**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 364 OF 2011**

**JULIUS MBAABU MARETE** (Suing on behalf

of the Estate of **Antony Kaimenyi** (DECEASED**.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**TOM AYORA.....1ST DEFENDANT/APPLICANT**

**NYERI SHUTTLE LIMITED.....2ND DEFENDANT/APPLICANT**

**KINYUA MONICAH.....3RD DEFENDANT/APPLICANT**

**MCHEZO COACHES LIMITED.....4TH DEFENDANT/APPLICANT**

**RULING**

1. The plaintiff's suit was dismissed for want of prosecution on the 17th November 2014 on court's motion upon a Notice to show cause why it should not be dismissed under provisions of **Order 17 rule 2 of the Civil Procedure Rules** served upon the parties. As at the dismissal date being three years had lapsed without any action taken by the plaintiff to progress the suit after close of pleadings.

2. In her application dated 20th July 2017 another three years after the dismissal of the suit, the applicant seeks an order to set aside, vary or discharge the dismissal order and reinstate the suit for hearing. It is further sought that summons to the 1st and 4th Defendants be effected through substituted service as the whereabouts of the two defendants are unknown, and had not been served prior to the dismissal of the suit.

3. The application is brought under **Order 5 Rule 17, Order 12 rule 7 and Order 51 rule 51 of the Civil Procedure Rules.**

The applicant in his supporting affidavit by his Advocate gives two reasons for the three years delay, that the Advocates firm was busy tracing the 1st and 4th respondents residences and were in the process of filing an application for leave to serve by substituted service, and secondly that the Advocates firm was being relocated and restructured to enroll a legal partner that resulted to misplacement of several files among them the plaintiff's file.

4. The application is opposed a by Replying Affidavit sworn by Wanjiru Njuguna, an Advocate in the defendant's advocates legal firm, to the effect that no good reasons were advanced to warrant the court to set aside the dismissal order or reinstate the suit for hearing. I have considered the reasons advanced. It is trite that one year after issue of summons, if not served they expire- **Order 5 Rule 2 of the Civil Procedure Rules.** I have not seen any order extending their validity. To that extent as at 14th December 2012, there was no valid suit against the 1st Defendant.

**Order 5 Rule 2 of Civil Procedure Rules** gives 12 months life to a summons unless they are renewed and concurrent summons another 12 months but upon extension by a court order upon application by a plaintiff.

5. Further **Rule 2(6)** gives the plaintiff liberty to attempt service upon a defendant as many times as it may wish. The applicant has not demonstrated any attempts to serve the defendants within the first 12 months nor any attempt to renew or extend the life of the summons. There being no summons to be extended for service upon the 1st Defendant, the matter rested there as the 1st defendant is concerned. This is different for the 4th Defendant as shall be shown hereinafter (Paragraph 7).

6. I have considered reasons for the three year delay in prosecuting this suit. **Order 17 Rule 2(1) of Civil Procedure Rules** gives the court power to issue notices to show cause why a suit should not be dismissed for want of prosecution if no step is taken to prosecute it within one year after close of pleadings.

7. The applicant's advocates admit that the said Notice to show cause was issued but denies having been served upon them. I have seen a Memorandum of Appearance for the 4th Defendant having been filed by Macharia & Company Advocates on the 28th March 2012. This is evidence from the record that the plaintiffs Advocates have not perused the court file to acquaint themselves of the correct status of the case, otherwise they would have known that the 4th Defendant had duly appeared by counsel. The 4th Defendant being the driver of the accident vehicle and the owner of the vehicle having been served, The plaintiff was not prevented from fixing the case for hearing. This is thereof a lame excuse.

8. On the matter of the Advocates restructuring of its offices and admission of a new partner to the firm, I find no satisfactory explanation as work does not cease when a firm is in the process of doing the above. In any event, and as submitted by the Respondents, no evidence was adduced to authenticate the allegations. On service of the notice to show cause, even if it was served upon the plaintiff's advocates and no contrary submission was urged, they state to have misplaced the plaintiff's file. On what basis then would they authoritatively urge that they were not served with the Notice to show cause?

