REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 227 OF 2002

SAID ABDALLA ZUBEDI.....PLAINTIFF

VERSUS

1. CHRISTINE WANGARE GACHEGE .....1ST DEFENDANT

2. ELIZABETH WANJIRA EVANS.....2ND DEFENDANT

3. MARY WANJIRU.....3RD DEFENDANT

4. PETER NJOGU GACHEGE ….....4TH DEFENDANT

RULING

1. The plaintiffs suit was dismissed by the court on the 12th November 2014 for want of prosecution. While dismissing the suit upon application, the court noted that the suit had been pending for hearing for 12 years and the last step taken by the plaintiff was on the 15th August 2008 when the case was adjourned upon the plaintiff's request for adjournment. The court further noted that the plaintiff despite being served with the application for dismissal did not file any response. The court found that the delay was inordinate and inexcusable as no plausible reasons were tendered for the delay.

2. By his application dated 11th December 2014 the plaintiff filed the present application under the provisions of **Order 45 Rule 1 and 2 of the Civil Procedure Rules** and **Sections 1A, 1B and 3A of the Civil Procedure Act** and sought the following orders:

> ***(a) Spent***
>
> ***(b) The Honourable court be pleased to review, set aside and or vary its order issued on the 12th November 2014 dismissing the plaintiffs suit for want of prosecution.***
>
> ***(c) That in the alternative, the court be pleased to set aside the said orders and grant the applicant leave to respond to the application dated 31st March 2013.***

3. The grounds for the application appear on the face of the application, and in a nutshell it is stated that the plaintiff was condemned unheard and that the court failed to accord the applicants advocate an opportunity to be heard which according to the applicant was gross error apparent on the face of the record.

The applicant swore an affidavit in support on the 11th December 2014.

He deposes that he has diligently prosecuted his suit and is desirous to prosecute the suit to conclusion and that the delay was occasioned by on going negotiations between the respondents after the demise of one of the defendants.

4. In his submission, the applicants Advocate Mr. Wambeyi Makomere urged that when the suit was dismissed on the 12th November 2014, the applicant was present in court and counsel Mr. Tombe had been instructed to hold brief for Mrs. Ndeda who was in another court and that none of the parties to the suit had exchanged their documents to facilitate fixing the case for hearing.

5. It was his submission that the delay was not in ordinate, that the plaintiff had been out of the country and had not obtained instructions to respond to the application for dismissal and that at the date of the offending ruling, the plaintiff was still in India for treatment. He further submitted that the delay of 6 years was not intentional as there were negotiations between the parties but never concluded due to lack of communication with the other defendants who were unco-operative. He continued that the dismissal of the suit has caused the plaintiff prejudice as the subject matter touches on title to land, that if the orders sought are not granted, he would suffer loss and damages. Citing **Article 50 of the Constitution of Kenya,** he submits that every person is entitled to a fair hearing.

6. The application is vehemently opposed by all the defendants by their replying affidavits sworn on the 18th May 2015 the first and second Respondents respectively.

Both submit that there were no ongoing negotiations with the applicant and that the suit had nothing to do with a criminal case against one Peter Njogu Gachege, deceased as he was never a party to the case. It is their deposition that the applicant deliberately took no action to progress the suit since 2008 and therefore the orders of dismissal were warranted.

7. In their submissions by counsel, the respondents urged that no Replying affidavit or groundsof opposition were filed to the application for dismissal hence the court was in order when it heard the application *exparte*, and dismissed the suit.

8. The applicant seeks setting aside of the dismissal order by way of review. Under **Order 45 of the Civil Procedure Rules,** a party to be entitled to an order of review must satisfy the court that there was either a mistake or an error apparent on the face of the record, or that a new matter or evidence has arisen that were not within the knowledge of the party when the order was made.

Though the applicant says there was an error apparent on the face of the record, such error has not been pointed out to this court.

9. I have considered the depositions by the applicant in his supporting affidavit. He states that on the material date when his suit was dismissed, he was present in court. In his advocates submissions filed on the 21st March 2016, it is stated that the applicant was away in India and had not come back. There must be a disconnect between the Applicant and his Advocates as the information given to the court is at variance.

10. There is no dispute that the applicant went to sleep to since 2008 and was woken by the dismissal of his case. A party should always take necessary steps to progress his case.

Section 1A, 1B, and 3A of the Civil Procedure Act enjoins parties and the court to expeditiously disposes off all cases without undue delay, for justice delayed is justice denied.

The inordinate delay of over six years, and in total 12 years since the suit was filed can not by all standards be reasonable unless sufficient reasons are tendered for the same.

In the present case, the court held that no plausible reasonable reasons were shown.

11. The court is minded that dismissal of a case should only be resorted to after due consideration of the

Justice of the case and if it is shown that dismissal is the only plausible thing to do.

See **Ivita -vs- Kyumbu (1984) e KLR** and **Mwangi S. Kimenyi** -vs- **A.G & Another (2014) e KLR** where the courts expressed themselves as stated above and that if the delay occasions injustice to the Defendant, unless it is sufficiently explained, a suit ought to be dismissed.

12. As I have stated, the applicant has not met the requirements under **Order 45 of the Civil Procedure Rules** nor the overriding objectives under **Section 1A, 1B and 3A of the Civil Procedure Act**.

A decision whether a suit should be reinstated for trial is a matter of justice and depends on the facts of such case. See **Ivita Kyumbu** case above.

The court while determining the above must endeavour to serve justice to all the parties by its judicious exercise of its discretion and to the question whether its decision to reinstate the suit or not will cause prejudice to the defendants.

13. It is trite that a party must take steps to prosecute its case. It is never the defendants who are dragged to the court by the plaintiff.

There can be no reasonable explanation by any party whose case lies in the court registries for over 6 years without even the slightest action been taken, and when such explanation is called for none is tendered, then after the same is dismissed, he runs to the aid of the court. Equity aids the vigilant, never the indolent. The applicant was given an opportunity to be heard but he failed to take it. I need not stress the prejudice occasioned to the defendant by the case hanging on their necks for twelve years. No new matter has been demonstrated to persuade the court to invoke the provisions of **Order 45 of Civil Procedure Rules. Article 50 of the Constitution** talks about fair hearing. There would be no fair hearing to the defendants if the case is reinstated when the plaintiff for six(6) years, failed to prosecute the same. What would be the position of witnesses who may not be found, and the court's position? The defendants would be more prejudiced than the plaintiff if the application were to be allowed – See **Ivita - vs- Kyumbu (Supra). Section 3A, 1A and 1B of the Civil Procedure Act** cannot come to the aid of an indolent party in the circumstances of this case.

14. For those reasons, this court finds no merit whatsoever in the applicants application dated 11th December 2014. It is dismissed with costs to the Respondent.

Dated, signed and delivered in open court this 15th day of September 2016

JANET MULWA

JUDGE