the learned Judge of the High Court at Malindi. From the record the following extracts demonstrate that the applicant is guilty of laches.

20th August, 2015

Learned counsel for the plaintiff Njiru Advocate in the registry.

The Defendant and his counsel to serve pretrial questionnaire dated 20th March 2015 is fixed for hearing.

1st September, 2015.

Notice to issue on 1st September, 2015 no action

22nd June 2016

In the registry Sophie for Njiru Advocates for the plaintiff present. None appearance for the defendant

Application dated 20th March 2015 is hereby fixed for pretrial on 4th July 2016. Notice to issue.

The aforementioned 4th July 2016 no activity was recorded

19th July 2016.

In the Registry Sophie for Njiru for the plaintiff present.

No appearance for the defendant

Application dated 20th March 2016 is hereby fixed for pretrial on 8th August, 2016. Notice to issue.

8.8.2016

Before Hon. Wandia – Deputy Registrar

Mr. Kiarie for Njiru for the plaintiff

D. M. Kimani for the 3rd defendant. Hearing dated to be taken at the registry.

30.8.2016

Peter for Njiru Advocate for the plaintiff

No appearance for the respondents/defendant

Bill of costs dated 20th March 2015 is hereby filed for pretrial on 26th September, 2016

Notice to issue.

26.9.2016

Mr. Binyenya holding brief for Kimani for 3rd defendant

The filed placed aside up to 11.00 a.m Mr. Kimani for the 3rd defendant – the matter cannot be set for hearing. The summons to the 1st and 2nd defendant have lapsed. They are therefore not served. The matter is not even ready for pretrial conference on

26th October 2018

Before Hon. Justice Korir.

The matter dismissed under order 17 Rule 2 of the Civil Procedure Rules.

It is in light of the above I proceed to determine whether the application satisfies the threshold issue to be granted the orders prayed for in the motion.

Analysis

Under **order 17 Rule 2** of the Civil Procedure Rules the court has unfettered discretion to dismiss the suit filed for want of prosecution if the following conditions have been met.

> ***(1) "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."***

The effect of this provision is that where the court finds substance on the pending suit the discretion to extend time for parties to comply and have the suit heard on the merits. It is trite law of procedure that the indolent party must disclose grounds to the satisfaction of the court why the suit has not been prosecuted for more than one year.

The Court is entitled to scrutinize the evidence and if there is a fair case have the delay excused and in the interest of justice allow it to proceed for hearing.

The test of whether or not the provisions of under **order 17 Rule 2** of the CPR wholly applies to the facts of each case was laid down in the case of **Ivita v Kyumbu [1975] eKLR**.

> ***"Justice is Justice to both the plaintiff and the defendant, so both parties to the suit must be considered and the position of the Judge too, because there is a easy risk for the documents, and or witnesses may be missing and evidence is weak due to the disappearance of the 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 court will exercise its discretion in his favor 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 the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time."***

Similarly, the Principle involved for reinstatement of a suit is as endorsed by Visram J as he then was in the case of **Agip (K) Ltd v High Land Tyres Ltd 2001 KLR 630**

> ***"Where a reason for the delay is offered, the court should be lenient and allow the plaintiff an opportunity to have his case determined on merit, the court must also consider whether the defendant has been prejudiced by the delay."***

When seeking the exercise of discretion, to enlarge time in terms of **Order 17 Rule 2** the canons of our constitutional provisions on the right to a fair hearing under **Article 50** and the right to access court in **Article 48** does recognize the practicability of Statute Law on both procedure and evidence ignored to meet the ends of justice. Whether dismissal order can issue or not depends on the nature of the suit instituted and the reasons for want of prosecution. Furthermore, in **Article 159(b)** of the constitution ***"justice shall not be delayed."*** The wording of **Article 50 (2) (e)** on the right to a fair hearing espouses and makes reference to a trial commenced and concluded without unreasonable delay. The above right though textured under the ambit of Criminal Law applies in equal measure to the resolution of Civil disputes in our courts.

These principles pre-supposes a situation where an order of dismissal has been validly granted by the court under **order 17 Rule 2** of the Civil Procedures a party in breach should not take refuge in the provisions of the constitution alleging infringement of fundamental right and freedoms in the bill of rights. The provision under **Article 159(d)** of the constitution on substantive justice cannot be said to confer a shield to a party who is in breach of the fundamental rules of procedure established to guide the administration of justice.

In the case of **Lyomons and others v Attorney General 2005 2 EA 127** the court held *inter alia* that;

"The onus is on the petitioner to show a prima facie case of violation of their constitutional rights".