In my very considered opinion the suit was procedurally and legally dismissed due to the plaintiff's and his advocates negligence, inertia and mismanagement of their clients files and briefs.

9. It is not always that a court will exercise its discretion in favour of a party if the mistake is by its advocates as submitted by the plaintiff. The advocates must demonstrate genuine and acceptable mistakes, not outright negligence as is in the case in this matter.

In circumstances as these, a client is not left without a remedy. If professional negligence is proved, the Advocates professional indemnity insurance cushions the advocates against such acts of negligence by compensating the clients by way of damages.

10. In the case **Ivita -vs- Kyumbu (1984) KLR 441, and in HCCC No.38 of 2010 Moses Mwangi Kimari -vs- Shammi Kanjirapparambil Thomas & 2 Others (2014) e KLR,** the court held that the reasons for delay in prosecuting a case must be sufficiently explained, and when no plausible explanation is is offered, then the delay is inexcusable.

11. Considering the three year period between the dismissal order (17th November 2014) and the filing of this application, it cannot be said that the plaintiffs advocates were genuinely concerned about the plaintiffs brief. No reason for this delay has been given whatsoever – See **Unga Ltd -vs- Maging Ltd (2014)e KLR.**

There being no explanation for the delay in filing this application, I find and hold that the application is an afterthought and was under the circumstances brought after undue delay. In both instances, I find the plaintiff guilty of inertia and indolence which is contrary to the spirit of **Sections 1A, 1B and 3A of the Civil Procedure Act,** and **Article 159(1) (b) of the Constitution.**

12. The applicant's advocate cited **Article 22(3)(b) of the Constitution**. I do not see relevance to the matter at hand save that courts are obligated to observe rules of natural justice and not to be unreasonably restricted by procedural technicalities. That I agree, but justice is to be done to all parties to a case. The position of the opposite party as well as the court must be considered as to the prejudices that the delay may occasion to them.

13. A Case belongs to the plaintiff and it is its duty to take steps to progress it. Leaving a case to the Advocates without checking on its progress is also negligence on the part of the plaintiff.

**Article 159(2) (d) of the Constitution** is not a cure to all sorts of negligent commissions and omissions by parties, so long as their actions are not satisfactorily explained to the court's satisfaction. Justice demands that the courts process be vindicated from blatant negligence of parties and their advocates. Justice shall not be delayed - **Section 1A, 1B and 3A of the Civil Procedure Act** on the overriding objectives of the Act to achieve the just, expeditions, proportionate and affordable resolution of disputes.

14. I am minded that the process of judicial systems requires that all parties be given a chance to present their cases before a decision is made. On the other hand it is public policy interest that the business of the court be conducted with expedition – **AGIP(K) Ltd -vs- Highlands Tyres Ltd (2001) 630 KLR**. To that extent, it is a balancing interest issue – what prejudices would be occasioned by a denial of the orders sought *viz -a viz* those that would be occasioned to the Respondents. It is trite that justice delayed is justice denied, and defeats equity.

15. It is interesting that the plaintiff himself did not swear an affidavit to explain the inordinate delays in support of his Advocates averments. Would it be that he too lost interest in the case? The case belongs to the plaintiff, and his failure to enlighten the court on the cause of the inordinate delays can only be construed to mean that he too lost interest in the case – See **Ivita -v- Kyumbu (Supra).**

16. At the tail end, I find no justification to set aside, vary or discharge the dismissal order of the suit dated 17th November 2014. It follows that the rest of the prayers cannot be availed to the applicant/plaintiff.

The application dated 20th July 2015 is devoid of merit and is dismissed with costs to the Respondents.

**Dated, signed and delivered this...7th .....Day of ....June.....2018**

**J.N. MULWA**

**JUDGE**