REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HIGH COURT CIVIL CASE NO. 414 OF 2010

MARTHA MWIKALI NYAMAI.....1ST PLAINTIFF/APPLICANT

STEPHEN KASOMO KIMWELE.....2ND PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

GARAM INVESTMENTS.....2ND DEFENDANT

RULING

[1] The Notice of Motion that is the subject of this Ruling is the one dated **19 August 2015**. It was filed herein by the 1st Plaintiff/Applicant, **Martha Mwikali Nyamai,** pursuant S**ection 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** and all other enabling provisions of the law, for the following orders:

> **[a] That the Court be pleased to reinstate this suit which was dismissed on 18 June 2015 for want of prosecution; and**
>
> **[c] That the costs of the application be provided for.**

[2] The application is premised on the grounds that the Notice to Show Cause preceding the dismissal was not served upon the Plaintiffs' erstwhile Advocates, **M/s Wamae & Allen Advocates**. It was also the Plaintiff's case that the parties have been engaged in out of court negotiations with a view of an amicable settlement, which negotiations ultimately broke down; and therefore that it would be in the interest of justice for the Applicant to be accorded an opportunity to present her case for hearing and determination on the merits.

[3] The Application is supported by the Applicant's Affidavit attached thereto, which was sworn on **19 August 2015**, in which she deponed that sometime in the year **2012** after the death of her husband, who was the 2nd the Plaintiff herein, the 1st Defendant vide their Legal/ Recoveries Officer, one **Albert Anjichi**, agreed to out of court negotiations with a view of settling this dispute out of court. Pursuant thereto, she was tasked to locate the purchaser of the suit property, which took a bit of time since she was not provided with, and did not have sufficient information as to his whereabouts. She added that she only came to find out on **29 July 2015**, that the suit had been dismissed for want of prosecution on **18 June**

2015 after instructing the firm of **M/s Oyatta & Associates** to take over the conduct of the suit on her behalf after **M/s Allen & Wamae Advocates** opted out; and that her erstwhile Advocates were resolute that no Notice to Show Cause was served on them prior to the dismissal.

[4] It was further the contention of the Applicant that**,** since the law recognizes alternative dispute resolution mechanisms, the delay in prosecuting the suit should not be viewed as inordinate; and further that the Defendants will not suffer prejudice in any way should this suit be reinstated. She added that, to the contrary, she stands to suffer prejudice should she be locked out of a merit hearing. She exhibited hard copies of emails exchanged in the course of their negotiations and urged that her application be allowed.

[5] The application is also supported by the Affidavit of **Prestone Ndombi Wawire**, a partner in the firm of **Wamae & Allen Advocates**, in which it was confirmed that the said firm was acting for the Applicant at the material time and that he advised her to instruct another firm of advocates on grounds that their firm had been appointed on the legal panel of the 1st Defendant; and that their firm was never served with any Notice to Show Cause why the suit should not be dismissed for want of prosecution. Counsel further averred that the reason for the delay in prosecuting the case was that he was waiting for the outcome of the direct negotiations between the Applicant and the 1st Defendant with a view of reaching an out of court settlement. He also relied on the copies of email correspondence between the parties; adding that the Defendants would not be prejudiced in any way if the suit was reinstated.

[6] The record shows that, as of **26 October 2015**, the defendants had not filed a response to the application, and was granted leave to file and serve a Replying Affidavit, within 14 days further to the Grounds of Opposition filed on **1 December 2015**. There appears to be no such affidavit on the file. Be that as it may, the application was canvassed by way of written submissions, which I have perused and considered.

[7] The brief background of the matter is that the Plaintiffs had been accorded some financial facilities by the 1st Defendant in 2004/2005 in respect of which the 2nd Plaintiff (now deceased) executed a Charge and Further Charge in favour of the 1st Defendant as well as Guarantees and Indemnities. In consequence of default by the Plaintiffs in servicing the facilities, the 1st Defendant instructed the 2nd Defendant to sell the charged property, **LR 12715/2644** situated in **Mavoko Municipality** (hereinafter, the suit property). It was thereupon that the Plaintiffs filed this suit along with the application dated **15 June 2010,** seeking an interlocutory injunction to restrain the Defendants from selling the suit property. However, that application was overtaken by events, having been placed before the Trial Judge at 3.15 p.m. in respect of a sale that was scheduled for 11.00 a.m. that day. The application was accordingly fixed for hearing *inter partes* on **28 June 2010**. In the circumstances, the Plaintiffs were constrained, in the interim, to file the application dated **22 June 2010** for the maintenance of the status quo, to restrict any transfer or vesting of title, pending *inter partes* hearing. The interim orders were granted, and thereafter the application was heard *inter partes* and a Ruling delivered on **10 January 2011**, granting the orders sought by the Plaintiffs.

[8] The record further shows that the main suit was subsequently fixed for hearing on **29 February 2012** but could not proceed as planned. For the purposes of the instant application, the suit was last in Court on **27 March 2012** for mention, when the Court directed the parties to fix a date for the hearing of the suit in the Registry. Evidently this was not done, and in consequence thereof, the Court moved *suo motu* for the dismissal of the suit for want of prosecution, pursuant to **Order 17 Rule 2** of the **Civil Procedure Rules**, and it was indeed dismissed accordingly.