The rationale of **Article 159 (d)** on substantive justice is to protect the fair administration of justice where the larger measure of justice would be assured in the adjudication of disputes which find their way to the courts. This safeguard did not wither away the rules of

procedure and presentation of evidence in a trial. Within the context of section 1A of the Civil Procedure Act on overriding objective and Article 159 (d) of the constitution. The court in **Nilesh Premichand Shah & another v M.D. Popal and Rule 2016 EKLR** stated as follows;

> **"Nonetheless"**, **Article 159** ***of the constitution and Rule 17 Rule 2 (3) gives the court the discretion to dismiss the suit where no action has been taken for one year without an application by a party as justice delayed without explanation is justice denied and delayed defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether, the party instituting the suit has lost interests in court, or whether the delay in preserving the suit is inordinate, unreasonable, inexcusable, and likely to cause serious prejudice to the defendant on account of delay."*** (see also **Kyumbu 1984 KLR 441) Argan Wekesa Okuma v Dima College Ltd 2015 eKLR**).
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> **The question I pause is whether the suit by the plaintiff was properly dismissed by the court on 26th October 2018?**

The essence of the rule under **order 17 Rule 2** of the Civil Procedure Rules is that if the plaintiff or the defendant having approached the court have a limitation period of one year time which to prosecute their claims. If and is so far as it is practicable in any such proceedings the court has a right on its own motion to issue notice inorder to dismiss stale suits which have not been scheduled for hearing within one year period. To buttress this legal proposition, the court in **Nilan v Patel & Others 1969 EA** held:

> ***"It is only too trite that as in every civil suit, it is the Plaintiff who is in pursuit of a remedy that he should take all necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilt of laches. On the other hand, when he fails to bring his claim to a speedy conclusion it is my view that the defendant ought to invoke the process of the court towards that end as soon as it is convenient by their application for its dismissal or setting down the suit for hearing."***

In the instant case there is ample evidence to lead to the conclusion that dismissal notice under order 17 Rule 2 was served through the plaintiff's last known address. The court faced with such a scenario exercised discretion under order 17 Rule 2 of the CPR to dismiss the suit for want of prosecution. It was now incumbent upon the plaintiff to prove by way of documentary evidence that the notice to show cause was received after the due date of dismissal. It is unclear where the suit has remained in limbo since it was registered on 7th October 2014. In exercise of the powers conferred under order 17 Rule 2 of the CPR the dismissal order by the court was well grounded.

The legal proposition in **Kamau Mahugu v Liban Mwangi HCC NBI, 2700 of 1993** buttresses my point of view in the current application where the court observed inter alia –

> ***"Equity will not help the indolent even if he has a genuine claim to be determined on the merits, public policy demands that disputes should not be kept in abeyance but should be put to rest as the respondents would be prejudiced if the applicants are allowed to prolong the dispute and this is more so if there is no explanation from the office of the advocate alleged to have made the mistake." (See also G. V. Odunga Digest on Civil Case Law and Procedure Page 1742 at Paragraph 3711(a).***

Upon careful consideration of the motion at hand I am satisfied with the principles in the case of **Allan v MCAI Pine & Sons 1968 I ALL ER 543** that whereas every case must depend on its own facts but in this particular case the following salient features remain unrebutted.

> ***(a) Inordinate delay***
>
> ***(b) That this inordinate delay is inexcusable***
>
> ***(c) There are no plausible reasons explaining the delay.***

On the other hand, in the instant motion the first and second defendant are yet to be served with summons to enter appearance. In my view the third defendant remains to be highly prejudiced by the delay of nonsuited plaint on record. Broadly founded on these principles there are no sufficient reasons to demonstrate that the exercise of discretion under order 17 Rule 2 of the Civil Procedure Rules was not properly exercised before the orders were issued against the plaintiff. A finding was made based on evidence that for four years the plaintiff did not justify his action of not commencing a prosecution of the suit against the defendants.

The set deadlines for service of summons, discovery and pretrial conferences were frequently breached by the plaintiff. It is also clear that order 17 Rule (2) of the Civil Procedure Rules the court can even by *suo moto power* or upon a motion by the defendants dismiss inactive cases as a sanction for non-compliance with the Civil Procedure Rules. The burden is on every litigant to diligently prosecute claims filed and incompliance with the court process and procedure.

Applying the above test, the plaintiff has not shown sufficient reasons to warrant an equitable relief for he has approached the court with tainted hands. The 3rd defendant who is the only surviving party to the suit has suffered prejudice as a result of the delay.

In view of the fact that the plaintiff allowed his claim against the defendant to stay in limbo for a long period of time, I find the delay inordinate, unreasonable, deliberate and tactical which firmly prejudices the defendant. See (**Green Shollds v Travellers Corp.781 S. E. 2D 84011** ***"to me there is no lesser Sanction for such inordinate delay to prosecute other than dismissal".***

In the instant case therefore besides the question on the merits in terms of order 17 Rule 2, the failure to serve summons of appearance will attract the doctrine of estopped in the suit. In this application by the plaintiff it's doubtful whether there is alive claim which deserves unfettered discretion from this court. The law relating to service of summons is Order 5 Rule 5 of the Civil Procedure Rules. Under the provisions:

> ***"Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub-rule (2) of this rule. Since it's the plaintiff who moves the court. The defendant must be initiated by him or his respective counsel. The other order sub-rule 7 provides that when no application has been made under sub-rule (2) the court may without notice dismiss the suit at the expiry of 24 months from the date of issue of the original summons. The service of summons sets out the pace of litigation over particular issues raised by the plaintiff."***

The court of appeal in the case of **John Akasiriwa v Alfred Inai Kimuso CA No. 164 of 1991** held as follows:

> ***"Proper service of summons to enter appearance in a litigation is a crucial matter in the process whereby the court satisfies itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not. Hence the need for strict compliance with order 5 Rule 9(1). The ideal form of service is personal service; it is only when the defendant cannot be found. That service on his agent empowered to accept service is acceptable."***

It is clear from Order 5 rule 2 of the Civil Procedure Rules the validity of summons to ensure the proper administration of justice has a conditional life span of twenty-four months. The discretion of the court to be exercised to enlarge time for service of summons to enter appearance pursuant to Order 5 rule 2 is to be guided by the stated provisions and sound judicial principles. where the plaintiff has not served or sought enlargement of time for the validity of summons and they happen to expire beyond the twenty-four-month period, the delay is fatal to extend the validity."

The jurisdiction of the court to exercise its discretionary power as laid down in **Mbogo v Shah 1968 EA 93** would be perverse to the principles entrenched in section 1A and 1B of the Civil Procedure Act on an overriding objective and the protection provided to the court under Article 159(D) of the constitution on substantive justice.

In my view, to fundamentally advance the administration of justice in the litigation of disputes the just, expeditious and proportionate principles would not entail re-opening validity of summons which have expired for non-service beyond the twenty-four months' period.

The applicant motion to set aside the dismissal order in his affidavit has not raised this important matter under Order 5 Rule 2 of the Civil Procedure Rules which was within his knowledge at the time the order on dismissal was passed by the court.

There is no reference to such an omission or mistake in default to serve summons upon the 1st and 2nd defendant since the suit was filed on 7th October, 2014. This court has the residual jurisdiction to uphold the integrity of the process in circumstances such as this where the plaintiff did not comply with the requirements of the Civil Procedure Act, and enabling Rules to seek leave of the court to extend the validity of summons. The situation here is as articulated and set out in the legal principles elucidated in **Grace Wairimu Mungai v Catherine Njambi Muya 2014 eKLR v Dekumar Chandrelal Rajuni & 3 Others V Charles Thathi 1997 eKLR.**

In the instant suit the claim against the 1st and 2nd defendants merely exist on paper on the basis that no summons to enter appearance were ever served to bring to their notice existence of a dispute with the applicant. On the evidence and wide discretionary powers given to the courts to make decisions in the interest of justice such justification should not be ad-infinitum to give life to a suit which has since abated for lack of service of summons.

The important words in Order 5 sub-rule 2(2-7) and Order 17 Rule (2) of the Civil Procedure Rules shall be construed in line with Article 50 (2) (e) of the constitution which provides that: ***"Every person has a right to commence a trial and conclude it without unreasonable delay."*** In order to trigger the adjudication process before an independent court or tribunal the plaintiff asserted claim must be served against the defendant.

In the present case the plaintiff has taken a period of four years to process the claim filed in 2014 against the defendants jointly and severally. The delay for all intents and purposes is so inordinate that it amounts to an abuse of the court process. The court declines to accept the position that various steps were taken to prosecute the claim and found the four-year period in the context of Order 17 Rule (2) of the Civil Procedure Rules to offend the decency of the right to a fair hearing which allows the court to dismiss a suit where neither party has taken administrative action within a period of one year.

The basic threshold issue is in the circumstances of this case is that the passage of four years from the date of filing suit to have the trial begin without undue delay as tied down by the constitution is a duty which is inexcusable whether one is dealing with public or private interest litigation. The excessive length of proceedings and its consequences is one of the key pillar that stems from both the constitution and statutory law which impacts the protection and minimum guarantee to the right to a fair hearing. The obligation and scope on reasonable time for judicial proceedings is a general right applicable to the litigants and the adjudication body. It is for this reason as a whole I decline to exercise discretion to permit the applicant to reinstate the suit as prayed hinged on the principles in the supreme Court case of **Nicholas Salat v IEBC** on grounds that the applicant has failed to explain the reasons for the delay to prosecute and or serve summons against the 1st and 2nd defendant.

The effect of the period time taken and unnecessary delay on the administration of justice and its impact on the defendants, specifically the 3rd defendant who has waited for four years without any claim being advanced sufficient to constitute a right. The fact that the prospect of success likely to be achieved from a stale claim appear to be remote equity frowns to the indolent.

In light of these the applicant has failed to make a case for grant of the orders in the notice of motion dated 14/12/2018.

Subsequently, for this case enough is enough, I agree with the 3rd defendant/respondent that, the general power to exercise discretion to set aside the dismissal order under order 17 Rule 2 of Civil Procedure Rule and order for restoration of the suit to conclusively determine the

rights of the parties is not available to the plaintiff. In the final analysis, I find that the applicant has not established a case for the grant of the orders sought in the notice of motion dated 4th December 2018. As a result, the notice of motion is dismissed with costs to the 3rd respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF JULY 2019

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R. NYAKUNDI

JUDGE