IN THE COURT OF APPEAL AT NAIROBI

(CORAM: KIAGE, MUCHELULE & KORIR,

JJ.A.) CIVIL APPEAL NO. 636 OF 2019

BETWEEN

DAVID NJONJO WAIHARO (Suing as the Legal Representative of GRACE WANJIRU.....APPELLANT

AND

SHRIJAI INVESTMENTS .....1ST RESPONDENT

JANTILAL D. NANJI.....2ND RESPONDENT NAIROBI CITY COUNCIL.....3RD RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi (A. Mbogholi Msagha, J.) dated 26th July 2017

in

***HCCC No. 36 of 2003*)**

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JUDGMENT OF THE COURT

This appeal emanates from the ruling of the High Court at Nairobi (Mbogholi, J. as he then was) dated 26th July 2017, by which the learned Judge dismissed the appellant's Notice of Motion dated 28th October 2016, in which he sought, in the main, orders;

"3. THAT the Honourable Court be pleased to set aside the order made on 26th February 2015 dismissing the Plaintiff's suit and all other consequential orders thereto.

4. THAT the Plaint dated 15th January 2003 be reinstated for hearing."

The crux of the appellant's complaint before the court was that Civil Suit No. 36 of 2003 was instituted by a plaint dated 15th January 2003 and filed on 16th January 2003 wherein **Grace Wanjiru,** whom the appellant now represents, was seeking general damages, costs of the suit and interest at court rates, against the respondents. Pursuant to leave of the court granted on 24th July 2009, the Plaintiff filed an amended plaint on 28th July 2009. On 26th September 2011, she was ready to proceed with the hearing but the 1st defendant's advocate sought an adjournment on the basis that the notice that was served was directed to **Lumumba, Mumma & Kaluma Advocates,** who were previously on record, rather than **Mumma & Kaluma Advocates.** In the interests of justice and to ensure proper service, the matter was adjourned. The Plaintiff was advised to fix another date at the registry where together with the respondents, they settled on a hearing date of 23rd January 2012. However, on that date, the matter was taken out and parties were advised to take a new date at the registry where, allegedly, they were informed that the court diary for the year 2012

was full.

The appellant averred that they were equally unable to find a hearing date in the year 2013 because they were advised that majority of the Judges were engaged with election petitions. Further, in the year 2014 they attempted to fix a hearing date but it was impossible as the file could not be traced due to the shifting of the registries from the Supreme Court Building to Milimani Law Courts. The appellant claimed that despite checking with the registry several times, the file remained missing. He continued that in 2015, counsel learnt that the health of **Grace Wanjiru,** the plaintiff, was deteriorating and since she was their only witness, he avoided fixing a hearing date. He later learnt that the matter was dismissed on 26th February 2015. The appellant denied ever being served with a Notice to Show Cause why the suit should not be dismissed for want of prosecution. He averred that any undue delay occasioned in fixing the matter for hearing was inadvertent. Moreover, the respondents did not stand to suffer any prejudice if the suit were reinstated.

In opposition to the motion, the 1st and 2nd respondents filed a statement of grounds of opposition dated 17th February 2017, in which they sought dismissal of the application with costs for

reasons that the appellant had inordinately delayed prosecuting the dismissed suit and filing the application for reinstatement. They explained that the subject suit was dismissed for want of prosecution on 26th February 2015, after the appellant had failed to prosecute it for a period of over 3 years, and only pursued it on 31st October 2016, after dismissal. The 1st and 2nd respondents contended that the appellant's failure to prosecute the suit and his filing of the application for reinstatement close to 2 years later was inexcusable and indolent, thus the court should not exercise its discretion in his favour.

Further, the appellant's claim that it was not served with a Notice to Show Cause was unmeritorious and unreasonable by virtue of the provisions of **Order 17 rule 2** of the **Civil Procedure Rules.** It was asserted that the rule does not mandatorily require a notice to be given before a suit is dismissed for want of prosecution. The 1st and 2nd respondents claimed that the appellant had sufficient notice of the intended dismissal of the suit but elected to allow the dismissal with a view of trying to reinstate it 2 years later, to the respondents' detriment. They alleged that they would suffer gross prejudice and their right to

fair hearing substantially

curtailed, if the subject suit was reinstated, since their witnesses were no longer available. In conclusion, it was urged that no sufficient and/or plausible reason had been advanced to warrant the reinstatement of the suit. Moreover, the application was incompetent, frivolous, misconceived, and did not disclose a *prima facie* case with a probability of success.

The 3rd respondent equally opposed the application through grounds of opposition dated 28th November 2016. It argued that the application was an abuse of the court process as the appellant had inordinately delayed prosecuting the suit. The appellant had also not made out a *prima facie* case with a probability of success. Further, the application was incompetent, misconceived and lacked merit.

Upon considering the application, the learned Judge found the delay in prosecuting the suit to be inordinate and inexcusable, and consequently dismissed the application with costs to the respondents.

The appellant disputes that decision on seven (7) grounds which he condensed to five (5) issues for determination in his written submissions as follows;

1. Whether the appellant was to blame for the delay.

2. Whether there was justifiable cause for the delay.

3. Whether the factors that led to the delay were intentional.

4. Whether the appellant was served with a Notice to Show Cause why the suit should not be dismissed for want of prosecution.

5. Whether reinstatement of the suit is a matter of *ex debito justitiae.*

When the appeal came up for hearing, learned counsel **Mr. Banji David** appeared for the appellant while **Ms. Vanice Kemunto** appeared for the 3rd respondent. There was no appearance for the 1st and 2nd respondents despite service and neither were there any filed submissions on their behalf. Counsel for the appellant and the 3rd respondent had filed written submissions prior. **Mr. Banji** orally highlighted his submissions while **Ms. Kemunto** chose to entirely rely on hers without highlighting.

Mr. Banji submitted that the appellant was not to blame for the delay in prosecuting the matter. He reiterated his averments before the High Court that when the matter came up for hearing on 26th September 2011, the appellant was ready to proceed but

the 1st respondent's counsel sought an adjournment. Next the matter was

fixed for hearing on 23rd January 2012 but it was taken out of the

day's cause list and parties were asked to take new dates at the registry. Upon visiting the registry, they were informed that the court diary for the year 2012 was full. In counsel's view therefore, the court registry was to blame for the delay. On whether there was justifiable cause for the delay, counsel continued to explain that when they tried to fix the matter for hearing in the year 2013, they were advised by the court registry that the Judges were primarily dealing with election petitions which had to be adjudicated within strict timelines. **Mr. Banji** submitted that thereafter they attempted to fix the matter for hearing but the court file could not be traced due to the shifting of registries from the Supreme Court Building to Milimani Law Courts. He contended that despite checking with the registry several times, the file could not be traced.

On whether the appellant deliberately intended to delay the matter, counsel urged that the delay was inadvertent and not intended to subvert the course of justice. He relied on the decision in ***IVITA Vs. KYUMBA [1984] KLR 441*** as cited in ***JOHN MWANGI MUHIA & 2 OTHERS Vs. DIRECTOR OF PUBLIC PROSECUTIONS & 5 OTHERS [2019] eKLR,*** and

NAFTALI OPONDO ONYANGO Vs.

NATIONAL BANK OF KENYA LTD [2005] eKLR for the argument

that courts should be slow to dismiss a suit for want of prosecution if satisfied that it can proceed without further delay. While acknowledging that there was indeed delay in setting the matter down for hearing, **Mr. Banji** urged that the appellant was willing to have the case heard at the earliest opportunity so that justice can be done to all parties. The decision in ***ARGAN WEKESA OKUMU Vs. DIMA COLLEGE LIMITED & 2 OTHERS [2015] eKLR*** was cited

for the argument that a court should strive to sustain a suit where possible rather than prematurely terminating it.

Referring to **Order 17 rule 2(1)** of the **Civil Procedure Rules,** counsel contended that a notice to show cause why the suit should not be dismissed for want of prosecution was never served upon the appellant. He submitted that had the appellant been served with the said notice, he would have informed the court the reason for the delay as well as the fact that the health of plaintiff, whom the appellant now represents, had deteriorated and she needed time to seek treatment and recover, being their only witness. To buttress this argument counsel cited the decision in ***DAVID KEMEI Vs. ENERGY REGULATORY COMMISSION & 2 OTHERS [2017] eKLR,***

where the court set aside an order for dismissal because there was

no evidence of service of the notice to show cause. Concerning whether reinstatement of the suit is a matter of e*x debito justitiae,* it was urged that in exercising its discretion, the court should consider among other things, the facts, circumstances and merits of respective parties' cases. Further, the court ought to consider whether the affected party, in this case the respondents, can reasonably be compensated by costs for any delay occasioned. Counsel urged that denying a person a hearing should be the last resort of the court. To support this argument, he cited ***SEBEI DISTRICT ADMINISTRATION Vs. GASYALI [1968] E.A 300.***

Mr. Banji contended that when the appellant learnt on 18th October 2016 that the suit had been dismissed, he filed the application for reinstatement immediately. He referred to ***EPHANTUS GATHUA MUIYURO Vs. KENYA POWER & LIGHTNG COMPANY LTD [2016] eKLR*** and ***DAVID KEMEI Vs. ENERGY REGULATORY COMMISSION & 2 OTHERS*** (supra) where the court observed that since an application for setting aside the order for dismissal of a suit was filed without delay, the applicant had demonstrated that he was desirous to prosecute the suit.

Counsel cited **Article 50** of the **Constitution** and urged the appellant’s right

to fair hearing. He in the end beseeched us to allow the appeal with costs, in terms of the suit in the High Court being reinstated.

We inquired from **Mr. Banji** whether he had furnished the Court with documentary evidence to support his averments on the reasons for the delay. Counsel's reply was that there was correspondence on record. He, however, acknowledged that there was no documentary evidence to back the allegation that the file went missing when the High Court moved from the Supreme Court Building to Milimani Law Courts.

The 3rd respondent opposed the appeal through submissions filed on its behalf by the law firm of **Eno & Associates.** Citing **Order 17 rule 2(3),** counsel submitted that the appellant's failure to prosecute the suit and his filing of the application for reinstatement two (2) years later showed indolence and this Court ought not exercise its discretion in his favour. Relying on **Article 159** of the **Constitution,** counsel urged that matters must be concluded in a timely manner and should there be any delay for a justifiable reason, that delay should not be inordinate, unreasonable or inexcusable. On further reference to **section 1B** of the **Civil Procedure Rules,** it was submitted that it is the

duty of

both the court and litigants to ensure that matters are concluded expeditiously. Further, **section 3A** of the **Civil Procedure Act** gives the court wide discretion over matters that are before it including whether or not to reinstate a suit that was dismissed on account of unreasonable delay by parties. Counsel contended that the appellant did not point out any reasonable ground warranting reinstatement of the suit.

Additionally, counsel urged that it was evident that the appellant inordinately delayed prosecuting the subject suit and the learned Judge observed as much when he noted that a delay of over

14 years was inordinate. To buttress this submission, he cited ***NILESH PREMCHAND MULJI SHAH & ANOTHER t/a KETAN EMPORIUM Vs. M.D. POPAT & OTHERS [2016] eKLR.*** Placing reliance on the decision in ***MOBILE KITALE SERVICE STATION Vs. MOBIL OIL KENYA LIMITED & ANOTHER [2004] eKLR,*** it was argued that the delay in prosecuting the matter at the trial court was substantially caused by the appellant's laxity, and the 3rd respondent would be greatly prejudiced if the instant appeal were allowed. In conclusion, counsel prayed that the

appeal be

disallowed so as to bring the litigation in the matter to an end. He also urged that the 3rd respondent be awarded costs.

We have given due consideration to the record of appeal, the submissions together with the authorities cited by counsel. In this appeal, what is being challenged is the exercise of discretion by the learned Judge. As an appellate court, we are extremely slow to interfere with a first instance court's decision that lies in its discretion, and it matters not that had we been dealing with the matter ourselves, we might have arrived at a different decision. We, however, will not hesitate to interfere if we are satisfied that the learned judge misapprehended the facts; or misdirected himself on the law; or that he took into account matters of which he should not have; or failed to take into account considerations which he should have; or that his decision was plainly wrong. See ***MBOGO Vs. SHAH [1968] EA 93***.

We think that the sole issue for our determination in this matter is whether the learned Judge erred in disallowing the application for reinstatement of the suit.

