REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 233 OF 2014

EXCLESIOR MIHASO LIMITED ……. PLAINTIFF

-VERSUS-

THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH …. 1ST DEFENDANT

THE ATTORNEY GENERAL ……..….. 2ND DEFENDANT

RULING

1. The Application herein is a Notice of Motion Application dated 28th January 2016. It is brought under Order 17 Rule 2 (1) and 2 (2), Order 51 Rule 1 of the Civil Procedure Rules 2010 and all enabling provisions or the law.

2. It seeks for the suit to be dismissed for want of prosecution and cost of this application be provided for. It is supported by the grounds on the face of it and the Affidavit sworn in support thereof by **EMMANUEL KIARIE**.

3. The Applicants case is that, the suit was filed in Court on 3rd June 2014 and since it's institution, it has never proceeded to full hearing. That, on 17th February 2015 the Applicants filed a notice of Preliminary Objection contending that the suit is time barred but ever since the notice of Preliminary Objection was filed, the Plaintiff has failed/neglected to take active/reasonable steps in ensuring that this matter is set down for hearing. That, the matter came before the Court on 30th July 2015, and the Counsel for the Plaintiff sought an adjournment so as to enable his client initiate dialogue with the Defendants. The Court allowed the Plaintiff's application for an adjournment but gave directions that the Respondents may apply to have this suit dismissed if no action is taken within three months from 30th July 2015. The Plaintiff failed/neglected to initiate dialogue. Therefore the Plaintiff's delay in prosecuting this suit has been inordinate and inexcusable. In the premises, it is only fair and just that this application be granted as prayed.

4. The Application is opposed based on the Replying Affidavit sworn by **BERNARD K. SANG**, dated 10th March 2016 and filed in Court on 11th March 2016. The Respondents avers that came up for hearing on the 30th of July 2015 and the parties agreed to negotiate the matter out of court. The Respondent Counsel wrote to their instructing client seeking to have all the necessary documents/information that would enable them make a settlement offer. The instructing client responded and forwarded part of the documents and promised vide a letter dated 3rd August 2015 to forward the rest. However on realizing that he needed to set down a date for negotiations and did not have all the documents, his Counsel sent a reminder to the client to forward the rest of the documents. After getting all the required documents, he

issued instructions to his Assistant to write a settlement offer attaching the documents received and to forward them to the Defendants. Unfortunately, the Assistant left the firm without issuing notice or conducting a proper handing over. This led to the misplacement of file, as such they could not take any action on it. He traced the file later in the month of December and commenced upon the preparations of the documents that they needed to forward to the Defendants as to their offer for settlement. However, the negotiation could not proceed as Defendants the offices were closed for December holidays and he had to wait until they resumed office in January. He then prepared a letter of offer and forwarded it to the Defendants, giving their proposal. The Counsel admitted that, indeed there has been a delay in commencing the negotiations, which was occasioned by the eventualities in his office, an act which he highly regrets. He told the Court that he has already initiated the negotiations by forwarding to the Defendants the Plaintiff's offer on settlement and that the Plaintiff is keen on having the suit dealt with to conclusion. Therefore he should not be put to suffer by having the suit dismissed. He requested for a further one month to finalize on the negotiations. He submitted that the Defendants will not suffer any harm by allowing an extension of one month.

5. The application is based on Order 17 Rule 2 sub rules 1, 2, 3, and 4 and Order 51 Rule 1 of the Civil Procedure Rules. Order 17 Rule 2 sub rules 1, 2, 3 and 4 provide as follows;

> ***2. (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.***
>
> ***(2) If cause is shown to the satisfaction of the Court it may make such Orders as it thinks fit to obtain expeditious hearing of the suit.***
>
> ***(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.***
>
> ***(4) The Court may dismiss the suit for non-compliance with the direction given under this Order.***

6. I have considered the Application herein, the grounds and affidavit in support thereof and the grounds and the Replying Affidavit sworn in opposition thereto. I have also considered the submissions tendered by the respective parties.

