REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL APPLICATION NO. 628 OF 2008

SCHENKER (E.A.) LIMITED …….APPLICANT /RESPONDENT

VERSUS

KENYA SHIPPING CLEARING &

WAREHOUSING WORKERS UNION…1ST RESPONDENT/APPLICANT

THE INDUSTRIAL COURT…….....2ND RESPONDENT

RULING

1. By a notice of motion dated 3rd April 2014 brought under the provisions of Order 17 Rule 2(3) and Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, the inherent powers of the court and all other enabling provisions of the law, the applicant who is the 1st respondent herein **KENYA SHIPPING CLEARING & WAREHOUSING WORKERS UNION** sought from this court orders:

1) That the suit be dismissed for want of prosecution by the applicant/respondent.

2) That the costs of this application and of the suit be awarded to the 1st respondent/applicant;

3) That the Honourable court do issue such orders or give such directions as it may deem fit and just to meet the ends of justice.

2. The application is premised on the grounds that:

1) Over three (3) years after the last adjournment of the suit generally, the applicant/ respondent has failed to set the matter for hearing;

2) The applicants/respondent's failure to set down the suit for hearing shows that it has no interest in the case;

3) That the applicant's failure to set down the case for hearing has caused the 1st respondent/applicant serious prejudice as the ruling of the Industrial Court which the applicant/respondent had sought to challenge, is in the 1st respondent's favour;

4) It will be for the best interest of justice that this suit be dismissed for want of prosecution.

3. The application is also supported by the affidavit sworn by Alfred Nyabera advocate sworn on 3rd April 2014 wherein it is deposed, inter alia, that on 23rd November 2010, the applicant/respondent's advocate fixed a date for hearing of f this matter as 29th November 2010 and that since then, the respondent has neglected, refused and or otherwise failed to set down the suit for hearing or to take any steps to prosecute the same; that the applicant appears not keen to prosecute this suit; that it is in the interest of justice that the suit be dismissed since it is now over three(3) years since the matter was last in court; that neglect, refusal or failure to prosecute the suit amounts to an abuse of the court process and the delay thereof to prosecute the matter or take steps to have it prosecuted is unreasonable and extremely prejudicial to the 1st respondent/applicant; and that it is just, fair and expedient; and that the suit be dismissed with costs for want of prosecution.

4. The applicant also gave the history of the matter herein.

5. In response to the notice of motion, the original applicants who are respondents in this application swore an affidavit on 14th June 2014 by George Ogembo advocate giving the history of the matter herein and contending that after the suit was instituted in 2008 and service of process (es) effected upon the respondents herein, a replying affidavit was filed and both parties filed submissions by 2009 but that the suit could not be heard by one judge hence directions were sought and obtained from the Chief Justice (Honourable Gicheru C.J. (as he then was), to constitute a bigger bench of two(2) judges to hear and determine the suit. That however, two of the judges assigned to hear the case were transferred and the file was send to the Chief Justice to constitute a new bench. That the file however went missing in 2010 after the applicant had been directed to invite the adverse parties, to fix a date.

6. That a new bench has never been constituted. That the applicant is still aggrieved by the decision of the Industrial Court and still desires that a three judge bench be constituted to hear and determine the matter.

7. That no prejudice will be occasioned to the respondents if the case herein is kept alive and that the applicant shall be greatly prejudiced if the matter is dismissed.

8. On a point of law, the applicant's counsel deposed that in any event, proceedings herein are constitutional in nature and not governed by the Civil Procedure Rules hence Order 17 Rule 2(3) and Order 51 of the Civil Procedure Rules do not apply to these proceedings.

9. Both parties advocates appeared before me today and urged the application orally. The applicant relied on the grounds and supporting affidavit of Alfred Nyabera whereas the respondent relied on the replying affidavit sworn by Mr George Ogembo. None of the advocates cited any case law to advance their respective positions.

10. The submissions which mirrored the positions taken in the respective pleadings and affidavits on record are taken into account as they are a replica of the averments in the application, supporting affidavit and replying affidavit respectively.

11. In summary, the 1st respondent's counsel urged the court to consider that the delay of 6 years to prosecute the suit is too long and prejudicial to the 1st respondent and that since there is no good reason given for the delay, the matter should be dismissed with costs.

12. On the other hand, Mr Okello counsel for the applicant submitted that the matter herein raises weighty constitutional issues which should be determined on merit since the Chief Justice had already constituted a three(3) Judge bench to hear and determine the suit. Further, that the applicant's counsel had done everything in their power to ensure the suit was ready for hearing and that there is no prejudice to the respondents if the suit is sustained. He urged the court to dismiss the application

seeking to dismiss the matter herein for want of prosecution, with costs.

Determination

13. I have carefully considered the application herein seeking for dismissal of this matter filed in 2008, for want of prosecution. I have also considered the opposition thereto and both parties counsel's brief submissions.

14. In my view, the issue for determination is whether this suit or proceedings should be dismissed for want of prosecution as prayed and if not, what orders should this court make.

15. I will first determine the point of law taken by the applicants as to whether Order 17 Rule 2(3) and Order 51 of the Civil Procedure Rules can be invoked to these proceedings which are neither civil nor criminal and which are brought as constitutional under Section 65 of the old Constitution (now repealed).

16. Examining the originating Notice of motion dated 9th October 2008, it is brought under the provisions of Section 65 of the Old Constitution seeking

a. declaration that the Industrial Court is subordinate to the High Court and the High Court has the jurisdiction under Section 65(2) of the Constitution to supervise to Industrial Court;

b.A declaration that the applicant has been deprived his Constitutional right of appeal by the Industrial Court and hence the proceedings in the Industrial Court cause No. 126/2007 are unconstitutional, null and void and that the said proceedings be quashed and or set aside;

c. A stay of any further proceedings and of execution in Industrial court cause No. 126/2007.

17. I have no doubt in my mind that the above issues for determination in the substantive originating motion are constitutional questions, which are neither civil nor criminal matters and therefore in determining those issues, the court will not be exercising either civil or criminal jurisdiction as the procedure for enforcement of fundamental rights and freedoms under the former constitution did exist under Section 84(6) thereof.

18. However, the procedure for dismissal of matters of this nature for want of prosecution is not provided for in the said former constitution.

19. In my humble view, although the Civil Procedure Act and Rules are not applicable in this case, this court notes that it has and can invoke its inherent jurisdiction to dismiss a matter which has not been prosecuted for an unnecessarily long time.

20. Besides, although the proceedings herein were instituted in 2008 when the former Constitution was in force, the application to dismiss the proceedings were instituted in 2014 during the new constitutional dispensation.

21. Accordingly, albeit the determination of the substantive originating notice of motion would be anchored on the law or constitutional provisions applicable as at the time of filing of this matter, nonetheless procedural steps taken in the matter during the currency of the new constitution would fall within the new constitutional order.

22. In this case, Article 159(2) (d) of the Constitution of Kenya, 2010 makes provision that in exercising judicial authority, the courts and tribunals shall be guided by the following principles:

a) ……

b) That justice shall not be delayed.

c) ……..

d) Justice shall be administered without undue regard to procedural technicalities.

23. Therefore, in my humble view, the application herein having been filed in 2014 is governed by the above provisions cited, which provisions abhor undue regard to procedural technicalities and delayed justice.

24. Furthermore, under part 5 of the Sixth Schedule to the Constitution of Kenya 2010- on administration of justice, until the Chief Justice makes Rules contemplated in Article 22, the Rules for the enforcement of the fundamental rights and freedoms under Section 84 (6) of the former constitution shall continue in force with the alterations, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with Article 22.

25. Article 22(d) of the Constitution also makes it clear that the court, while observing the rules of natural justice shall not be unreasonably restricted by procedural technicalities.

26. What the above provisions espouse it that in dealing with constitutional matters or where a person's right or fundamental freedom is concerned, courts shall not be unreasonably restricted by procedural technicalities as to whether the provisions of the Civil Procedure Act and or Rules apply or not.

27. What is significant is whether a matter which is filed in court and which has not been prosecuted for nearly 10 years can be left archived and hanging on the respondent's shoulders in perpetuity.

28. Accordingly I find that the objection as to the applicable procedure for dismissal of constitutional matters for want of prosecution not well taken and dismiss it.

29. Back to the main substantive question of whether the matter herein should be dismissed for want of prosecution, and therefore, relying on the principle that justice shall not be delayed, and without this court paying undue regard to procedural technicalities, there are several authorities that espouse the question and provide the test to be applied in determining whether or not to dismiss a matter or cause for want of prosecution.

30. In **Moses Murira & 2 Others Vs Maingi Kamuru & Another - Nyeri CA No. 151/2010,** the Court of Appeal, while citing with approval the decision by Chesoni J (as he then was) in **Ivita vs Kyumbu [1984] KLR 441** stated inter alia:

> **"The power of the court to dismiss a suit for want of prosecution is a discretionary power, but which should be exercised judicially."**

31. In **Agip (K) Ltd v Highlands Tyres Ltd [2001] KLR 630,** the court outlined three principles governing the dismissal of a suit for want of prosecution as being:

> ***i. Delay must be inordinate;***
>
> ***ii. The inordinate delay is inexcusable.***
>
> ***iii. The defendant is likely to be prejudiced by the law.***

32. In **E.T. Monks & Company Ltd V Evans [1985] KLR 584** Kneller J (as he then was held that:

> ***1) Whether an application for dismissal of suit for want of prosecution should be allowed or not is a matter for the discretion of the judge who must exercise it judicially. The court shall among other things, consider whether the delay was lengthy; whether it has rendered a fair***

trial impossible and whether it was inexcusable.

However, each case will turn on its own fats and circumstances.

2) If an action is dismissed for want of prosecution, a plaintiff may sue his advocate for negligence unless such plaintiff has caused or consented to the delay which led to the dismissal of the action;

3) The delay in this case was inordinate and inexcusable and a trial would be prejudicial to the defendants, as important witnesses may no longer be traced."

33. In the Ivita **V Kyumbu** case (supra) Chesoni J further held that:

" The test to be applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay.

Thus, even if he delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."

34. In my humble view, from the decisions above cited and the provisions of Article 159(2) (b) of the Constitution that justice shall not be delayed, it becomes apparent that the court reserves inherent jurisdiction to dismiss matters filed before it but not prosecuted for unnecessarily long periods and in so doing, the court will also be acting to prevent abuse of its process or to prevent injustice, for, delayed justice is denied justice.

35. In **Mukisa Biscuit Company V West End Distributors CA [1969] EA 696,** the Court of Appeal made it trite that the court has inherent jurisdiction which can be invoked to dismiss suits for want of prosecution.

36. It is s the primary duty of the applicant who instituted these proceedings to take steps to progress its case since it is the one who dragged the 2 respondents to court and where no such action is taken, indeed, a court of law should not condone any inertia on the part of the applicant or initiator of proceedings.

37. However, that discretion of the court should not be exercised capriciously. This court does ascribe to the principle of law that dismissal of cases without hearing the merits thereof is a draconian act which drives a party from the judgment seat of justice and therefore from accessing justice which is a fundamental right guaranteed under Article 48 of the Constitution.

38. Therefore, albeit I am indeed persuaded by the record hereto which speaks for itself that from 13th May 2010 to 4th April 2014 when the application herein was filed, no action had been taken by the applicant to have the originating motion to be prosecuted, I find that delay of 4 years and until the 1st respondent moved this court to have the matter dismissed for want of prosecution, however, inordinate, justice can still be done by according the applicant an opportunity to ventilate its grievances.

39. In addition, I note that the matter herein is the type that would not require oral evidence of witnesses who could be said to be dead or their memories affected or documents that could be lost or destroyed. The matter raises purely constitutional issues and based on the record of proceedings before the industrial court(as it then was). it therefore follows that the delay has not necessarily prejudiced the 1st respondent and the prejudice, if any can be adequately compensated by an award of costs.

40. In addition, although it is the duty of the applicant to prosecute its case, where it is clear that any

delay in prosecuting the case will occasion prejudice to the respondents, then the respondents too have a duty to move the court within reasonable time to have the suit prosecuted expeditiously on its merits or even apply earlier on to have it dismissed for want of prosecution and not to sit back and wait for 4 years then seek to have the suit dismissed for want of prosecution. This is so, even though the respondents have no counterclaim in the matter. This is the principle espoused in the **Mukisa Biscuit Manufacturing** Company **vs West End Distributors** (supra) case where the Court of Appeal stated inter alia.

> ***" without wishing in any way to condone the inordinate delay which has undoubtedly occurred in this case it seems to me that both sides contributed to the delay in reaching a hearing, and that if the appellant genuinely belief itself to be prejudiced by the delay, it would have applied for dismissal at a much earlier stage."***

41. In the instant case, whereas this court finds that for 4 years no action took place before this application was filed, and that indeed there is no satisfactory explanation given for the delay in prosecuting the matter, I however note that both parties were ready to have the matter heard by filing submissions which then would be highlighted before a three judge bench as constituted by the then Chief Justice but as the record shows, the judges who were to hear the matter namely Honourable Dulu J, Honourable Wendoh J and Honourable Abida Ali Aroni J, as a bench, were all transferred away from Nairobi and that situation may have contributed to the inertia on the part of the applicant.

42. My examination of the substantive motion reveals that the matter indeed raises weighty constitutional issues affecting rights and as such it is only fair and just that those issues be subjected to a full trial. The originating motion, in other words is not on the face of it, frivolous.

43. This court will, therefore exercise its discretion leniently in order to accord the applicant an opportunity to be heard, in the interest of justice, and moreso, substantive justice, as it is not persuaded that the delay is likely to affect a fair trial of the issues in the action or cause serious prejudice to the 1st respondent.

44. In other words, having weighed the prejudice that is likely to be suffered by the 1st respondent/applicant innocent party by the prolonged delay in prosecuting this matter and as against the prejudice that is likely to be suffered by the applicant/respondent who is the offending party, if I dismiss this matter for want of prosecution, when, clearly, the applicant has shown interest in prosecuting this matter to its logical conclusion, I would have ousted the applicant from the judgment seat. I find that it is appropriate in the circumstances, to sustain this matter for a full trial.

45. Thus, despite the delay, justice can be done and in this case, the justice of the matter is that this matter is sustained and the application to dismiss it for want of prosecution is dismissed. However, as the delay was occasioned by the applicant's necessitating this application, I order that the applicant shall pay costs to the 1st respondent amounting to kshs 50,000/- within 21 days from the date hereof and in default, the 1st respondent is at liberty to execute for recovery of the same.

46. I further order that as the matter had already been certified to be heard by a three judge bench, the file be placed before the Honourable Chief Justice to constitute a three Judge bench to hear and determine this matter expeditiously. The file shall be placed before the Principal Judge for onward transmission to the Honourable Chief Justice for appropriate directions.

47. Orders accordingly.

Dated, signed and delivered at Nairobi this 10th day of November 2016.

R.E. ABURILI

JUDGE