**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 8 OF 2015**

*(Formerly Nairobi HCPT No. 488 of 2014)*

**Before Hon. Justice Dr. Jacob Gakeri**

**ALI ISSA ALI** **P ETITIONER**

***VERSUS***

**HON. ATTORNEY GENERAL** **RESPONDENT**

**RULING**

1. On 8th July 2021, a Notice to Show Cause why the suit should not be dismissed for want of prosecution was issued. The same was brought before this court on 8th November 2021.

2. The Petitioner responded to the Notice vide an Affidavit in Opposition of Dismissal of the Suit sworn on 15th November 2021.

3. The Petitioner avers that the failure to prosecute the matter was not by design but was occasioned by various health challenges, a subject matter of the petition herein, during the course of the suit. He depones that the same is excusable and that he is desirous to have the suit heard on merit and urges the Court to allow the same. Copies of hospital visitations dated 12th February 2006, 30th January 2013, 1st, 5th and 12th October 2017 are attached in support.

4. Having been opposed to the filing of the petition owing to the inordinate delay in doing so, the Respondent did not react to the notice to show cause. There is an Affidavit of Service to show receipt of the same.

**Analysis and Determination**

5. The singular issue for determination is whether this suit is liable for dismissal for want of prosecution.

6. The Court is guided by the provisions of Order 17 Rule 2 of the Civil Procedure Rules, 2010 and Rule 16(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 on dismissal of suits that have been idle for a period of more than one year. Rule 16(1) provides that

> **(1) In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.**

7. In addition, Order 17 Rule 2(1) of the Civil Procedure Rules, 2010 provides that –

> **(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 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.**

8. In determining whether a matter should be dismissed for want of prosecution, courts are guided by the principles laid down in **Ivita v Kyumba [1984] K.L.R 441** where the Court stated that:

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

9. Similarly in **Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR** the Court stated as follows –

> *"Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to 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 defendant on account of that delay. This is what the case of **Ivita V Kyumba [1984] KLR 441** espoused"*

10. Finally, in **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** as follows –

> *"When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.*
>
> *Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;*
>
> *i) whether the delay has been intentional and contumelious;*
>
> *ii) whether the delay or the conduct of the plaintiff amounts to an abuse of the court;*
>
> *iii) whether the delay is inordinate and inexcusable;*
>
> *iv) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and*
>
> *v) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."*

11. The Court is in agreement with these sentiments.

12. These propositions of law are clear that as courts endeavour to administer substantive justice and ensure that justice is not only done but is more importantly seen to be done, they must balance the interests of the petitioner, claimant or plaintiff against the prejudice the order made is likely to occasion on the part of the respondent or defendant. Justice must be served to all parties before the Court.

13. I will now proceed to apply these principles to the facts in the instant case.

14. In light of the foregoing, the question is whether the Petitioner is guilty of inexcusable and inordinate delay.

15. From the affidavit sworn by the Petitioner and the documentation attached, there is evidence that the Petitioner was attended to at the Nairobi West Hospital on 12th February 2006 and on 30th January 2013 and at the Mater Misericordiae Hospital on 1st October 2017, 5th October 2017 and 12th October 2017. There is no documentation of what has transpired thereafter.

16. From the record, the matter was last active on 10th November 2015 with directions that it would be mentioned on 25th January 2016. Thereafter, there appears to have been no activity until 8th July 2021, when the Court issued the Notice to Show Cause.

17. Evidently, no action has been taken since the 25th January 2016 until the Court issued the notice to show cause dated 8th July 2021, which is incontrovertibly unreasonably long and it is unexplained. This petition was filed in the High Court and was subsequently transferred to this Court in 2015. It is also important to note that the petition is essentially an employment claim contesting a termination that occurred in 1995 and appear to have been purposely filed to defeat the provisions of Section 90 of the Employment Act, 2007.

18. Regrettably, no keen interest to prosecute the matter has been demonstrated since the suit was filed. The fact that the Petitioner resides away from Nairobi is insufficient to explain the apparent indolence since October 2017 when the Petitioner appears to have stopped seeking

medical attention.

19. