REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. NO.879 OF 2013

TALENT ACADEMY LTD….. …..…….……PLAINTIFF/RESPONDENT

-VERSUS-

KENYA NATIONAL HIGHWAY AUTHORITY…… DEFENDANT/APPLICANT

RULING

The matter for determination herein is the ***Notice of Motion*** application dated ***30th December 2015,*** brought by the Defendant herein under Order 17 and Order 3(2), Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law.

The Applicant has sought for the following orders:-

a. That the court be pleased to dismiss the Plaintiff's suit for want of prosecution.

b. That costs of the suit and application be borne by the Plaintiff/Respondent.

This application is based on the grounds stated on the face of the application and on the ***Supporting Affidavit*** of ***Amisi Orengo Advocate.***

These grounds are:-

a. No application has been made or step taken by the Plaintiff for a period exceeding one year and which delay is inordinate and inexcusable on the part of the Plaintiff.

b. The suit herein has never been fixed for Hearing and/or Mention ever since the Plaintiff/Respondent was given more time to amend their pleadings.

c. It is apparent that the Plaintiff is no longer interested in the suit and the same only remains an unnecessary burden on the Defendant.

d. The continued pendency of this suit is prejudicial to the Defendant/Applicant.

e. It is in the interest of justice that litigation once commenced should come to end within reasonable times.

It is the Applicant's case that the Plaintiff filed this suit ***on 22nd July 2013***, whereafter the Defendant entered appearance on ***25th July 2013,*** and filed their Defence on ***19th August 2013***. It was averred that the suit herein has never been fixed for hearing.

Further that the Plaintiff was allowed more time to amend the pleadings but the Plaintiff nor its advocate have never taken steps towards fixing the matter for hearing and neither have they made any application nor taken any other steps towards the conclusion of this matter. It was the Applicant's allegation that the continued pendency of the suit and the delay in concluding the same is prejudicial to the Defendant's Defence as the Defendants intended

witnesses may not be easily traced. Further that with the delay, the presence of these witnesses may only be obtained with an amount of delay or expense beyond the reach of the Defendants in the circumstances of this case. Further, that the Defendant continues to incur costs in legal fees due to the continued pendency of the matter and the same is causing unnecessary anxiety. The Applicant alleged that it is evident that the Plaintiff has lost interest in this claim and may not be keen to bring it to conclusion. The Applicant urged the Court to dismiss the suit by allowing the Defendant's application.

The application herein is ***opposed*** and ***Sarah Anzazi Omondi*** swore a ***Replying Affidavit*** on ***11th July 2016***, and confirmed that indeed the Plaintiff filed this suit against the Defendant and sought for orders to restrain the Defendant from demolishing the building on ***LR.No.209/11630***. She further averred that even with the grant of the orders, the Defendant demolished the building before the orders were served upon them. It was therefore imperative for the Plaintiff to amend the Plaint and seek compensation. That the Plaintiff needed a report on Bills of Quantities prepared by a Quantity Surveyor and survey needed to be done on the land to confirm that it was not a public land. That all the above required additional sums of money, which the Plaintiff did not have. She alleged that they now have the Survey Report, Bills of Quantities

and are therefore ready to file the Amended Plaint. It was her contention that the Defendant will not suffer any prejudice if the suit is heard and determined on merit. Further that striking out the suit is a draconian measure that would be prejudicial to the Plaintiff. She urged the Court to disallow the instant application and allow the suit to proceed for hearing and final determination.

The Defendant/Applicant through ***Duncan Akhulia*** filed a further affidavit and averred that the issues raised by the Plaintiff were not substantiated. Further that the Bills of Quantities prepared by the Quantity Surveyor were not attached to the Plaintiff's affidavit and the said allegation only seeks to delay the matter further. He further alleged that it was just, fair and equitable that the suit herein should be dismissed for want of prosecution.

The said application was ***canvassed*** by way of ***Written Submissions***. The Court has now carefully considered the Written Submissions, the cited authorities and the relevant provisions of law. The application is brought under Order 17 Rule 2(3) which provides that:-

> ***"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 the cause is not shown to its satisfaction, may dismiss the suit"***

Sub Rule 3; "Any party to the suit may apply for the dismissal as provided in Sub Rule 1."

In the instant suit, the application herein is brought by the Defendant in accordance with Sub Rule 3. Further the application is premised under Sections 1A & 1B of the Civil Procedure Act which deals with the overriding objective of the Act which is to facilitate the ***just, expeditious, proportionate*** and ***affordable*** resolution of the Civil disputes governed by the Act.

The application is also premised under the inherent power of the Court as provided by Section 3A of the Civil Procedure Act wherein the Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.

Bearing in mind the above provisions of law, the Court will now consider the available evidence in determining whether the suit herein should be dismissed for want of prosecution as sought by the Defendant/Applicant. The decision whether or not to dismiss a suit for want of prosecution is purely discretionary. However, the said discretion must be exercised judicially and should neither be based on sympathy nor exercised capriciously.

The principles to be considered in determining whether to dismiss a suit or not have been elucidated in various judicial decisions. In the case of

Ivita….Vs Kyumbu (1984) 441, the Court held that:-

> ***"The test applied by courts in an application for the 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 available time. It is a matter in the discretion of the Court".***

Further, as the Court ponders on the best decision, it will take into account that Courts should strive to sustain suits where possible rather than prematurely terminating the same without giving parties an opportunity to be heard. In the case of ***Et Monks & Co.Ltd…Vs…Evans (1985) KLR Kneller J.*** stated that:-

> ***"The Court when pondering over an application to dismiss a suit for want of prosecution should among other things, ask whether the delay was lengthy, has it made a fair trial impossible and was it unexcusable? Whether or not the application should be allowed is a matter for the discretion of the Judge who must exercise it of course judicially. Each turns on its own facts and circumstances".***

From the above positions held by various Courts, it is clear that the issue for determination herein are:

> ***a. Whether there has been inordinate delay from the Plaintiff/Respondent in prosecuting the suit.***
>
> ***b. Whether the delay is inexcusable.***
>
> ***c. Whether the delay cause substantial risk to fair trial or cause prejudice to the Applicant.***
>
> ***d. What prejudice will the dismissal occasion to the Respondent.***
>
> ***e. What is best for the interest of justice***.

a) Whether there has been inordinate delay from the Respondent in prosecuting the suit?

There is no doubt that the suit herein was filed on ***22nd July 2013***. Simultaneous to the Plaint, the Plaintiff filed an application for injunction in which interim orders were granted on ***22nd July 2013***. However, when the suit came up for hearing on ***31st July 2017***, the Plaintiff alleged that demolition had taken place. On ***5th March 2014***, the Plaintiff sought for time to amend the Plaint which leave was granted. However, by ***9th June 2014***, the Plaint had not been amended and the Court directed the Plaintiff to put its house in order and amend the Plaint accordingly. Since ***9th June 2014***, the Plaintiff did not take any action until ***30th December 2015***, when the Defendant filed the instant application. There was a delay of more than 18 months. Order 17 Rule 2 provides that when there is no action within a period of ***12 months***…. The Plaintiff had taken more than 12 months and had not taken any action. There was indeed delay on the part of the Plaintiff in failing to have the suit set down for hearing. In the case of ***Mwangi S. Kimenyi…Vs…Attorney General & Another (2014) eKLR***, the Court held that:-

> ***"There is no precise measure of what amount to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case, the explanation given for the delay and so on. Nevertheless inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore unexcusable"***.

The Plaintiff herein sought for time to amend its pleadings. However from ***9th June 2014 to 30th December 2015***, no action had been taken. Given the circumstances of the case and that the suit herein was filed accompanied with a certificate of urgency, there was indeed delay which delay was inordinate.

b) Whether the delay is inexcusable.

The Plaintiff has alleged that it delayed in filing its amended pleadings because with the change of circumstances after the demolishing of the building, it needed to seek for compensation and that would have been possible from Bills of Quantities prepared by a Quantity Surveyor and it also needed to have a Surveyor's Report to establish whether the land was public land or not. It was its explanation that the reports are now ready and the Plaintiff can now accordingly amend the pleadings. In the case of ***Utalii Transport Co.Ltd & 3 Others…Vs…NIC Bank Ltd & Another (2014) eKLR***, the Court held that:-

> ***"A delay is inexcusable if it is shown to be intentional and contentious for instance where there has been disobedience of a peremptory order of the Court"***

The Plaintiff has given reasons for the delay in amending the Plaint. It alleged that it was waiting for the Bills of Quantities from a Quantity Surveyor and that it also lacked funds to carry on with the matter. Given the circumstances of the case that the Plaintiff's building was demolished, the Court finds the delay excusable. As was held in the ***Ivita…Vs…Kyumbu case***, the Plaintiff's excuse for the delay is satisfactory and the Court will accept the said explanation.

c) Whether the delay cause substantial risk to the fair trial or cause prejudice to the Applicant.