It is not in dispute that on 26th February 2015, the suit in question was dismissed for want of prosecution pursuant to

Order

17 rule 2(1) of the **Civil Procedure Rules.** Our perusal of the record at page 316 shows that prior to the suit being dismissed, the last proceedings were on 19th October 2011. The appellant blames the court registry for the delay in prosecuting the matter. He also alleges that he was never served with a notice to show cause why the suit should not be dismissed. In opposition to the appeal, 3rd respondent asserts that the delay in prosecuting the suit was largely caused by the laxity of the appellant and the Court ought not exercise its discretion in his favour by reinstating the dismissed suit. It is also submitted that the delay was inordinate, the suit having been in court for over 14 years. Further that, the 3rd respondent would be greatly prejudiced if the suit was reinstated. In analysing the application, the learned Judge reasoned as follows;

> *"On the day the suit was dismissed only the advocate for the defendants was present. Prima facie this would show that the defendants had received the notice contemplated under Order 17 rule 2. However, the plaintiff's counsel has deponed that no notice was served. The order sought is discretionary and the court has to take into consideration all the facts leading to the dismissal. This suit was filed in the year 2003 and the last time any step was taken relating to the hearing was on 19th October 2011, when both parties appeared in the registry and listed the case for hearing on 23rd January 2012.*

On that day, no proceedings were recorded and since then, no action was taken until 4 years later when the suit was

dismissed. It is the plaintiff's responsibility to move the court as owner of the case and notwithstanding what has been stated in the affidavit in support of the application, there is no sufficient cause that has been given to elicit the discretion of the court.

It is now 14 years since the suit was filed, and if the plaintiff had any interest in pursuing the prayers set out in the plaint, this suit would not be pending today."

We note that the learned Judge also warned himself of the drastic consequences of dismissing a suit. However, he in the end considered the delay to be inordinate and inexcusable and thus dismissed the suit. As properly pleaded by parties, the relevant provision on dismissal of a suit for want of prosecution is **Order 17 rule 2** of the **Civil Procedure Rules.** The rule provides;

"2. Notice to show cause why suit should not be dismissed [Order 17, rule 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) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its

dismissal as provided in sub-rule 1.

(4) ***The court may dismiss the suit for non-compliance with any direction given under this Order".*** (Emphasis ours)

The appellant averred in the affidavit sworn by his counsel, on 28th October 2016, in support of the application for reinstatement of the dismissed suit, that the suit was filed on 16th January 2003. That on 26th September 2011, they were ready to proceed with the hearing but the 1st respondent sought an adjournment. We observe that a hearing notice for that date was furnished to the court. Parties next fixed the matter for hearing on 23rd January 2012, but it was taken out. Attached to the affidavit is a copy of the notice showing cases that were taken out on the particular date. We, however, note that there is no evidence on record to support the averment that when the appellant tried getting another hearing date in 2012, the registry informed his counsel that the court diary was full. Similarly, there is nothing on record to support the claim that he could not fix the matter for hearing in the year 2013 because he was informed that majority of Judges were handling election petitions. The appellant's counsel also admitted before us that there is no documentary evidence to show that the file in this matter went missing when the court

registries were moving from

the Supreme Court Building to Milimani Law Courts. We, in the circumstances, are in agreement with the learned Judge that no satisfactory explanation was given as to why the matter lay inactive for the three years from 23rd January 2012, when it was taken out, to 26th February 2015 when it was dismissed.

The appellant also contends that he was not given the notice contemplated in **Order 17 rule 2**. On that ground, we equally concur with the learned Judge that the nature of the order sought by the appellant is discretionary to the extent that notwithstanding failure to issue notice, the court has to be persuaded by the explanation given, while taking into account all facts leading to the dismissal. Besides, **rule 2(1)** uses the words *'the court **may** give notice'*, suggesting that the notice is not mandatory. Bearing in mind the submission by counsel on both sides that their witnesses are deceased, we think it would be imprudent to reinstate a suit that has been in court for over 14 years exemplifying the adage that justice delayed is justice denied. The appellant has also not given us sufficient cause to warrant exercising our discretion in his favour. As was held in ***MOBILE KITALE SERVICE STATION Vs. MOBIL OIL KENYA LIMITED & ANOTHER*** (supra) and ***NILESH***

interest of justice that litigation is conducted expeditiously and in exercising our discretion, we take into account whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the respondent.

Ultimately, we do not think that the learned Judge committed any error of principle, misdirected himself or was otherwise plainly wrong so as to entitle us to interfere with his exercise of discretion.

In consequence, this appeal is devoid of merit and we accordingly dismiss it with costs to the 3rd respondent.

Dated and delivered at Nairobi this 27th day of February, 2026.

P. O. KIAGE

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

W. KORIR

.....

…… JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR