REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 237 OF 2013

TIMAU AGRO INDUSTRIES LIMITED ....…….....PLAINTIFF

VERSUS

NATIONAL OIL CORPORATION OF KENYA.....….....DEFENDANT

RULING

1. The Notice of Motion application dated **19th January, 2016** was filed herein on **21st January 2016** for orders that this suit be dismissed for want of prosecution and that the costs thereof be borne by the Plaintiff. The application is anchored on **Sections 1A, 1B** and **3A of the Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and**Order 17 Rule 2(3)** and **Order 51 Rule 1**of the **Civil Procedure Rules.**It is supported by the affidavits of **Milly J.Odari** and **Gladys Koletit** sworn on **19th January, 2016,** respectively. The grounds relied on in support of the application are:

> **(a) That no application has been made or step taken by the Plaintiff since 30th January 2014 when the matter came up for hearing of the Defendant's application for leave to amend Defence.**
>
> **(b) That it is now almost two years since the Plaintiff took any step to set down this suit for hearing;**
>
> **(c) That the delay by the Plaintiff in prosecuting this matter is inordinate, unreasonable and inexcusable, and is causing serious prejudice to the Defendant;**
>
> **(d) That it is apparent that the Plaintiff has lost interest and is no longer keen in pursuing this matter, and therefore that it is in the interests of justice that the orders sought be issued.**

2. In response to the application, the Plaintiff filed relied on the Replying Affidavit sworn by its Managing Director, **Lawrence Muriithi Mbabu,** on **18th April, 2016**. The Plaintiff contended that it was keen on prosecuting its suit since it had filed since filed its Statement of Agreed issues dated **1st March, 2015**. As such, it is the Plaintiff's case that the suit herein is only awaiting Case Management Conference and the fixing of a hearing date. The Plaintiff also sought to explain that the delay had been occasioned by ongoing negotiations between itself and the Government of Kenya for the purpose of entering into a joint venture agreement for the development of the suit property into an oil storage utility. That, pending these negotiations, the Plaintiff instructed its advocates to withhold any further steps towards the prosecution of this suit against the Defendant. It was further averred that the Defendant was all along aware of these

negotiations and is in no way prejudiced by the same. The plaintiff further averred that the Defendant is not free from blame as it was also yet to file its bundle of documents, witness statements and statement of agreed issues. Further to this, the Plaintiff contended that there was some difficulty in obtaining court dates after the close of pleadings. The Plaintiff therefore urged that the matter be saved from dismissal to afford it an opportunity to progress it to hearing and determination on the merits.

3. The application was canvassed by way of written submissions that were orally highlighted in court. It was the Defendant's submission through its learned counsel, **Mr. Akhabi**, that the application before the court had merit. That it has been adequately demonstrated that there was intentional and prolonged delay by the Plaintiff in prosecuting it matter for two years. The Defendant further submitted that there were no pending negotiations between the Plaintiff and the Government of Kenya as asserted, and that the same was a false assertion on the part of the Plaintiff aimed at misleading the court. Further to this, it was argued that the Plaintiff had not demonstrated that it tried to get dates at the registry for the hearing of the matter and that the same could not, therefore, be used to explain the delay. Moreover, it was the Defendant's case that it has been greatly prejudiced by the delay as the suit has been hanging over its head for two years. That given these circumstances, it was urged that it would only be in the interests of justice that the suitbe dismissed for want of prosecution as prayed.4.

4. In opposing the Defendant's application, **Ms. Ithondeka**, learned counsel for the Plaintiff, submitted that in exercising its discretion, the court should take note that the claim by the Plaintiff was quite substantial and therefore that it would be against the interests of justice to dismiss the same without a fair hearing. She attributed the delay in the prosecution of the case to the general difficulty that was experienced in obtaining dates by the parties in **2014/2015** in addition to the negotiations between the Plaintiff and the Government of Kenya in respect of the suit property. The Plaintiff therefore urged the court to dismiss the application with costs.

5. I have considered the Notice of Motion, the depositions made herein in respect thereof as well as the pleadings and proceedings herein. I have also given due consideration to the submissions made herein by learned counsel, including the authorities they relied on. The application was filed pursuant to **Order 17 Rule 2(1) and (3)**of the Civil Procedure Rules, which provide as follows:

> ***"(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....***
>
> ***(3) "Any party to the suit may apply for its dismissal as provided in sub-rule 1"***

6. Thus, the Applicant must show that the delay complained of is **inordinate**, that the inordinate delay is **inexcusable** and that the Defendants are likely to be **prejudiced** by such delay. It is also trite that in weighing the pros of cons of each application, the court should bear in mind always that each litigant is entitled to a hearing and a decision on the merit and therefore that it should strive, where possible, to sustain rather than prematurely terminating a suit. (See the case of **Naftali Opondo Onyango Vs National Bank of Kenya [2005] eKLR)**. Therefore, in exercising its discretion in such matters, Courts of law should maintain a fair balance between the foregoing considerations and the constitutional imperatives with regard to the expeditious disposal of cases. Bearing these principles in mind, the question to pose is whether the Defendant has met the threshold required for the dismissal of a suit for want of prosecution.

7. I have perused the court file and noted that the last step taken before the filing of the Defendant's Notice of Motion on **5th August 2014**, was on **30th January, 2014** when the court granted the Defendant leave to amend its defence. It is therefore evident that no activity took place with regard to the hearing of the matter until Defendant filed the instant application on **21stJanuary, 2016.** From the foregoing, it is apparent that delay in this matter has been established. It is now trite that when such delay is established, unless it is well explained, it becomes inexcusable. In **Agip (Kenya) Limited-v-Highlands Tyres Limited [2001] KLR 630**, **Visram J** stated of inordinate delay as follows: -

> ***"Delay is a matter of fact to be decided on the circumstances of each case. 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."***

8. Has the Plaintiff in this case offered any plausible reason for its failure to fix the suit for hearing since **30th January, 2014**? In paragraph 2 (b) of the Replying Affidavit, the Plaintiff explained that the delay was caused by the fact that it was negotiating a joint venture agreement with the Government of Kenya with a view of constructing an oil storage facility on the Plaintiff's property. That due to the said negotiations, the Plaintiff's had instructed its advocates to put the case on hold until the conclusion of the said talks. However, the Defendant countered this explanation by contending that there were no such negotiations, and that in any event the parties were under obligation to progress the matter those negotiations notwithstanding. Given this contestation, it was incumbent on the Plaintiff to provide proof of such negotiations if any. However, I note from the record that no such proof was submitted to the court to verify this assertion. Counsel argued though that since the negotiations were on a without prejudice basis, they were precluded from using the documentation as evidence herein.

9. Having considered the rival positions taken by the parties, I am in agreement with the Defendant's position that such negotiations cannot be an excuse for non compliance with the timelines set in the Civil Procedure Rules. Besides, if the Plaintiff was diligent in its pursuit for justice, it ought to have brought to the attention of this court the fact that there were ongoing negotiations for appropriate interim orders to be made in the matter. Consequently, I am persuaded to find, as I do, that the issue of negotiations was raised as an afterthought on the part of the Plaintiff.

10. With regard to the Plaintiff's explanation that it was unable to secure any dates in the year 2014 and 2015, again, it is noted that no proof of the efforts, if any, that were taken to get in touch with the registry was provided. There is no indication that the Plaintiff took steps to write to the Deputy Registrar with a view of having the case fixed hearing. It does not help matters, in my view, for the Plaintiff to argue that the Defendant was also in default as to compliance with the Case Management Practice Directions, because it is the duty of the Plaintiff to take the lead in the prosecution of its case. In the case of **Nilani – vs- Patel (1969) EA page 341,** the Court made this observation thus**;**

> ***"it is only too trite to say that as in every civil suit, it is the Plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a Defendant ought to invoke the process of the court towards that end as soon as is convenient by either applying for its dismissal or setting down the suit for hearing……Delay in these cases is much to be deplored. It is the duty of the Plaintiff's advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died…documents may have been mislaid, lost, destroyed and the memory tends to fade" (emphasis supplied)***

It was therefore the duty of the Plaintiff to move the court towards the expeditious disposal of this matter including seeking appropriate directions in connection with the Defendant's alleged non-compliance.

11. The foregoing notwithstanding, it is a constitutional imperative that justice be administered without undue regard to procedural technicalities (**Art. 159(2)(d) of the Constitution).** The question that then arises is whether justice can still be done in this matter inspite of the delay. A perusal of the record shows that the Plaintiff has filed its Reply to Defence and Statement of Issues, the latter of which was filed on **7 March 2016**, subsequent to the filing of the Notice of Motion herein. I am satisfied therefore that no prejudice will befall the Defendantfor which an award of costs would be insufficient as a remedy.

12. In the result, I would exercise my discretion herein in the Plaintiff's favour and afford it a chance to prosecute this case for a determination on the merits. Thus, the application dated **19 January 2016** is

hereby dismissed, with an order that costs thereof be paid by the Plaintiff to the Defendant. The Plaintiff and the Defendant are hereby ordered to ensure compliance with the Case Management Practice Directions within the next **45 days.**

It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2016

OLGA SEWE

JUDGE