[9] It is within the general discretion of the Court to set aside any order issued by it *ex parte*, so long as sufficient cause has been shown for the exercise of such discretion. Although Learned Counsel, in their written submissions urged the Court to consider the application from the prism of whether there has been inordinate delay; or whether the delay was inexcusable, it is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no

explanation. I say so because in the case of **Ivita vs. Kyumbu [1984] KLR 441** the said principles were set out thus:

> **"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it 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 the court will exercise its discretion in his favour 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.** (Emphasis supplied)

[10] Thus, I find instructive the expressions of the Court in **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173** that:

> ***"In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order… was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."***

[11] Accordingly, the Court would be interested in finding out the Applicant's explanation for not attending Court to defend the Notice to Show Cause; and whether any prejudice will be suffered by either the Applicant or the Defendants should the *ex parte* orders be set aside and the suit reinstated to hearing and disposal on the merits. To this end, the Applicant averred, at paragraph 6 of her Supporting Affidavit, that she only came to find out that the suit had been dismissed on **18 June 2015** for want of prosecution after instructing **M/s Oyatta & Associates** to file Notice of Change of Advocates on **29 July 2015**. She contended that she was not served with Notice to Show Cause for **18 June 2015**. Her erstwhile Counsel, **Mr. Wawire,** also deposed that their firm was never served. Accordingly, the burden of proof shifted to the Defence to prove such service as alleged.

[12] From the proceedings of **18 June 2015**, it is discernible that the Court moved *suo motu*; and in the Respondents' written submissions, they urged the Court to reflect on the constitutional imperative under **Article 159** thereof that cases be disposed of expeditiously. It was further submitted that **Order 17 Rule 2(1)** of the **Civil Procedure Rules** does not require service of notice, and that it uses the words "**give notice in writing**;**"** and further that since this suit was dismissed during the Judicial Service Week, the Court should take notice that service was then being effected through the Cause List and the websites of the Judiciary and the Law Society of Kenya. Thus, the Court was called upon to give effect to the Overriding Objective of the Civil Procedure Act as outlined under **Sections 1A** and **1B** thereof; which include the use of suitable technology.

[13] I agree entirely with the foregoing submissions and would accordingly endorse the expressions of the Court in the case of **Fran Investments Limited vs. G4S Security Services Limited [2015] eKLR** in which the Court had occasion to consider the aforesaid provision and held the view that:

> **"Order 17 Rule 2(1) of the Civil Procedure Rules does not require service of notice; it uses the word "give notice". The court may give notice of dismissal through its official website or through the cause list. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2(1) of the Civil Procedure Rules."**

[14] However, there is no demonstration herein that notification herein was via the cause list of or the website. As has been stated herein above, upon the denial of service by the Applicant, the Defendants were put on notice to demonstrate that service was indeed effected. This, in my considered view, is not a matter for judicial notice, given its primacy to the application at hand. The Defendants opted not to rebut the Plaintiff's averments in this regard and therefore are deemed to have admitted those averments.

[15] More importantly, in the Court Order of **18 June 2015**, it is expressly stated that:

> **"After the inordinate delay of 3 years since the last step was taken on 27/3/2012 with view to proceeding with the Suit, and service of Notice having been effected to show cause why this suit should not be dismissed and there being no satisfactory response, the Court in exercise of the powers conferred upon by Order 17 Rule 2 of the Civil Procedure Rules hereby orders this suit dismissed/closed."**

In view of the clear wording of the Order, there ought to have been proof of such service; which does not appear to be on the court file. This may be attributed to lapseSs in the internal registry operations of the Court, but it is nevertheless a mistake for which the Applicant should not be blamed. In this regard I would restate the words of **Apaloo, JA** in the case of ***Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103*** that:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."***

Accordingly I would resolve the question of service in favour of the Applicant.

[16] On the question of **prejudice,** it was submitted on behalf of the Applicant that she is a widow with a low income job; and that the suit property is the only property she inherited from her deceased husband. It was thus contended that she will be highly prejudiced if she were to lose the entire estate of her deceased husband without being given a hearing on the merits. Counsel for the Applicant further posited that the Defendant stands to suffer any prejudice that cannot be assuaged by way of costs. On the other hand, it was the contention of the Defendants that they will be greatly prejudiced if this suit is reinstated, in that

> **"... the Defendants witness memory fade, witnesses may die, evidence may be lost through destruction, witnesses may move jobs given the mobile nature of employment in the banking industry, coupled by increased costs of litigation and the exposure the continued subsistence of the suit has on the Defendants."**

[17] It is instructive however, that in the case of **Ivita vs. Kyumbu** (supra) it was made explicit that it is the duty of the Defendant to demonstrate the prejudice alleged by it. The Defendant must satisfy the court that it will be prejudiced by the delay by showing that justice will not be done in the case due to the prolonged delay on the part of the plaintiff. All there is herein are allegations in the written submissions filed by Counsel for the Defendants. There was no tangible proof that any of the witnesses has since left its employ or died; or even that any of the documents it purposed to rely on herein has since been destroyed; and it cannot be gainsaid that costs of litigation are costs that are recoverable. More importantly, it was common ground that the suit property was sold, what was restrained was the vesting of title in the name of the purchaser. Indeed, with regard to irreparable or insurmountable trial prejudice, **Lenaola, J** had the following to say in the case of **Joshua Chelelgo Kulei vs. Republic & 9 others [2014] eKLR,** which I entirely agree with:

> **"Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability**

should not be equated with irretrievability."

[18] Accordingly, I would take the view that, in the circumstances hereof, no prejudice would befall the Defendants which cannot be remedied by an award of costs; and that to the contrary, it is the Applicant who would be greatly prejudiced by being driven from the seat of justice without a hearing, were her application to be dismissed.

[19] The foregoing being my view of the matter, I would allow the application dated **19 August 2015** and set aside the dismissal order of **18 June 2015** and order that the suit be reinstated for hearing and determination on the merits.

Costs of the application to be costs in the cause.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16th DAY OF JUNE 2017

OLGA SEWE

JUDGE