REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL MISC. NO. 359 OF 2009

MR. RICHAND VELJI SHAH……. 1ST PLAINTIFF

MR. JAYENTILAL VELJI SHAH …….. 2ND PLAINTIFF

MR.GULABCHAN VELJI SHAH…….. 3RD PLAINTIFF

MR. MAYURKUMAR RAICHAND SHAH T/A……. 4TH PLAINTIFF

VERSUS

VIKTAR MAINA NGUNJIRI……. ……. DEFENDANT

RULING

The Defendant by a Notice of Motion application dated 31st January 2013 stated to be brought under section 1A and 1B of the Civil Procedure Act and order 17 Rule 2 of the Civil Procedure Rules, 2010 seeks orders that the plaint filed against the Defendant on 2nd July 2009 be struck out for want of prosecution and that the costs of the application and the suit be awarded to the Defendant. The application is premised on the grounds set out on the face of the application and the affidavit sworn in support of the application and the further affidavit filed in response to the Plaintiff/Respondent's replying affidavit filed on 5th June 2013.

The Defendant/Applicant avers that the Plaintiff has not for over a period of three years since filing the suit taken any action to prosecute the same. Specifically the Defendant avers that the plaintiff has not taken any action to ready the suit for hearing and that no pretrial directions have been taken to enable the suit to be set down for hearing. The Defendant avers that the plaintiff has no interest and/or has lost interest in the suit and thus it would be in the interest of justice that the suit is dismissed for want of prosecution.

Mr. Jayentilal Velji Shah the Managing partner of the plaintiffs has sworn a replying affidavit in opposition to the Defendant's application and denies that the plaintiffs have not shown any interest in preparing the suit for hearing. The plaintiff explains that the suit was fixed for hearing on 13th October 2010 and subsequently on 16th and 17th November 2011. The court record shows that on 13th October 2010 an interlocutory application was disposed off while the record does not show any proceedings as having taken place on 16th or 17th November 2011. The plaintiffs attribute the delay in preparing the suit for hearing to their decision to change their Advocates in the matter following the appointment of their **Advocate, Okong'o Omogeni** to the Kenya Anti-Corruption Commission. The plaintiffs aver that their

newly appointed Advocates **M/S S. Musalia Mwenesi Advocates** did not get the case file released to them by the plaintiffs previous advocates who insisted on being paid their full fees before they could release the file to **S. Musalia Mwenesi** Advocates. That although the firm of **S. Musalia Mwenesi Advocates** filed notice of change of Advocates on 1/3/2011 they could not prosecute the suit before receiving the original file from the plaintiffs previous Advocates.

The plaintiff deposes that the original file was released to the firm of M/S **S. Musalia Mwenesi Advocates** by the firm of **Okongo Omogeni** vide the latter's letter of 12/7/2012 and the plaintiff avers that a lot of effort was put to get their file released to their new advocates and that demonstrated their interest in having the suit prosecuted. The plaintiffs affirm that they have since complied with order 11 of the Civil Procedure Rules, 2010 and that it is the defendant now who requires to comply to enable the court to give pretrial directions.

The Defendant in response to the plaintiffs replying affidavit swore a further affidavit dated 28th February 2014 where he deposes that the plaintiffs needed not to await the release of the original file as they had copies of the pleadings which they could have used to prepare and ready the suit for hearing. The Defendant avers that the plaintiffs new advocates on record had copies of the pleadings and that it was unnecessary for them to have waited until they received the original file from the previous Advocate. The Defendant contends that the plaintiffs only made compliance with order 11 of the Civil Procedure Rules on or about 16/8/2013 after the present application had been filed with a view of affecting the outcome of the application. It is the Defendants view that the plaintiffs have not offered any reasonable excuse for not preparing and prosecuting the suit. The Defendant urges the court to allow the application as no good reason has been adduced by the Plaintiffs to show why the suit should not be dismissed for want of prosecution.

The parties filed written submissions articulating their respective positions. The Defendant applicant submits that the plaintiffs new Advocate on record having obtained copies of pleadings from the court by 3/11/2011 were in a position to process the suit for hearing but failed to do so. The plaintiffs, the Defendant submits was jolted into action by the present application as it was only after being served with the application that the plaintiffs made effort to comply with order 11 of the Civil Procedure Rules merely in an endeavour to defeat and/or circumvent the application. The Defendant argues that the non prosecution of the suit has exposed the Defendant to unnecessary anxiety prejudice and expense and that the ends of justice would be met if the application is granted. The Defendant/Applicant referred the court to a recent ruling by Hon. **Justice A. Mabeya** in the case of **Governors Ball Safaris Ltd –vs- Skyship Company Ltd and another (2013) e KLR** where the court considered the principles applicable while considering an application for dismissal for want of prosecution as in the instant case. In the case the judge cited with approval the holding by **Salmon, L.J**. in the case of **Allan –vs- Sir Afred MCAlphine and Sons Ltd (1968) IALL E.R. 543** where the judge held.

