IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR, JJ,A)

CIVIL APPEAL NO. 95 OF 2016

BETWEEN

JOHN HARUN MWAU.....APPELLANT

VERSUS

THE STANDARD LIMITED.....1ST RESPONDENT

TOM MUSHINDI.....2ND RESPONDENT

MUTUMA MATHIU.....3RD RESPONDENT

(Appeal from Ruling and Order of the High Court Milimani at Nairobi

(Onyancha, J.) delivered 19th February 2015)

in

Civil Suit No. 114 of 2005)

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JUDGMENT OF THE COURT

The appeal for determination arises from a ruling arising from a Notice of Motion dated 31st May 2013 which was brought under ***order 17 rule 2*** and ***order 51 rule 1*** of the ***Civil Procedure Rules*** and filed by the respondents seeking to dismiss the appellant's suit at the High Court for want of prosecution.

The application was supported by the sworn affidavit of Caroline Cheruiyot, Senior Legal Officer of the 1st respondent, dated 3rd May 2013 wherein it was deponed that, the plaint was filed on 3rd February 2005, and on 11th February 2005, the respondents were served with summons to enter appearance; that they filed their defence on 24th February 2005, and that the suit was not set down for hearing until 28th September 2011, but on that date it was not listed on the cause list. It was deponed that since then no further action had been taken on the matter, yet the nature of the dispute required that it be promptly prosecuted while the evidence was still fresh, and the witnesses had a clear recollection of the facts of the case. The respondents' complaint was that, as the appellant had failed to set the suit down for hearing for a period of more than one year, the suit should be dismissed for want of prosecution.

In a replying affidavit sworn by the appellant on 17th March 2014, it was deponed that the allegations made in the application were unsubstantiated as, by a letter dated 30th January 2012 the appellant's advocates invited the respondents' advocates to fix the suit for hearing on 3rd February, 2012, but that no dates were taken as the court file could not be traced; that another attempt was made on 5th November 2013, but without success. Further, it was deponed, the delay in prosecuting the suit for the better part of the year was occasioned by a directive from the Honourable, The Chief Justice requiring that priority be given to the disposal of Election Petitions; that if there was any delay it was not inordinate or inexcusable, and no prejudice was visited upon the respondents arising from any perceived delay.

In a ruling dated 19th February 2015, the learned judge allowed the application, and dismissed the appellant's suit with costs to the respondents.

The appellant was aggrieved by the decision of the High Court and brought this appeal on grounds that the learned judge erred in finding the delay in prosecuting the suit was inordinate and inexcusable; in finding that no reasonable explanation had been provided by the appellant for the delay; in dismissing the suit, notwithstanding that the respondents did not show any evidence of prejudice that they suffered; in wrongly exercising his discretion to dismiss the suit.

When the parties appeared before us, both learned counsel, ***Mr. Odera Obar*** for the appellant and ***Mr. Kimachia*** holding brief for Wambugu Gitonga for the respondents informed us that they had filed written submissions which they would adopt in full, and requested that this Court proceed to deliver a judgment in respect of the appeal on the basis of the written submissions.

In the written submissions filed on 3rd April 2017, the appellant submitted that, the genesis of the application was a suit in the High Court where the appellant sought general and special damages for defamation; that the suit was fixed last for hearing on 28th September 2011, and on 28th June 2013 the respondents filed the application seeking to have the suit dismissed for want of prosecution on the basis that the appellant had failed to set the suit down for hearing since 28th September 2011. It was argued that the appellant's replying affidavit of 17th March 2014 set out credible reasons for the delay in fixing a date for hearing. The appellant faulted the learned judge for failing to take into account the explanations for the delay in prosecuting the suit, and for failing to appreciate that the respondents had not sufficiently demonstrated the prejudice suffered on account of the delay in the prosecution of the suit. Counsel cited dicta from the case of ***Salkas Contractors Limited vs Kenya Petroleum Refineries Limited Civil Appeal No. 250 of 2003*** in support of the contention that attempts to fix a hearing date constitute rational grounds for delay, and the case of ***Ngwambu Ivita vs Akton Mutua Kyumbu [1984] KLR 441*** for the contention that the court must satisfy itself that the defendant will be prejudiced by the prolonged delay.

On their part, the respondents' written submissions filed on 15th May 2017 stated that the learned judge correctly set out the two tests applicable for dismissal of suits for want of prosecution; that the learned judge correctly found that the one year threshold for delay was met. As regards the second test, it was submitted that the learned judge rightly concluded that the reasons for delay that Election petitions took precedence over other civil suits was inexcusable, as there was sufficient opportunity before and after the elections to fix the case for hearing; that on the basis that the threshold requirements were met the learned judge rightly allowed the respondents' application to dismiss the appellant's suit for want of prosecution.

We have considered the pleadings and the parties' submissions and are of the view that the issue for our consideration is whether or not the court below judiciously exercised its discretion to dismiss the appellant's suit for want of prosecution under ***order 17 rule 2*** of the ***Civil Procedure Rules.***

But before addressing the issues, we bear in mind the caution regarding our mandate in matters of this nature. In the case of ***Maina vs Mugiria (1983) KLR 79*** when it held, *inter alia*, that:-

> ***"The Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that***

the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

We are also cognisant that the discretion under ***order 17*** is conferred upon the trial court and not on this Court. Our obligation in this appeal is therefore to satisfy ourselves that the learned judge properly applied the laid down principles in dismissing the appellant's suit.

Order 17 rule 2 of the ***Civil Procedure Rules*** stipulates;

"(1) In any suit in which no application has been made or a step taken by either party for one year, the court may give notice in writing to the other party 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 a 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."

In applying the above provisions the learned judge observed that;

"From the above provision of the law, there are two tests to be satisfied for the dismissal of a suit for want of prosecution. The first one is whether the threshold of one year's delay in prosecuting a suit has been met. The second test is that the delay must be inexcusable."

As to whether this was the applicable test, the case of ***ET Monks & Co. Limited vs Evans (1985) KLR 584*** is germane wherein Kneller J, (as he then was) set out the applicable principles and held inter alia that;

"Whether an application for dismissal of the suit for want of prosecution should be allowed or not is a matter for the discretion of the Judge who must exercise it judicially. The court shall among other things consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was inexcusable. However, each case will turn on its own facts and circumstances."

Therefore, what the trial court was required to take into account in determining whether the appellant's suit should be dismissed was firstly, whether any of the parties had taken a step in the suit one year prior to the application to dismiss the suit, secondly whether the delay was inexcusable, and together with these, whether the defendant had suffered prejudice arising from that delay.

With regard to the first test, the learned judge observed that;

"In the instant case it is common ground that the matter was last in court on 28th day of September 2011 although the court record shows that the matter was last in court on 9th November 2010 before Rawal J. The Plaintiff claims to have attempted to fix the matter for hearing in the year 2012 and again in 2013, but all in vain. He explains that in the first attempt the matter could not be fixed for hearing because the court file could not be traced. And in a second attempt, the courts were busy with election petitions. In my view the threshold of one year in this case has been met. The delay in this case is over one year."

There is no dispute that the last time the case was in court was 28th September 2011. The application was filed on 31st May 2013. Clearly, the last time any step was taken by the appellant to prosecute the suit was

one year and ten months since the last invitation to fix a hearing date which was 31st January 2012, and which was evidently filed 4 months after the filing of the application to dismiss the suit for want of prosecution, in reaction to the respondents' application.

Consequently, we find that the learned judge rightly concluded that no step had been taken by the appellant to prosecute the suit in over a year thereby rendering the first test duly surmounted.

Turning to the second test, that is, whether the delay was inexcusable, the learned judge applied the principles set out in the case of ***Ngwambu Ivita vs Akton Mutua Kyumbu (supra)*** wherein it was stated that before a court can exercise its discretion in the defendant's favour, the defendant must satisfy the court that he will be prejudiced by the delay, and that justice will not be done due to the prolonged delay on the part of the plaintiff. And where the defendant satisfies the court that there has been prolonged delay, and the plaintiff fails to give sufficient reason for the delay, the court will be entitled to presume that the delay is not only prolonged but inexcusable and dismiss the suit.

The court went on to find, and rightly so in our view, that the respondents had satisfied the court that the delay was prolonged, and that the appellant had not satisfied the court that the prolonged delay was excusable as the suit, being one of defamation, required that it be prosecuted whilst the facts and the evidence were still fresh; that as the suit was filed over 10 years previously, when the witnesses, if still alive, may have been affected by age, ill health and impaired memories, justice would not be seen to be done if the suit were to proceed to trial.

But, the appellant's complaint was that in arriving at this conclusion, the learned judge failed to consider whether indeed the respondents had suffered prejudice, as no evidence was tendered to support the findings that the respondents' witnesses had suffered a memory loss or ill health.

The case of ***Ngwambu Ivita vs Akton Mutua Kyumbu (supra)*** makes it clear that,

> ***"The Defendant must however satisfy the court that he 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."***

While it is true that the learned judge appreciated the respondents' assertion that the nature of the suit required that it be promptly prosecuted when the evidence was fresh and the witnesses were available and able to clearly recollect the facts of the case, this conclusion was reached without the benefit of any evidence in support. Nothing was shown by the respondents to demonstrate what prejudice they suffered due to unavailability of witnesses, or that due to the prolonged delay, a key witness had suffered memory loss or did not have a clear recollection of the events leading to the suit. Without evidence to show that the prolonged delay was prejudicial to the respondents' case, such that a fair trial was thereby rendered impossible, we are not persuaded that the two requisite tests for dismissal were sufficiently fulfilled. We are also cognizant that justice is better served by having matters determined on their merits, unless delay and inaction has resulted in intolerable prejudice.

In view of the above, we are not satisfied that the learned judge took into account all the pertinent matters in dismissing the appellant's suit for want of prosecution. We therefore allow the appeal, but with no orders as to costs. And to forestall any further delay in the prosecution of the suit, we order that the appellant do proceed to fix the suit for hearing within 60 days from the date hereof, and thereafter the parties to proceed in accordance with the law.

It is so ordered.

Dated and delivered at Nairobi this 1st day of December, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR