REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC NO. 205 OF 2010

NAFTAL OKWANYO MASARA……..…1ST PLAINTIFF/APPLICANT

JANE MASARA……2ND PLAINTIFF

-VERSUS-

TOWN CLERK ……1ST DEFENDANT

DIRECTOR OF CITY PLANNING

CITY COUNCIL OF NAIROBI……..……2ND DEFENDANT

DIRECTOR OF INSPECTOR ATE & ENFORCEMENT

CITY COUNCIL OF NAIROBI……..……3RD DEFENDANT

CITY COUNCIL OF NAIROBI… …….4TH DEFENDANT

RULING.

The matter coming up for determination is the Defendants/Applicants Notice of motion dated ***12th September, 2013*** seeking for orders that:-

i. *That the matter herein be dismissed for want of prosecution.*
ii. *Costs of the application and the suit be awarded to the applicant.*

The application was premised on these grounds.

That despite the case having been filed in **June 2010,** the Respondents have failed to prosecute the main suit. Further, it is now more than **(2) years** since the matter was heard whereupon the court made orders on the application dated **22nd October, 2010.** It was further alleged that is for the interest of justice that this application be allowed so as to prevent abuse of the court process. The application was also supported by the annexed affidavit of ***Dennis Joseck Mare*** who averred that the Plaintiffs have lost interest in prosecution of this case and it is only fair and just that the same should be dismissed for want of prosecution and with costs.

The application is opposed by the Plaintiffs herein. One ***Naftali Okwanyo Masara,*** the 1st Plaintiff/Respondent swore a Replying Affidavit on his behalf and on behalf of the 2nd Plaintiff herein. In his Affidavit the 1st plaintiff explained the reasons for the delay in prosecuting this suit. He urged the court to allow the matter to be heard on merit rather than on technicality. He also averred that the mistake of their counsel should not be visited on them.

The parties herein canvassed this Notice of Motion by way of Written Submissions. I have now carefully considered all the pleadings herein, the court's records, and the written submissions and I make the following findings:-

The applicants herein have brought this Notice of Motion under **Section 3** , **3A** of the **Civil Procedure Act** and **Order 17 Rule 2(3)** of the **Civil Procedure Rules.**

Order 17 Rule 2(3) provides that:-

"Any party to the suit may apply for its dismissal as provided by sub rule 1 ".

Sub rule 1 provides as follows:-

" 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".

Under the above **Order (17)** the court has discretion to exercise in either dismissing a suit for want of prosecution. However, that discretion must be exercised judicially. This was the position held in the case of **Joseph Ndungu Gachoka Vs United Insurance Co. Ltd, HCCC No. 2309 of 1996** where it was held that:-

….this court has unfettered discretion to exercise but it must do so judicially".

Section 3A of the Civil Procedure Act donates power to this court to issue such orders that are just or which would ensure that the end of justice is met and also prevent abuse of the court process. While deciding this application. I will therefore be guided by the provisions of ***Order 17 Rule 2 Section 3A of the Civil Procedure Act.*** I will also take into account the overriding objective of the Civil Procedure Act as provided by Section 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution which enjoins the court to do substantive justice to the parties without relying so much on technicalities.

Having carefully considered the written submissions and the authorities quoted by both parties, I find that the power of the court to dismiss Civil Suit for want of prosecution is discretionary power, but which must be exercised judicially. The test to be applied in determining such an application was laid down in the case of **Ivita Vs Kyumbu (1984) KLR 441;** where the court held that:-

" The test is whether the delay is prolonged and inexcusable , and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too……thus even if delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed , but it will be ordered that it be set down for hearing at the earliest available time".

From the court's records, there is no doubt that the Plaintiff herein filed this suit in June 2010. They also filed a Chamber Summon seeking restraining orders. The same was allowed on 4th October 2010.

However, immediately after the said Ruling by *Okwengu J* (as she then was) the Defendants herein filed an application for setting aside of the Orders issued by *Okwengu J,* (as she then was) . The said application was dismissed on 21st September, 2011 by *Mbogholi J*. It is also not in doubt that before

the Ruling of 21st September 2011, the Defendants herein had issued an Enforcement Notice dated 15th September, 2011 which prompted the plaintiffs herein to file a Judicial Review application to quash the said Enforcement Notice. A Ruling for the said application was delivered on 24th October, 2012 by W.K Korir J. It is apparent that from 3rd June, 2010 when the suit was filed , several applications have been prosecuted over this matter. The said application has been filed by either the Defendants or due to actions of the Defendants.

The Plaintiffs have submitted that since they filed the suit, they have not set down the matter for hearing since they have on several occasions been busy defending the applications, brought up by the Defendants or trying to quash the Defendants actions.

Further , that their former advocates delayed in setting up the matter down for hearing and the mistake of their counsel should not be visited on them.

Have the Respondents herein offered reasonable explanation for the delay?.

I find that it is indeed correct that the Defendants herein did file an application to set aside the Order of the court issued on 4th October, 2010. Ruling for the above application was delivered on 21st September 2011. It is also indeed correct that again on 15th September, 2011, the Defendants issued an Enforcement Notice to the Plaintiffs. That action by the Defendants caused the Plaintiffs to file a Judicial Review application, to protect their rights. The Ruling for the above application was delivered on 24th October, 2012. During the pendency of the above applications the plaintiffs would not have set the matter down for hearing.

Further the Respondents alleged that they travelled out of the county for treatment. Though no medical notes where attached to their Replying Affidavit, that is an excusable reason. The fact that their advocate also failed to set the matter down for hearing cannot be visited or blamed on them. The mistake of an Advocate should not be visited on the party as was held in the case of **Concord Insurance Co. Ltd Vs Susan Nyambura Hunga, Civil App.No 251 of 2002.**

" Mistakes of counsel in normal circumstances ought not to be laid at the door of the litigants*……".*

Courts have severally held that it is not good practice to dismiss a suit unless satisfied there has been an inordinate delay. This was the position held in the case of **Sagoo Vs Bharij , Nairobi Civil Suit No. 657 of 1989** where, the court held that:-

" It is not the practice of the court to exercise the drastic power of dismissing a suit unless satisfied that there has been intentional , inordinate or inexcusable delay on the part of the plaintiff and that there is a risk that the delay would inhibit a fair trial or that would cause prejudice to the Defendants".

The applicants herein have not demonstrated that there is indeed an intentional, inordinate, or inexcusable delay on the parts of the Plaintiffs herein. There is also no evidence that the delay has caused prejudice to the Defendants herein. Though it is the duty of the Plaintiffs to prosecute its matter to logical conclusion, there would have been no harm if the Defendants herein could also have set down the matter for hearing. Have the Defendants herein complied with the provisions of Order 11?

The upshot of the foregoing therefore is that the Defendants/Applicants Notice of Motion dated 12th September 2013 is not merited. The same is dismissed entirely with costs to the Plaintiffs.

It is so ordered.

Dated, Signed and delivered this **9th** day of **June, 2014**

L. GACHERU

JUDGE

In the Presence of**:-**

Masara holding brief Beji for the Plaintiffs/Respondents

Ogoro holding brief Mare for the Defendant/Applicant

Kabiru: Court Clerk

L. GACHERU

JUDGE