REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL CASE NO. 419 OF 2003

SUSAN GACHAMBI KANURI.....1ST PLAINTIFF

GEORGE KANURI.....2ND PLAINTIFF

Versus

BRITISH AMERICAN INSURANCE CO. LTD.....DEFENDANT

RULING

Reinstatement of suit

[1] The suit had been dismissed on 20th January, 2012. And, the Plaintiffs have now applied through for the suit to be reinstated. The application is dated 28th November, 2012 and grounded on Order 17 Rule (2) of the Civil Procedure Rules among others. The Applicants submit that the notice calling the Plaintiff to show-cause why the suit should not be dismissed was served on 17th January, 2012. It gave them only two days and that was extremely short. The notice required them to appear in court as shown on the cause list of the day on the second floor at 9.00 a.m. on the 20th day of January, 2012. According to the Plaintiffs' advocates, the notice defied the rules of natural justice as it did not afford them sufficient time to prepare or get instructions from the client. Unfortunately the Notice was not brought to the attention of the managing Partner of the advocates for the Plaintiffs as at the time was engaged in other matters in Mombasa. The Applicants submitted that the sins of the Advocate should not be visited upon the client.

[2] The Applicants think that the ground upon which the suit was dismissed was ostensibly because of want of prosecution. However, the evidence annexed to the supporting affidavit clearly demonstrates the Applicant's eagerness to pursue the matter. The Applicants also beseeched the court to take judicial notice of the fact that, litigants ordinarily have only one chance to list their cases for hearing annually. The applicants have since changed advocates on 24th April, 2008, and filed a notice to produce documents on 16th June, 2009. Consequently they allege that they pursued the file at the registry and wrote several letters notably that fo1 5th March and that of 7th April, 2011 which yielded results by way of a response on 12th May, 2011. Attempts to have the matter mentioned before the duty judge yielded no results. And at the time the matter was being dismissed on 20th January,2 012, the Applicants allege they had scheduled to fix it for hearing on the 24th January, 2012 and had invited the defence to the registry for

the said purpose. Thus, they argued that the closure of the file is not a sufficient reason not to reinstate this suit as the file can be recalled. The applicants believe they have demonstrated sufficient grounds to warrant the orders sought. The applicants are interested in the matter. They relied on the case of **Burnaby Properties v Suntra Stock Ltd HCCC No.636/2004**.

[3] The Defendant opposed the application. It first gave an account of brief background facts. The suit was filed on 15th July, 2003; over 11 years ago after the alleged cause of action arose in the year 2000. The Notice to show-cause why the suit should not be dismissed was duly served and received by the Plaintiffs two days prior to the hearing date. The plaintiff's failed to appear before the court to defend and ensure the sustenance of their suit thereby compelling the court to dismiss the suit for want of prosecution on 20th January, 2012 pursuant to Order 17 Rule 2 of the Civil Procedure Rules, 2010. The advocates informed the defendant of the outcome who paid their fee and closed the file. Over two years have passed by since the suit was dismissed and it would therefore be prejudicial to the defendant for the suit to be reinstated as it had laid the matter to rest. The defendant is unable to trace its file and no longer has witnesses available to adduce evidence should the matter be reinstated which shall be totally to its detriment.

[4] The Defendant submitted that the Plaintiffs have not disclosed any substantive reasons to warrant the reinstatement of the suit and they have not offered any justifiable explanation for the delay in making the application and prosecuting the suit before dismissal. The Plaintiffs have not even filed affidavits to urge their case which is an indication that they are personally not interested in pursuing the reinstatement of the suit. That notwithstanding, the Defendant submitted that Order 12 Rule 7 of the Civil procedure Rules, 2 010 gives the court set aside or vary judgment or dismissal upon such terms as may be just. Equally, the overriding objective of the court in Section 1A and 1B of the Civil Procedure Act is to facilitate just and expeditious resolution of disputes. But, there must be finality in litigation.

[5] The Defendant also submitted on Article 50 of the Constitution of Kenya, 2010 on the right to have any dispute that can be resolved by the application of law to be decided in a fair hearing before a court; fair trial as provided for at Article 50(2) (e) of the constitution includes the right to have the trial begin and conclude without unreasonable delay. They submitted, therefore, that the court should adhere to the above right and constitutional principles. The delay in this matter is two pronged; first by the inexcusable failure to prosecute the suit since 2003 and secondly by failing to present this application for reinstatement of the suit until ten months after the dismissal of suit. They cited the case of **Njuki Gachugu v Githi (1976 – 1980) 538** where the court relied on the case of **Allen v Alfred Mc Alphine & Sons (1968) 1 All ER 543**

> ***''...that where the delay is prolonged and inexcusable, and is such as to do grave injustice to the one side or other or both, the court may in discretion dismiss the actions straightaway. On the other hand this power should not be exercised unless the court is satisfied… that there has been inordinate delay and inexcusable delay on the part of the plaintiff or his lawyers and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the plaintiffs or between each other or between them and a third party."***

[6] They also relied on the case of **Mukisa Biscuit Manufacturing Company v West End Distributors Limited (1969) EA 696** where the court stated as follows;

> ***"It is the duty of the plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty…. A plaintiff who for whatever reason delays for over six years before bringing his suit for trial can expect little sympathy.'***

And the case of **Mbogo & Anor v Shah (1968) EA 93** where the court stated as follows;

> ***"The judge also relied on other factors. Delay and its possible effect in relation to witnesses are, off course, factors to be borne in mind in determining whet her, looked at as a whole, the justice***

to the case requires that the case be re-opened to as to try it on its merits."

Again on the case of **William C. Parker Ltd v FJ Hamn & Sons (1972) 3 All ER 1051** the court relied on the case of **Rowe v Tregaskes (1968) 3 All ER 447** where Lord Denning observed as follows;

> ***"What is to be done? We have said in many occasions that we consider all delay. Not only the delay after writ, but also the delay before it. The delay in the first two or three years is often the most prejudicial of all. At any rate, if a plaintiff does delay until the period of limitation is almost expired, he should keep to the timetable thereafter."***

Further, in the Will C Parker case, the court stated as follows;

> ***"The court may take into account the delay before the issue of the writ in ascertaining whether subject delay after proceedings have commenced is inordinate, inexcusable and prejudicial to the Defendant, even though the earlier delay is permissible under the rules governing the limitation of actions….."***

[7] It is in the interest of justice that all litigation comes to an end, in one way or the other. The Defendant was of the view that it is not possible to conduct a fair trial as the delay in prosecuting the suit has given rise to substantial risk to fair trial and will result in grave injustice to the defendant. The cause of action in the dismissed suit allegedly took place in 2000, that is 14 years ago and since the filing of the suit it is 11 years ago. The defendant cannot trace its file, witnesses and documents which will weaken its evidence should the matter be reinstated. That can only be at its detriment. The defendant therefore urged the court to dismiss the Plaintiffs' application with costs.

THE DETERMINATION

[8] This suit is dismissed already, but for want of prosecution under Order 17 rule 2 of the Civil Procedure Rules. Therefore, the appropriate test in the exercise of discretion to reinstate the suit is the same as the one applicable in deciding whether to dismiss or spare a suit. The court has the discretion to excuse any delay which is not contumelious and inexcusable; one which has been explained to the satisfaction of the Court and it causes no substantial prejudice to fair trial of the case or to one party or other or both. Therefore, the fact of delay *per se* does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay 1) is inordinate and inexcusable; and 2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. The Court will be interested in the nature and importance of the case, the right of the Plaintiff to be heard and the fact that summary dismissal of a suit drives away the Plaintiff from the seat of judgment; an arbitrary and draconian act comparable only to the proverbial ''sword of the Damocles''. And, for the Defendant, in order to complete the balancing, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice, and Articles 48, 50 and 159 of the Constitution are the relevant guide. Ultimately, as Chesoni J (as he then was) stated in the case of **Ivita Vs Kyumbu,** the Court should ask itself, whether, despite the delay, it is still possible to do justice for all the parties.

[9] I will apply this test. This suit was dismissed by the court pursuant to the power of the court conferred under Order 17 rule 2 of the civil Procedure Rules. Order 17 rule 2 of the Civil Procedure Rules, 2010 is relevant here. It provides that:

> ***1. In any suit in which no application or step has been taken by either party for more than 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 of the court, it may dismiss the suit.***

2. If cause is shown to the satisfaction of the court, it may make such orders as it thinks first to obtain expeditious hearing of the suit.

3. Any party to the suit may apply for its dismissal as per rule (1).

[10] The notice to dismiss the suit unless sufficient cause is shown by the Plaintiff was given to the Plaintiff's advocates and that fact is not denied. Order 17 requires notice to be given and a notice to the advocates is sufficient for purposes of dismissal under Order 17 of the Civil Procedure Rules. Neither the advocates nor the Plaintiffs attended court to offer any explanation on the delay. The Advocates who were served did not move with convenient speed to rectify the situation and they have not given any reasonable explanation why they took about ten months to file the application for reinstatement. I note, and this is important in this application, that the Plaintiffs have not filed any affidavit to explain any of the two delays herein. The first delay occurred between 2003 when the suit was filed and 2012 when the suit was dismissed. The second delay occurred between January 2012 when the suit was dismissed and 28th November, 2012 when this application was filed. I will discuss all these two delays in more detail in line with the accepted standard founded on the words of Lord Denning **MR** in **Rowe v Tregaskes (1968) 3 All ER 447** that:-

"What is to be done? We have said in many occasions that we consider all delay, not only the delay after writ, but also the delay before it. The delay in the first two or three years is often the most prejudicial of all. At any rate, if a plaintiff does delay until the period of limitation is almost expired, he should keep to the timetable thereafter."

[11] This suit was filed on 15th July 2003 and since I have not seen any reply to defence, I presume pleadings closed 14 days after 22nd August 2003 when the defence was filed. The Plaintiffs filed its documents and agreed issues on 3rd February 2005. The suit was fixed for hearing on 28th September 2005 but it did not proceed at the instance of the defendant. Again on 6.2.06 the hearing was adjourned and the case was marked ''S.O.G.'' but this time at the instance of the plaintiffs. The plaintiffs obtained another hearing date, i.e. 18.6.2009 and were to issue a hearing notice. The record does not show the notice whether the notice was served or what happened on the appointed date. On 29.5.09 none of the parties attended court. The plaintiff has annexed letters to the court and to the defence which they intend to show that the delay was not of their making. They have tried to blame the court but the record show that the file was available and that communication was relayed to the plaintiffs. See letters dated 12th May 2011 and 22nd June 2011 as well as the plaintiffs' advocates' letter dated 13th June 2011 and the remarks by Mr Obendo for the Deputy Registrar showing that the file has always been available. Those letters are meant to show that the plaintiffs made efforts to set the suit down for hearing. What is startling is that the plaintiffs' counsels who have portrayed themselves as being ready and willing to prosecute this case failed to appear on a notice to show-cause why the suit should not be dismissed. The explanations they are giving now were available then but it was not offered to thee court. Another matter; the delay of ten months between the dismissal and the filing of this application has not been explained too. When the chain of events and the realities in the file are taken together, the explanations given are not reasonable explanations for the delay herein which makes it inordinate.

[12] Despite the delay, is it still possible to conduct a trial without committing injustice to the defendant? The plaintiffs will be deprived of a hearing of their case on merits. But what prejudice will the Defendant suffer if the suit is reinstated? As I stated earlier, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. The defendant says that the delay has been so prolonged that it will not be able to procure its file, witnesses and documents which will greatly prejudice fair trial in the matter. The Government pathologist is one of the key witnesses and that evidence is crucial for the defence. Their defence will be crippled totally and that will be an injustice. The argument is plausible especially noting the cause of action goes back to 2000 which is about 14 years. On this, I am content to cite the case of **Mukisa Biscuit Manufacturing Company v West End Distributors Limited (1969) EA 696** where the

court stated that;

> ***"It is the duty of the plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty…. A plaintiff who for whatever reason delays for over six years before bringing his suit for trial can expect little sympathy.'***

And the case of **Mbogo & Anor v Shah (1968) EA 93** where the court stated as that;

> ***"The judge also relied on other factors. Delay and its possible effect in relation to witnesses are, off course, factors to be borne in mind in determining whether, looked at as a whole, the justice to the case requires that the case be re-opened so as to try it on its merits."***

[13] 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 and 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 results into, impediment to fair trial, aggravated costs, and the specific hardships outlined above. See the case of **Njuki Gachugu v Githi (1976 – 1980) 538** which relied on the case of **Allen v Alfred Mc Alphine & Sons (1968) 1 All ER 543.** The prejudice on the fair trial and on the defendant outweighs the prejudice to the plaintiffs in losing their case without being heard on merit. I make this decision based on the constitutional principle of justice that justice is to all parties not only one of them. See also the case of **Shah v Mbogo** that exercise of discretion of the court to set aside ex parte orders is to avoid an injustice or hardship resulting from accident, inadvertence or excusable mistake or error and not otherwise to delay justice. In the case before me, setting aside the order of dismissal will result into an injustice to the fair trial and the defendant and I have shown how that will be. I, however, have considerable sympathy with this cause which relates to a deceased person, and it is with great trepidation, that I am forced to dismiss the application dated 20th November, 2012, which I hereby do. Given the circumstances of this case, I make no order as to costs.

Dated, signed and delivered in court at Nairobi this 5th day of November, 2014

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F. GIKONYO

JUDGE