" That the Defendant must show:

i. **That there has been inordinate delay….. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.**
ii. **That this inordinate delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.**
iii. **That the Defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between each other or between themselves and third parties. In addition to any inference that may be properly drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at the trial".**

Thus in an application for dismissal for want of prosecution the applicant must show that the delay complained of is inordinate and that the delay is inexcusable and that the applicant stands to be prejudiced by reason of such delay. In determining whether or not a suit ought to be dismissed for want of prosecution the court exercises its discretion and such discretion has to be exercised judicially

having due regard to the facts and circumstances of each case and noting that no two cases shall have exactly the same facts and/or circumstances. The present application has to be considered having due regard to the foregoing considerations.

The plaintiffs in response to the Defendants submissions recapped the facts as outlined in the replying affidavit and maintained the delay was occasioned by the process and the time it took the firm of **S. Musalia Mwenesi & Company Advocates** to get the original file released to them by the plaintiffs previous Advocates. The plaintiffs submit the effort that they put to get the original file released to their new advocates now on record shows the plaintiffs were keen to prosecute the suit. The plaintiffs submitted that they have for their part made compliance with order 11 of the Civil Procedure Rules and all that remains now is for the defendant to make compliance with order 11 to enable the suit to be fixed for hearing. Further the plaintiffs submit they have offered good reasons for the delay and states that the Defendant will not suffer any prejudice if the matter is allowed to proceed to full hearing.

The plaintiffs argue that the power of the court to dismiss a suit for want of prosecution is discretionary which the court should exercise judiciously and not capriciously. The plaintiffs have referred the court to the case of **Ivita –vs- Kyumbu (1984) KLR 441** to illustrate the considerations that the court ought to take into account in determining an application of the nature before the court. In the case of **Ivita –vs- Kyumbu** (**supra) Chesoni Judge** (as he then was) cited the principle enuciated by **Lord Denning MR** in the case of **Allen –vs- Alfred MCAlpine & Sons Ltd** (**Supra**) and went on to state thus:-

"**So the test is whether the delay is prolonged and in-excusable, 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 because it is no easy task for the documents and or witnesses may be missing and the evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if 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 not withstanding the delay the action will not be dismissed, but it will be ordered to be set down for hearing at the earliest available time…"**

The issue for determination in this application is whether there was inordinate delay in the prosecution of the suit and if so whether the plaintiffs have given a reasonable excuse such that the delay can be termed excusable. Further for determination is whether the defendant has demonstrated and/or shown that he stands to be prejudiced by reason of the inordinate delay that has been occasioned by the plaintiff in the prosecution of the case.

On the question whether or not there has been delay in the prosecution of the suit Order 17 Rule (2) pursuant to which the application has been brought provides:-

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 directions given under this order.

Both parties are agreed that the last action in this suit was when the suit was fixed for hearing on 16th and 17th November 2011 when apparently the matter was not confirmed for hearing. It is instructive to note that as at the time the suit was scheduled to come up for hearing the new Civil Procedure Rules 2010 had come into force and that the parties would have at any rate have been expected to comply with Order 11 of the Civil Procedure Rules, 2010 and take pre trial directions. Thus the hearing of the case could not have proceeded on the scheduled dates for non compliance with order 11 of the Civil Procedure Rules. The period from 16th November 2011 to 31st January 2013 when the Defendant filed the instant application was clearly more than one year and thus satisfies the threshold under Order 17 Rule 2 of the Civil Procedure Rules of what may be considered as inordinate delay.

However the plaintiffs explain the delay by stating that they were caught in the transition of changing their Advocates. Their previous Advocate held onto their file and could not release it for some reason to their lawyer now on record and they state their new lawyers could not process their case for hearing without the benefit of the original file in the custody of their previous Advocates. The Defendant argues that the new Advocates had access to the copies of pleadings supplied by the court. With respect I do not think copies of pleadings alone would have enabled the plaintiffs Advocates on record to prepare the suit for hearing. Order 11 of the Civil Procedure Rules require parties to file and exchange documents and to make discovery. The plaintiffs file held by their previous Advocates may have contained vital documents that the plaintiffs required to prepare their case. There is evidence that the plaintiffs made concerted efforts to get the file released to their new advocates. In the circumstances it is my view that the plaintiffs have given a viable and reasonable explanation for the delay in prosecuting the suit and thus the delay in excusable.

On the question whether or not the defendant would be prejudiced owing to the delay my position is that the defendant has not shown and/or demonstrated the prejudice that he will suffer by reason of the delay. In my view the applicant must illustrate real prejudice that he stands to suffer and not merely to state he will be prejudiced. Such prejudice may perhaps be in the nature of loss of a key witness or vital documents required in evidence which can be shown to be attributed to the delay.

Thus it is my finding that even though there was a delay on the part of the plaintiffs in prosecuting the suit, the plaintiffs have given a reasonable and credible explanation for the delay and as justice cuts both ways the court will exercise its discretion to sustain the suit to afford the parties the opportunity to have the suit heard and determined on its merits.

In the result I disallow the Defendants application dated 31st January 2013 and direct that the parties do make full compliance with Order 11 of the Civil Procedure Rules, 2010 within the next sixty (60) days of this ruling whereupon the parties shall fix the matter for a pretrial conference for directions on the hearing. The cost of the application are awarded to the Defendant/Applicant.

Orders accordingly.

Ruling date, signed and delivered this…14th…….day of……July..……..2014.

J. M. MUTUNGI

JUDGE

In the presence of:

…….. For the Plaintiffs

…….. For the Defendant