REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO.608 OF 2006

SOPHIA WANJIRU KARANJA

as the administratix of the estate

of

PETERSON WANJOHI KARANJA ….... PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY

FUND BOARD OF TRUSTEES ….... DEFENDANT

RULING

1. The application for determination is a Notice of Motion dated 18th July, 2013 brought under Order 17 Rule 2 (3), Order 51 Rule 1 of the Civil Procedure Act. The Defendant sought for dismissal of the Plaintiff's suit for want of prosecution. The Application was premised on the grounds appearing on the face of the motion as well as the Supporting Affidavit of Kennedy Ochieng, sworn on 18th July, 2013.
2. It was contended that the Plaintiff had filed this suit on 18th November, 2006, and had failed to take any further steps since 18th November, 2006 which was over 6 years ago. That since the pleadings were closed on or about 30th November, 2006, the matter had been fixed for hearing on 3rd July, 2008 and had been taken out of the Cause List with the consent of the parties. That subsequently the Defendant lodged two applications dated 4th March, 2010 and 22nd March, 2011 respectively, which sought to have the suit dismissed. That the said applications were withdrawn by the Defendant to give the Plaintiff a chance to prepare for the hearing of the suit. It was further deponed that the Court, *suo moto*, issued a notice for dismissal of the suit for want of prosecution. The notice was set for hearing on 27th February, 2012 when the Plaintiff was directed to file witness statements by the Court.
3. It was further contended by the Defendant that the matter was then last in Court on 27th February, 2012 when the Plaintiff's learned counsel again sought for more time to file witness statements whereupon the matter was fixed for a further mention on 26th April, 2012. That since that adjournment, the Plaintiff did nothing more. The Defendant thus contended that the Plaintiff had failed to fix the suit for hearing or even comply with the pre-trial requirements. As such the Defendant complained that it had been prejudiced as the instant suit had been hanging over its head indefinitely.

4. Mr. Ochieng, Learned counsel for the Defendant submitted that it was clear from the record that the Plaintiff had lost interest in prosecuting the suit. That this had necessitated the thing of the present application given the failure by the Plaintiff to file witness statements as directed by the Court on a number of occasions. That it is the application that had prompted the Plaintiff to file the witness statements on 7th November, 2013. Mr. Ochieng admitted that there had been attempts to settle the matter in 2008 but the letter by the Plaintiff's Advocate dated 3rd October, 2013 was a mere afterthought. He therefore urged the court to allow the application and dismiss the suit as prayed.
5. The application was opposed by the Plaintiff through her Replying Affidavit sworn on 12th November, 2013. She contended that she was ready to prosecute the suit given that the matter had been fixed for pre-trial hearing on 8th November, 2013. That the cause for the delay was due to the fact that the original Plaintiff, Peterson Wanjohi Karanja, who was her husband, had passed on. That she was then submitted as the legal representative of the deceased Plaintiff on 15th December, 2011. The Plaintiff therefore contended that she needed time to familiarize herself with the suit before taking any step. She further deponed that she did not know the Advocates on record until 2011 when the said advocates managed to trace her. That there had been attempts to settle the matter out of Court, though a conclusive agreement had not been arrived at by the parties.
6. Mr. Main a learned Counsel for the Plaintiff, submitted that the delay in this suit had been adequately explained. That the Plaintiff had since taken a date for the pre-trial hearing and had proceeded to file witness statements and further documents in readiness of hearing the suit. He further argued that the Defendant's authorities in support of the application were inapplicable given the circumstances of the matter. That for the foregoing reasons the Plaintiff should be given one last opportunity to prosecute the suit. He urged the Court to dismiss the application with costs.
7. I have considered the affidavits of the respective parties and the oral submissions of the learned counsel. The applicable law is Order 17 rule 2 (1) w3hich provides as follows:

> ***"In any suit <u>in which no application has been made or step taken by either party for one year,</u> 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."***

Further Order 17 Rule 2 (3) provides as follows:

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

8. The principles governing applications for dismissal of suit for want of prosecution are well settled and have been established by a long line of court cases. The Applicant must show that the delay complaine3d of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution. Further to this, it is clear that the decision of whether or not to dismiss a suit is discretionary. Such discretion should however, be exercised judiciously. Each case must be decided on its own facts keeping in mind that a Court should strive to sustain a suit where possible rather than prematurely terminating the same. See the case of **Naftali Opondo Onyango vs National Bank of kenya [2005] eKLR.** The purpose therefore of Order 17 Rule 2 (3) of the civil procedure Rules is derive4d from the policy that Court cases must be heard and disposed of expeditiously. This calls for the vigilance of the parties. See the Cases of **Sheikh vs. Gupta and Others Nairobi HCCC No.916 of 1960 [1960] EA 140 and Eliud Munyua Mutugi -v- Francis Murerwa [2008] eKLR.** Bearing these principles in mind, has the Defendant met the threshold required in dismissing the Plaintiff's suit for want of prosecution?
9. On inordinate delay, it is not denied that the suit is still in its nascent stages even though it was filed vide a Plaint on 8th November, 2006, which is over 6 years ago. The record before me shows that when the matter was listed for hearing on 3rd July, 2008, the same was taken out of the Cause List by the consent of the parties. The matter was then listed for hearing on several

occasions by the Defendant for the hearing of its applications dated 22nd March, 2011 and 27th May, 2011 respectively. The same were once again in court on 8th December, 2011 when the Court was informed of the demise of the Plaintiff. The Court therefore allowed the Plaintiff's application dated 7th December, 2011 for the legal representative of the deceased Plaintiff to be made a party to these proceedings. The Plaintiff was then ordered to file witness statements within seven (7) days. The time frame for this was however extended on 25th January, 2012 when the matter came up in Court again. On 27th February, 2012 the Court was informed by the Plaintiff's Advocate that the parties were pursuing an out of Court settlement. The Court took note of this and ordered that the suit be mentioned on 26th April, 2012.

10. From the record, no action was taken until 24th July, 2013 when the present application was lodged. That was a delay of one (1) year and six (6) months. I therefore find that in this matter has been established.
11. When such delay is established, it is is well explained, it becomes inexcusable. Indeed in **Agip (Kenya Limited -v- Highlands Tyres Limited [2001] KLR 630, visram J** as he then was considered the issue of inordinate delay and stated that:

"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."

Also see the Cases of **Hellen vs McAlpine [1968] 1 ALL ER 543, Ramuka Agencies Ltd Vs Esther Wanjira Maina and another Nairobi, High Court ELC 1187 of 2007 [2002] e KLR.**

12. Has the Plaintiff in this case offered any plausible reason for her failure to fix the suit for hearing since 27th February, 2012? In paragraphs 3, 4, 5, and 6 of her Replying Affidavit, the Plaintiff has attempted to explain the cause of the delay. It was deponed that she was enjoined in these proceedings on 15th December, 2011 as the Legal Representative of her deceased husband who was the original Plaintiff in this case. That she needed time to be fully appraised of the issue at hand. She further deponed that the parties had attempted a settlement with regard to the matter but the same had not been concluded. She produced the letter by the Defendant's Advocates dated 17th July, 2008 marked "SWW2" in support of her argument.
13. I find that the reasons advance by the Plaintiff for the delay between 27th February, 2012 and July, 2013 to be unsatisfactory. Though it is common ground that the Plaintiff in this case is now deceased, his legal representative was enjoined in these proceedings on 8th December, 2011. The Court thereafter ordered that witness statements be filed and exchanged within seven days. The Plaintiff was then given additional time to file these witness statements on 25th January, 2012. this was however not done. The Plaintiff only purported to do so on 7th November, 2013 four months after the Defendant had filed the instant application. This was probably intended to give the illusion that the Plaintiff was still interested in prosecuting the suit, a fact that has not escaped the attention of this Court. It is clear that the Plaintiff was only jolted into action by the Defendant's application for dismissal.
14. In the case of **Mobile Kitale Services -v- Mobil Oil Kenya Limited and Anor, Warsame J cited the case of Nilani -vs- Patel [1969] EA page 341,** where it was held;

> ***"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 <u>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 speady 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.</u> It is the duty of the Plaintiff's advisor to get on with the case. l 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)***

I am in agreement with the above holding. The plaintiff had a duty to prosecute the suit that had been filed in Court. The delay in my view was therefore inordinate and inexcusable.

15. As to prejudice, the Defendant contended that it had suffered prejudice as the suit continued to "hang" over its head. I am in agreement with the Defendant that having a suit hanging over a party is highly prejudicial. However, it was not contended that justice cannot be done to the parties at this stage. I have considered that the Plaintiff having been joined to the proceedings required time to familiarise herself with the case. I also note that on record, there is an application by the Plaintiff dated 27th May, 2011 for enforcement of a settlement that had purportedly been arrived at. What is lacking is an explanation as to why it was not prosecuted and if it was, what the outcome was.
16. Further, I have considered that the matter was listed on 8/11/13 for pre-trials and that as at that date, the Plaintiff had complied with the orders of Odunga, J, of 27th February, 2012.
17. For the foregoing reasons, I am not satisfied that I should shut out the Plaintiff from the seat of justice. I am inclined to sustaining the suit but on terms: I will therefore dismiss the application:

a) Order the Plaintiff to pay the Defendant costs assessed at Ksh.20,000/= payable within 60 days.

b) The Plaintiff to take steps to either prosecute the application dated 27th May, 2011 or withdraw the same within 30 days.

c) Alternative to (b) above taken steps within 30 days to take pre- trial directions.

Orders accordingly.

DATED and Signed at Bungoma this 23rd day of January, 2014.

A. MABEYA

JUDGE

DATED, Signed and Delivered at Nairobi this 11th day of February, 2014.

J. B. HAVELOCK

JUDGE