7. The Applicants submission gave a chronology of events in relation to the progress of the suit. They submitted that, the suit was instituted on 3rd June 2014. The defence thereto was filed on 7th April 2015 after obtaining leave to file the same out of time. A preliminary objection was filed to the effect that the suit was time barred. Todate that preliminary objection has never been dealt with. Subsequently the suit was marked stood over generally on 30th July 2015, and remained silent until the filing of the Application herein on 7th March 2016. The Applicant's referred the Court to several authorities. They cited the case of **Reggentine –vs- Beecholme Bakeries Ltd (1967) III Sol, Jo. 216** where it was held:

> ***"It is the duty of the Plaintiff's advisers to get on with the case. Public policy demands that the business of the Courts should be conducted with expedition …"***

8. They also referred to the case of **Cecilia Wanjiku Njoroge –vs- National Environmental Management Authority & Another ELC. CASE No. 529 of 2010** to buttress the fact that the Plaintiff has lost interest in prosecuting the matter by failing to set the suit down for hearing. In that case the Plaintiff ceased to give instructions to her lawyers and the Court held that the Plaintiff had lost interest in the suit and it was highly unfair on the Defendants to let the suit continue to tax them. The Applicant submitted that, the long delay in prosecuting and or initiating negotiations to finalise the suit has adversely affected the Applicants who has since lost the key witnesses and or documents required to prosecute the suit. As such, the natural consequences thereof will be to render the defence case weak and lead to loss of colossal sum of public funds resulting from interest accrued over the years. The Applicant sought that the Application be allowed with costs.

9. On their part, the Plaintiffs submitted that, the delay was for only two months and therefore not inordinate, is excusable, and is not prejudicial to the Applicant. They relied on the cases of:

> **Mwangi S. Kimenyi vs Attorney General & Another (2014) eKLR** *where F. Gikonyo J relying on the authority in* ***NBI HC ELC Case No. 2058 of 2007 and Sagoo vs Bhari (1990) KLR 459****, held where a delay of eight (8) months and five (5) months, respectively was considered not to be inordinate. They also cited the case of* **Chandaria Industies Limited vs Sonal Holdings (K) Limited & Another (2014) eKLR** where the case of **Allen vs Sir Alfred McAlpine** was cited as hereunder;
>
> ***"… Since the power to dismiss an action for want of prosecution is only exercisable on the application of the Defendant, his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely on it …"***

10. They further relied on the case of **Patrick Ayisi Ingoi & Another vs Madhav Bhalla t/a Taibjee & Bhalla Advocates & 2 Others (2014)** where F. Gikonyo J. held that;

> ***"Despite the explanations given by the Plaintiffs, there is a delay in the prosecution of this case. But as I stated earlier, the test is whether despite the delay, it was still possible to do justice. Pendency of a case for a prolonged period is quite unpleasant and may cause anxiety as well as prejudice to the Defendant. The third parties and the Defendant are right in so asserting. But, the prejudice to the Plaintiff on losing his cause of action arbitrarily should be considered when determining the prejudice to the Defendant. In this case, there is no specific prejudice, hardships or change in position on the part of the third parties and the Defendant which has been shown to have been occasioned on them by the delay. This case will still be capable of prosecution without cause substantial prejudice to fair trial or to the third parties and the Defendant".***

11. The Respondent submitted that in the event the suit is dismissed, they will suffer loss of large, sums of money obtained through loans, which are accruing interest due to the cancellation of the contract by the Applicants. They prayed for a chance to be heard as the Court has the discretion to excuse a delay and order the suit be set down for hearing justice to be done.

12. I find the following issues need determination:

- ***Whether the delay is inordinate and inexcusable,***
- ***Whether the delay gives rise to substantial risk to fair trial or cause serious prejudice to the Defendant,***
- ***What prejudice will the dismissal occasion to the Plaintiff?***
- ***Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?***

13. I have perused the Court record, the last time the matter was in Court was on the 30th July 2015, before the Application herein was filed on 15th March 2016. The case was marked stood over generally (S.O.G). According to the Respondents submission, the delay was occasioned by the delay to receive documents from the Instructing client to enable them pursue negotiations for settlement of the matter out Court. This was followed by misplacement of the file as a result of the Associate who left the Law firm without proper handover. The file was traced later and a proposal was send to the Applicant on 20th January 2016. I have seen a letter annexed to the Replying Affidavit marked **"BKS 2"** dated **3rd August 2015**. It is addressed to the Plaintiff's Counsel by the Defendant's Counsel. It is forwarding documents requested for and indicates that further documents will be forwarded. That letter was responded to vide letter dated **17th September 2015**, where the Plaintiffs Counsel was seeking for pending items/information to facilitate an out of Court settlement; and finally a letter dated **20th January 2016** from the office marked "without prejudice" and forwarding a proposed amicable settlement out of Court.

14. From all these correspondence it's clear that from the 30th July 2015 to 20th January 2016 the parties were engaged in negotiation with a view of settling the matter out of Court. The Application is dated 28th January 2016 and was filed in court on 15th February 2016. Is this delay of about two weeks if any, inordinate, prolonged and or inexcusable. I don't think so.

15. Allow me to associate myself with the holding in the case of **Ivita vs Kyumbu (1984) KLR 441**, where it held that, the test in any Application's for dismissal of the suit for want of prosecution is a balance between a prolonged and inexcusable delay and the need to give justice to both parties. Hence, the Court need to weigh and establish whether justice can still be done despite the delay if any. I fully agree with the finding therein that **"Justice is Justice to both the Plaintiff and Defendant"** (emphasis mine).

16. Allow me also make an observation that, as much as **"delay may create denial of Justice"** but the spirit of Article 48 the Constitution of Kenya guarantees the right of **"access to Justice".** That must be upheld at all time. The main core business of the Judiciary is administration of justice through settlement of disputes referred to it. The Courts must be hesitate to throw out parties from the temple of Justice. Each Case must be treated on it's own merit. I hold the opinion that the Courts should shift blame where it belongs. If for example, an instructed party fails in his or her professional duties to comply with the instructions of the instructing client either due an inadvertent mistake and or negligence, such party must be held to blame. An order that such a party should pay the costs resulting from such non-performance will not be too harsh in my opinion. It will keep all the parties involved in the case alert.

17. However, I am not certainly exonerating the Plaintiff from his duty to keep vigil over the progress of his, her, or it's case. They too, are duty bound to do so. In the same vein, the Defendants should not be left in agony for years over a case, due to the laxity of the part of Plaintiff to prosecute the suit. I therefore believe at the end of the day, each case must be decided on its own facts and Justice to both parties must be the informing factors.

18. In conclusion I find that the delay herein is excusable, it was hardly a delay of two months. Order 17 Rule 2 gives a period of at least one year. I don't think the period of delay herein will substantially prejudice the Defendants. The Amount of claim as per the Plaint is substantial. The Plaintiff should not be shut out of Court.

19. The upshot of all this is the following orders:

- ***The Notice of Motion dated 28th January 2016 be and is hereby dismissed.***
- ***The costs of the Application will be awarded to the Applicants. Respondents admitted the delay and regreted the same and it's the Applicant who has moved them.***
- ***The parties must proceed forthwith and set down the case for compliance with the requirements of Order 11 Civil Procedure Rules.***

Orders accordingly.

READ,DELIVERED AND DATED, AT NAIROBI IN AN OPEN COURTTHIS 14th DAY OF JULY 2016.

G L NZIOKA

Ruling Read in open court in the presence of:

Nderitu for Sang for the Plaintiff/Respondent

Wambui for the Defendant/Applicant

Teresia – Court Clerk