It is indeed correct that it is the primary duty of the Plaintiff to take steps to progress their case since they are the ones who dragged the Defendant to Court. However, the primary duty of the court is to do substantive justice. The Court has considered the circumstances of the case. The Plaintiff's building was demolished. The Defendant is a public institution. The Plaintiff has given reasons for the delay was the amount of time it took to gather its evidence to advance its case. The Court finds that the delay herein has not given rise to substantial risk to fair trial which will prejudice the Defendant herein. As was held in the case of ***Omwambo Mayoyo & 16 Others…Vs… Kiyayi Group Ranch Co-operative Society Ltd***, ***ELC No.163 of 2008 at Kisii***, the suit should be allowed to proceed for hearing. In the above stated case, the Court held that:-

> ***"Due to the nature of the Plaintiff's claim and the Defence that has been put forward by the Defendant, I am of the view that a fair trial of the issues arising in this suit can still take place. There is no evidence that the Defendant is likely to suffer any serious prejudice if this suit is allowed to proceed for hearing. In the circumstances, I do not think that the Plaintiffs should be denied their constitutional right to have the dispute herein heard and determined by the Court on merit"***.

Equally in this matter, the Court finds that there is no substantial risk to the fair trial and there is no evidence of any prejudice to the Applicant in case the Plaintiff would be allowed to prosecute the matter.

d) What prejudice would the dismissal of the suit occasion to the Respondent?

The Plaintiff herein has alleged that its building was demolished by the Defendant even with the existence of Court Order. The Plaintiff is seeking for damaged. If indeed the suit is dismissed for want of prosecution, then th suit will have been terminated before the Plaintiff has advanced its case. As has

often been held by the courts, the Court should strive to sustain a suit rather than terminate it prematurely. A litigant should not be driven out of the seat of justice through a draconian remedy. See the case of ***Prafulla Enterprises Ltd…Vs…Norlake Investment Ltd, Kisumu HCCC No.145 of 199***7, where the Court held that:-

> ***"striking out pleadings is a very draconian remedy and it should be done with tremendous caution because a litigant should not be driven from the seat of justice without being heard***..".

The Court finds that the Plaintiff herein should not be driven out of the seat of justice without being heard.

e) What is the best order for the interest of justice?

The Court finds that the Plaintiff herein has a claim against the Defendant and the duty of the Court is to do substantive justice. Therefore the Court finds that as empowered by Section 3A of the Civil Procedure Act, the interest of justice would dictate that the Plaintiff do set down the suit for hearing at the earliest available time without delay. In the case of ***Chepsire…Vs…Rosemond (1965) 1 All ER 145***, the Court held that:-

> ***"In an application for dismissal for want of prosecution the Court can make the Plaintiff give an undertaking that if the cases is not set down for hearing within a specific time, the same to stand dismissed***".

Equally in this matter, the Court finds that the Plaintiff should be directed to prosecute the suit within the next ***60 days*** from the date hereof. Failure to do so, the suit will stand dismissed for want of prosecution.

Having now carefully considered the ***Notice of Motion*** dated ***30th December 2015,*** by the Defendant/Applicant, the Court finds it is ***not merited*** and it is ***dismissed entirely***. However the Plaintiff/Respondent will pay costs of this application.

Further, Plaintiff to set down the suit for hearing within the next 60 days from the date of this Ruling. Failure to do so, the suit will stand dismissed for want of prosecution.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this 31st day of August, 2017.

L. GACHERU

JUDGE

31/8/2017

In the presence of

Mr. Otieno for Plaintiff/Respondent

Mr. Akhuhe for Defendant/Applicant

Catherine - Court clerk.

L. GACHERU

JUDGE

31/8/2017