REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 441 OF 2012

STEPHEN KIATU NGANGA..... APPELLANT

VERSUS

STANLEY KINDIGA .....1ST RESPONDENT

HY-Q ENTERPRISES.....2ND RESPONDENT

JUDGMENT

This appeal arises from the Ruling and Order of the Senior Principal Magistrate P.T Nditika siting at Milimani Commercial Courts, Nairobi delivered on 27/7/2012 in civil suit No. 12655 of 2003.

The Appellant herein Stephen Kiatu Nganga was the Plaintiff in the court below. He sued the Respondent herein Stanley Kindiga and Hy-Q Enterprises Ltd who were the defendants claiming for special and general damages arising from an alleged road traffic accident which occurred on 20/12/2001 along Kangundo road involving the Appellant and the Respondent's Motor vehicle Registration No. KAL 462K then being driven by the 1st Respondent Stanley Kindiga. The Appellant was a pedestrian on the said road when the said motor vehicle allegedly knocked him off the road at a junction of Kangundo Road and Outer-Ring Road.

The appellant blamed the 1st Respondent for being negligent thereby causing the accident as a result of which the Appellant was seriously injured and that he suffered loss and damages. He therefore filed a Plaint dated 8th December 2003 on 9th December, 2003.

The Respondent herein entered an appearance on 7/6/2004 through the firm of V.T Awori & Co. Advocates. I have not come across any defence filed on record in the court below and neither is it included in the record of appeal. The proceedings show that the suit came up severally for hearing but for one reason or the other to be recorded later in my analysis, the case could not proceed to hearing. On 20/6/2007 when the Plaintiff's advocate Mr. Kaluu sought an adjournment on the ground that he was unable to procure the Doctor's attendance, the Defendant's counsel objected. The court thus ordered as follows:

> ***"Order: this is an old case – 2003. Last adjournment granted. This case should be prosecuted fully within the next six months otherwise it will stand dismissed with costs to the defendant. Hearing date to be fixed on priority basis. The Plaintiff to pay court***

adjournment fees, defendant's costs and witnesses expenses of Kshs.1,000/-.

C.W. Githua (Mrs.

Ag. Senior Principal Magistrate

20/6/2007."

On 6/11/2007 the Plaintiff's advocates fixed a hearing date for 6/12/2007 before Mokaya Ms SRM who adjourned the matter for reasons of workload and advised parties to take a hearing date before 20/12/2007 in view of the order of 20/6/2007.

Upon realization that the suit could not be heard or prosecuted before expiry of 6 months from 20/6/2007, the Plaintiff's advocates did file in court an application dated 10/12/2007 under certificate of urgency seeking for enlargement of time within which the suit should be prosecuted as it was not practicable to have the suit prosecuted within the six months period given by the Order of 20/6/2007.

On 17/12/2007 Hon. Githua (Mrs.) Ag. SPM(as she then was) certified the application as urgent and fixed a hearing date for 20/12/2007. The said application was eventually heard and vide a ruling delivered on 30/1/2008, the court reviewed its order of 20/6/2007 removing the time limit within which the Plaintiff should prosecute the suit. The parties then embarked on an out of court negotiations for a possible amicable settlement of the claim.

By a notice of motion dated 13/4/2012 the defendant filed an application seeking to dismiss the Plaintiff's suit for want of prosecution on the grounds that:-

1. The suit herein has never been set down for hearing.
2. It has been over three years since the matter was last in court.
3. The plaintiff has not taken steps to prosecute the matter since instituting it.
4. It seems the Plaintiff lost interest in the suit and or its advocates has slept on his rights and duties and thus guilty of laches.
5. The pendency of this suit since 2009 is prejudicial to the Defendants and a burden to this court.
6. The plaintiff is not serious, keen enough and or interested in the suit and it is only fair and just that the same be dismissed with costs.

The application was supported by the sworn affidavit of Mungai Victor Kimani on 13/4/2012.

The Plaintiff swore a replying affidavit on 14/5/2012 opposing the defendant's application and contending among others, that the parties were negotiating for a settlement out of court and that there was evidence that his advocates had been inviting the defendant's advocate to attend the registry with a view to fixing a suitable hearing date in vain. Further, the plaintiff denied that he had lost interest in the suit or that he had slept on his rights as alleged by the defendants.

The parties' advocates filed written submissions to dispose of the application and by a ruling delivered on 27/7/2012 the Hon. P.N Nditika (Mr.) P.M. dismissed the Plaintiff's suit for want of prosecution with costs to the defendants. It is that ruling which provoked this appeal by way of memorandum of appeal dated 23rd August, 2012, setting out 13 grounds of Appeal namely:-

1. The learned magistrate erred in law and in fact in failing to appreciate that despite the suit having been set down for hearing on various occasions, adjournment was sought by consent in order to enable parties explore the possibility of out of court settlement.
2. The learned magistrate erred in law and in fact in failing to appreciate the constitutional provisions and the importance given to out of court settlement as a means of dispute resolution by dint of Article 159 (2) (c) of the Constitution of Kenya, 2010.
3. The learned magistrate erred in law and in fact in failing to consider and take into account that the evidence tendered by the plaintiff of 'without prejudice' correspondent entered into by the parties

was not for the purpose of indicating liability but solely for the purpose of demonstrating that the plaintiff was alive to his suit and involved in negotiations with the defendant towards reaching an amicable out of court settlement.

4. The learned magistrate erred in law and in fact in failing to consider and in entirely disregarding the evidence of out of court negotiations tendered by the plaintiff.
5. The learned magistrate erred in law in failing to appreciate that the rule on non-admissibility of 'without prejudice' communication is not absolute but subject to exceptions and that the Plaintiff's tendering of the 'without prejudice' evidence succinctly fell within the exceptions.
6. The learned magistrate erred in law and in fact in wrongly exercising his discretion to dismiss the Plaintiff's suit for want of prosecution without giving cogent reasons why he was resorting to such a draconian act despite there being no flagrant and culpable inactivity on the part of the Plaintiff.
7. The magistrate erred in fact and in law in wrongly exercising his discretion to dismiss the suit for want of prosecution despite the plaintiff exhibiting and demonstrating the steps taken towards out of court settlement and the substantial extent of the negotiations, which were at an advanced stage, that had taken place between the parties.
8. The learned magistrate erred in fact and in law in failing to appreciate that on 6/12/2007 the Plaintiff was ready to proceed with all witnesses but the court adjourned the matter of its own motion due to work load thus contributing to the delay in having the suit heard and disposed.
9. The learned magistrate erred in fact in failing to appreciate that the sole reason why there has been inactivity on the part of the Plaintiff is that at all material times he optimistically believed that parties would settle the matter out of court due to the advanced stage negotiations on settlement were at.
10. The learned magistrate erred in fact and law in failing to take into account and hold that the Defendants had not shown what prejudice if any had been occasioned on them as a result of the delay which they were at all times part of due to the out of court negotiations prevailing between the parties.
11. The learned magistrate erred in fact in failing to take into account the Plaintiff's depositions and undertaking to have the suit urgently set down for hearing, a fact indicative of his intention to prosecute his suit, after ensuring full compliance with the Civil Procedure Rules, 2010.
12. The learned magistrate erred in law by disregarding the principle of stare decisis by failing to consider and totally disregarding several decisions of the High Court of Kenya holding that dismissal of suits for want of prosecution is a draconian remedy to be exercised in only the clearest of cases.
13. The learned magistrate erred in law by disregarding the principle of state decisis in failing to consider and uphold the authorities of the High Court of Kenya cited by the Plaintiff which were similar, and more compelling, in material respects to the Plaintiff's case.

The appeal herein was admitted to hearing on 13/5/2014 by Hon. Hatari Waweru J and on 21/7/2014, Hon. P.K. Limo J gave directions wherein parties agreed to make oral submissions to dispose of the appeal.

However, when the parties' advocates appeared before me on 11/12/2014, they sought to review the order of Limo J made on 21/7/2014 and by consent, they both agreed to dispose of the appeal herein by way of written submissions.

The appellant filed his submissions on 23/1/2015 whereas the respondent's submissions were filed on 10/2/2015.

The appellant condensed the 13 grounds of appeal into 4 namely:-

a. The Magistrate's failure to consider the out of court negotiations that were conducted by the parties.
b. Failure by the magistrate to give cogent reasons for taking the draconian step to drive away a litigant from the courts
c. Failure by the magistrate to consider the entire court record and history of the proceedings.
d. The Magistrate's failure to uphold the principle of stare decisis.

On the first ground above, the appellant submits that the appellant in his replying affidavit exhibited a chain of communication between the parties as evidence that parties had been negotiating out of court but that the learned magistrate in a shot but unreasoned ruling failed or abdicated his duty to consider and analyse the reasoning and purpose behind the appellant submitting 'without prejudice' communication, which was only used as an indication to the court that indeed parties had been engaged in extensive negotiations towards a settlement of the dispute out of court.

He relied on the case of **Margaret Njuguna vs Muriuki Mburu t/a Heko Bar & Restaurant & another (1998) eKLR** where the Court of Appeal cited **M. Gheewala Vs A. Gheewala CA 144.86** and held:-

> ***"It is one thing for a party to state to a court that there were 'without prejudice' negotiations. It is quite another for a party to want to refer to the particulars of offers or proposals which are made by parties."***

On the second ground, the appellant submitted that a court of law should be hesitant and cautious always keeping in mind that the general rule is that suits are for sustaining rather than dismissing as embodied in the constitutional edict of access to justice as enshrined in Article 48 of the Constitution. He relied on **Joe Issac Nderitu Vs Kenya Industrial Estates case (2006) eKLR** where the High Court in quoting from the Halsbury's Laws of England 4th edition, Vol. 37 paragraph 448 stated:-

> ***"the power to dismiss an action for want of prosecution without giving the plaintiff the opportunity to remedy his fault will not be exercised unless the court is satisfied that the default has been intentional and contumelious or that there has been prolonged or inordinate delay on the part of the plaintiff or his lawyer and that such delay will give rise to a substantive risk, that is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendant either as between them and third parties."***

Counsel for the appellant also relied on **Utalii Transport Company Ltd and others Vs NIC Bank Ltd and Another (2014) eKLR** where Hon. Gikonyo J analyzed the law on dismissal of suits and held that the practice of courts and inclination was towards sustaining suits rather than dismissing them.

The appellant submitted that the respondents did not demonstrate how the pendence of the suit had or was likely to prejudice them and or what prejudice they would suffer. Further, that it is the appellant who would suffer prejudice if the suit is dismissed because he sustained serious injuries following the accident material to this suit. He urged the court to accord the parties substantive justice by balancing out their rights.

On the third issue, it was submitted that the trial magistrate failed to consider the entire conduct of parties and the court record before making his determination on the respondents' application. In addition, that the court record was clear that the suit had been set down for hearing several times contrary to the assertion by the respondents which the learned magistrate accepted, in error of fact.

On the last issue, the appellant complains that the trial magistrate exercised his discretion arbitrarily and failed to give due consideration to the application before him. That he also failed to consider the cited authorities, citing the case of **Sunflag Textiles & knitwear Mills Ltd & Anor Vs Johnstone Etale Lisutsa (2007) eKLR** where the court excused a delay of four years on the basis that there was a proposal for settlement out of court.

The Appellant beseeched this court to allow this appeal and reinstate the appellant's suit in the court below for hearing on merit.

The respondents in their submissions opposed the appeal and urged this court to uphold the trial magistrate's ruling/order dismissing the suit filed by the appellant for want of prosecution. Relying on the holding of Chesoni J in **Ivita Vs Kyumbu (1984) KLR 441** the respondents maintain that the delay in prosecuting the appeal was prolonged and no excuse was given for the delay.

The respondents also contended that the trial magistrate considered the out of court negotiations from the correspondence annexed, which were, nonetheless, inadmissible as they were exchanged on a without prejudice basis citing **Ronnie Rogers Malumbe Vs Erasto Muga (2005) eKLR.** It was further submitted that the magistrate considered the history of the case and the last time the matter was in court before considering its dismissal. Further, that the appellant did not adduce any evidence of the steps taken to finalize the suit after 7/10/2009 up to 13/4/2012.

On the allegations of failure to uphold the principle of *stare decisis*, it was submitted on behalf of the respondents that there was delay in prosecuting the suit and that the court's reasoning was in line with the holding by Hon. Justice Gikonyo J in **Susan Gachambi Karuri & Anor Vs British American Insurance Co. Ltd (2014) eKLR** that:-

> ***"In sum, the defendant's concerns are not exaggerated matters, they are real concerns of justice in which fair trial is the cornerstone. The delay is prolonged and inexcusable for it will cause grave and substantial injustice to the defendant. The prejudice to fair trial to the defendant will arise in the fact that the defendant may not procure witnesses and documents at all or without untold difficulty and expense. These issues will result into impediment to fair trial, aggravated costs and the specific hardships outlined above."***

The respondents submitted that the magistrate correctly exercised judicial discretion which should not be interfered with as was settled in the Court of Appeal case of **Mbogo & Anor Vs Shah (1968) EA 93** and urged this court to follow the principles set out in that decision and decline to interfere with the trial court's discretion. Finally, the respondents urged this court to dismiss the appeal herein with costs to the respondents.

I have carefully considered the appeal herein comprising the entire lower court record, the ruling by the trial magistrate dismissing the appellant's suit for want of prosecution and the memorandum of Appeal challenging that order of dismissal of suit and the respective parties' advocates rival written submissions filed to dispose of this appeal.

This being the first appeal, this court is enjoined by Section 78 of the Civil Procedure Act Cap 21 Laws of Kenya to exercise the same powers and perform as nearly as may be the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of the suit and matter subject of this appeal.

This court is therefore called upon to evaluate and examine the lower court record and the affidavit and oral evidence before it and arrive at its own conclusion. The above principle is in line with what was settled in the case of **Selle vs Associated Motor Boat Co. Ltd (1968) E.A 123** where Sir Clement De lestang stated:-

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif Vs ali Mohammed Solan (1953) EACA 270"***

The power to dismiss a party's suit for want of prosecution is donated by Order 17 of the Civil Procedure Rules. In the matter subject of his appeal, the suit was dismissed pursuant to the application made by the Defendant/Respondent herein under Order 17 rule 2(1)(3) of the Civil Procedure Rules which provides:-

> ***"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) .....

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

That power of the court as espoused in the provisions above is a discretionary power. It therefore follows that the learned trial magistrate was exercising his discretionary powers in dismissing suit for want of prosecution, following an application being made by the defendant/Respondent herein pursuant to Order 17 Rule 2(3) of the Civil Procedure Rules.

In the case of **Mbogo Vs Shah & another (1968) EA 93**,the Court of Appeal set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into account matters which it should have taken into consideration and account and in doing so arrived at a wrong conclusion."***

The main issue for determination in the 13 grounds of appeal as filed on 24/8/2012 and as summarized by the appellant's counsel into four issues is whether the trial magistrate erred in law and fact in dismissing the appellant's suit for want of prosecution. The ancillary question is whether in dismissing the Appellant's suit for want of prosecution the trial magistrate exercised his discretion wrongly and or arrived at a wrong conclusion.

In my analysis of the record as laid bare above, I have demonstrated that the trial magistrate had initially on 20/6/2006 ordered a last adjournment to the plaintiff and directed that the suit should be prosecuted within the next six months otherwise it would stand dismissed with costs to the defendant. She then directed that a hearing date would be fixed on priority basis.

Thereafter, when it became apparent that owing to unforeseen circumstances, the suit could not be prosecuted within the timeliness given by the court, the appellant timeously sought from court enlarged time and the court dutifully granted the application removing the stringent timelines it had originally fixed.

One of the reasons for the delayed prosecution of the Plaintiff's suit after the 20/6/2007 order, according o the record, is that on 6/12/2007 which was a date that the appellant had been given on 6/11/2007 for the hearing of the suit as a priority date, the court was unable to hear the parties due to work load and the parties were directed to take a date for hearing before 20th Decemer,2007 following court order made on 26/6/2007.

The application for enlargement of time was allowed by a ruling delivered on 30.1.2008.this was after the six months period initially set by the court. Thereafter, the matter went quiet, according to the record, between 30.1.2007 and 30.1.2009 when the plaintiff's advocates fixed a hearing date for 7/9/2009, eight months away and the advocates informed the court that parties were talking with a view to a settlement. On 1/10/09 when the matter was mentioned, there was no settlement reached hence the trial magistrate stood over the matter generally. There was again no action between 1.10.09 to 23/4/2012 when the defendants/respondents filed their application to dismiss the plaintiff/appellant's suit for want of prosecution. Two years and seven months had elapsed without any steps being taken to prosecute the suit by either party.

The Respondents averred that the appellant had lost interest in the suit and the delay, which was inordinate and inordinate, had occasioned them prejudice and also burdened the court.

The appellant on the other hand contended that the delay was excusable as the parties were negotiating for an out of court settlement. His advocate on record annexed several correspondences between the respective parties' advocates to demonstrate the existence of the negotiations.

As I have stated above, the procedural law for dismissal of suits for want of prosecution is Order 17, of the Civil Procedure Rules, whereas the substantive law can be found in Article 159 (2) (b) of the Constitution, Sections 1A, 1B, 13 A and 63(e) of the Civil Procedure Act.

Indeed, the Constitution and statute law is the basis for the requirement of expediency of prosecution of suits. And for a fair hearing to be achieved, a dispute must be determined within a reasonable time, which to a very large extend, saves on the costs, as contemplated in Section 1A and 1B of the Civil procedure Act, the overriding objectives. Thus, where the plaintiff slumbers and forgets to prosecute the case for unreasonably long period of time, without any justification or excuse, in such instances, it may be time of the hunted to hunt the hunter.

Inordinate and explained delay may be a perfect opportunity for the defence to turn the tables on the Plaintiff's side and put it on the defensive. In some cases, the defence may get away with dismissal of an otherwise meritorious case.

The case law on application for dismissal of suits for want of prosecution is now well settled as courts have variously been called upon to interpret and apply statutory and case law as established. The case of **E T Monks & Co. ltd Vs Evans (1985) EA 584** established the public policy interest in demands that the business of the court be conducted with expedition. Perhaps that is the foundation for Article 159(2)(b) of the Constitution which enact that

> ***"In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-***

a. **.....**
b. ***Justice shall not be delayed."*****.....**

In **Agip (K) Ltd Vs Highlands Tyres Ltd (2001) KLR 630** Visram J (as he then was) considered and articulated the flipside of the issue as follows:-

> ***"It is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. It is, therefore, not possible that the Rules Committee intended to leave the plaintiff without a remedy and to take away the authority of the court when it made order XVI Rule 5 of the Civil Procedure Rules."***

In **Naftali Opondo Onyango Vs National Bank of Kenya (2005) eKLR** the court reiterated the burden of proof that a defendant seeking a dismissal of suit for want of prosecution must meet. Quoting Salmon L.J in **Allan Vs Sir Alfred McAlphine and Sons Ltd (1968) 1 ALL E.R 543,** F. Azangalala J (as he then was) stated that:-

"The Defendant must show that-

i. ***There has been inordinate delay – what is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.***
ii. ***That this inordinate delay is excusable. As a rule until a credible excuse is made out, the natural inference would be that it is inexcusable.***
iii. ***That the defendants are likely to be seriously prejudiced by the delay. This may prejudice at the trial of issues between themselves and the Plaintiff or between each other or between themselves and third parties. In addition to any inference that may be properly drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at trial."***

The Court of Appeal in the case of **Salkas Contractors Ltd Vs Kenya Petroleum Refineries, Mombasa CA 250/2003** stated that the above principles apply in Kenya and had been consistently followed by

Kenyan courts. For instance, Chesoni J in **Ivita Vs Kyumbu (1984) KLR 441** applied them when he opined:-

> ***"The test 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 the 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."***

Thus, in deciding whether or not to dismiss a suit for want of prosecution, the court will be slow to make an order, if it is satisfied that the hearing of the suit can proceed without further delay; that the defendant will suffer no hardship; and that there has been no flagrant and culpable inactivity on the part of the Plaintiff. In the Naftali case (supra), the judge stated as much and proceeded to consider the fact that the Plaintiff had shown that he had instructed his lawyers to urgently fix the suit for hearing on merits. The courts as a result, concluded that the Plaintiff had not lost interest in the case and that the suit could then proceed to be prosecuted expeditiously. The court declined to grant the orders for dismissal. Visram J (as he then was, succinctly summarized the principles for dismissal of suit for want of prosecution as:-

1. The delay must be inordinate
2. The inordinate delay must be inexcusable; or
3. The defendant is likely to be prejudiced by the delay.

And on what is delay, the learned judge stated:-

> ***"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."***

In that case, there was delay of 8 months and the plaintiff's advocates explained that the delay was occasioned by their relocation of their officers and that they were willing to take an early hearing date. The court considered that the explanation was satisfactory, that 8 months delay was not inordinate in the circumstances of the case. The court also considered the conduct of the plaintiff in the case and particularly its vigilance and spirited effort in defending the application for dismissal and concluded that the Plaintiff was not indolent as alleged. The court in the Naftali case also considered the matter of prejudice and the fact that the amount claimed was Kshs.50million which was "not a simple amount to be taken lightly." The court was also of the view that the court would not be up to its duty if it were to drive the plaintiff out of the seat of justice because of 8 month delay and reminded itself of the plea that the court exists to sustain suits rather than throwing them out.

The same principles were as summarized by Visram J above were applied in Esther **Chemeli Keter Vs Charles Kirui & 3 others (2005) eKLR** where the delay was over 7 months. The court in declining to dismiss the suit for want of prosecution despite acknowledging the delay in failing to fix it for hearing considered that there were other defendants who had not sought the dismissal of the suit and that the plaintiff's claim against them was intertwined and hence inseparable and concluded that if the court were to strike out the plaintiff's suit against the 3rd defendant alone, it would fatally compromise the plaintiff's suit against the other defendants. It therefore in the 'interest of justice' declined to grant the prayers sought.

Applying the above principles to the present appeal, I note that the delay to prosecute the plaintiff's suit was in excess of 2 years thus from 7/9/2009 when the matter was last in court and stood over generally to 23/4/2012 when the application for dismissal was filed, precisely 2 years and 7 months.

Upon being served with the application, the plaintiff's advocates swiftly got their client who timeously swore a replying affidavit and had it filed on 15/5/2012 opposing the dismissal and urging the court to

sustain his suit as he had consented to the matter being negotiated out of court and to consider that the matter had come up severally for hearing but that the court had also been too busy on one occasion to hear the parties. In addition, the appellant contended that there were changes of advocates representing the parties which may have delayed the negotiations which were in very advanced stages; and that he is ready and was always desirous of prosecuting the suit without undue delay.

The correspondence annexed touching on negotiations on a without prejudice basis show that indeed from 12/4/2005 up to 30th September,2009, the parties were negotiating for a settlement, even after the matter had been stood over generally on 7/9/2009 when the parties reported that negotiations had broken down. However, there was no communication between October, 2009 to April, 2012 prior to the filing of this application for dismissal of the suit.

I therefore find that indeed there was delay in setting down the suit for hearing, which delay is inordinate. The appellant has regrettably not offered any lucid explanation as to what was happening between October, 2009 and April, 2012. Since there is no evidence of any action on the matter for over 2 years, in my view therefore, the appellant did not sufficiently explain the reason for the inordinate delay. It is that delay which I find inordinate and inexcusable.

In this case I have found the appellant in his replying affidavit of 14/5/2012 very defensive. There is no credible excuse made out for the inaction for the over two years succeeding the last correspondence for a negotiated settlement. That failure by the respondents to respond to the last letter by the plaintiff/appellant's counterproposal should have send a strong signal to the appellant that time for negotiations were over and it was now time to move the court and set a date for hearing of the suit on merit. The appellant and his advocates went to slumber and no reason has been advanced for the inaction.

On prejudice to the respondent, I find that indeed, justice must be administered without undue delay as the longer the delay the more the prejudice that may be occasioned. Witnesses' memory may fade, they may die, evidence may be lost through destruction, besides the heavy burden that may befall a defendant in a running down claim should the insurance company that insured the respondent's motor vehicle become extinct by reason of liquidation or otherwise. That would highly prejudice the respondent.

Speaking of prejudice in the present case, I have no doubt that the appellant too would be prejudiced if the suit is dismissed for want of prosecution as the pleadings show that he sustained serious injuries following the material accident involving:-

a. Fracture of the right femur.
b. Injuries on the left hip
c. Injuries on the right knee

In my view, injuries involving fracture, albeit we are not told the age of the appellant, are serious injuries. The appellant, off course subject to proof on a balance of probabilities is expected to prove his claim against the respondent who denies the claim in toto. Correspondence made on a without prejudice basis cannot be considered as evidence that the respondent is to blame to a certain extend until that is recorded as a consent or the claim proved. It is for that reason that this court has only referred to that correspondence to explain the length of delay and not for any evidential value to the claim.

This court finds that despite the delay which is inordinate and unexplained and the prejudice that the respondent is likely to suffer, the appellant has shown real interest in expeditiously having the suit disposed of. This is demonstrated by the manner in which he vigorously though unsuccessfully and with alacrity, defended the proceedings seeking to discuss his suit in the lower court and how expeditious this appeal has been prosecuted.

The appeal was filed on 24/8/2012 and by 4/12/2012; a record of appeal had been compiled, filed and served on the respondent. The appellant also expeditiously pursued the submissions of the lower court file which was availed to the High Court on 1/3/2013 from which time this court's administrative arm no doubt played a role in delaying to have the appeal placed before a judge for consideration under Section

79B of the Civil Procedure Act until 13/5/2014, over two years after the record of the lower court was availed to this court. Directions were given on 21/7/2014.

It is the conduct of the appellant after the application to dismiss the suit, to date, that endears him to this court to find that although the power to dismiss a suit for want of prosecution is discretionary; and that although the appellate court should be slow to interfere with the discretion of the lower court unless it is demonstrated, as was held in the **Shah Vs Mbogo case (supra)** this court finds that the trial magistrate in the exercise of his discretion was clearly wrong or failed to take into account matters which he should have taken into account and in doing so arrived at a wrong decision.

I am persuaded that it is in the interest of justice that the appellant should not be driven away from the seat of justice, but that he should be accorded an opportunity to have his day in court.

In my view, the respondent has not clearly spelled out what real prejudice that it had suffered by the delay of 2 years 7 months which prejudice if any in this case, would have adequately been compensated by an award of costs. I find that the trial magistrate erred in law and in fact in failing to exercise his discretion in favour of the appellant.

The one paragraph ruling casually and generally referred to the application's date, the reply, submissions and annextures on without prejudice basis and the fact that the appellant had slept on his rights for too long hence the trial magistrate could not exercise his discretion in his favour. That is so, as it is conceded by the appellant, but the learned magistrate did not take into account the principles applicable for the exercise of that discretion and as a result arrived at a decision that was not reasoned.

Both parties' advocates ably put forth strong propositions and opposition to the application for dismissal of the suit but what is reflected in the ruling has no bearing on the law and precedents as settled in the cases that I have referred to herein, which the learned magistrate simply considered at heart.

In a persuasive decision issued on 31/3/2015 in the **Texas First District Court of Appeals case No 01-14-00269 – CV Adolfo R. Mantinez Vz Noel P. Benavides, Pat & 9 others** the Court held in an appeal dismissing the petitioner's suit for want of prosecution that:-

> ***"A trial court abuses its discretion when it acts without reference to any guiding rules or principles" that is, when it acts in an arbitrary and unreasonable manner."***

Further, the same court held that:

> ***"When determining under its inherent authority whether the plaintiff has demonstrated a lack of diligence in prosecuting his case, the trial court may consider the entire history of the case including the length of time the case was on file, the extent of activity in the case, whether the plaintiff requested a trial setting and the existence of reasonable excuse for delays...."***

In my view, indolence and flagrant or deliberate delay are two different aspects. In this case there was delay which was inordinate and unexplained, but it has not been shown that the delay was deliberate as was found in the cases cited by the respondent/defendant/applicant in the lower court namely: **Alice Mumbi Nganga Vs Danson Chege Nganga & Another (2006) eKLR** citing **Peter Kinyari Kihumba Vs Glady's Wanjiru Migwi & Another CA NAI 121/2005** and in **Shirika la Kusaidia Watoto wa Kenya & another Vs Rhoda Rop & Others (2005) eKLR**.

Iam not persuaded by the appellant's explanation that the delay to set the suit down for prosecution was occasioned by impeding negotiations either as I have discounted that factor since there was no evidence of negotiations for 2 years and 7 months. Neither do I accept the theory that the delay is excusable on that ground, but I accept the reason that the delay was not intentional and contumelious or intended to overreach.

I shall in the circumstances and for those reasons allow this appeal, set aside the order of the learned trial

magistrate made on 27/7/2012 dismissing the appellant's suit for want of prosecution and substitute it with an order dismissing the respondent's application dated 13/4/2012 and reinstate the appellant's suit for trial on merit.

I shall however award costs of the application in the court below to the respondents. The costs of this appeal shall be borne by each party.

I further order that the appellant/plaintiff shall within 30 days of the date of this judgment comply with all the pre-trial requirements contemplated in Order 11 of the Civil Procedure Rules and a pre-trial conference date set within 30 days of that compliance. In default of compliance with all the pre-trial requirements within the 30 days hereof, the appeal herein shall stand dismissed with costs to the respondent and the orders of 27/7/2012 by the Trial court shall revert.

The costs of this appeal shall be borne by the appellant.

Dated, signed and delivered in open court at Nairobi this 7th day of May, 2015.

R.E. ABURILI

JUDGE

7/5/2015

7/5/2015

Coram: R.E Aburili J.

C.A. Kavata

Mr Ismael for appellant

Miss Maina holding brief for Thiga for respondent

Court – Judgment read and pronounced in open court as scheduled.

R.E. ABURILI

JUDGE

7/5/2015

Mr Ismael- I pray that the judgment be typed expeditiously and the lower court file be transmitted back to the Chief magistrate's court at Milimani for an expeditious trial and compliance with the directives of this court.

Court- Orders as prayed.

R.E. ABURILI

JUDGE

7/5/2015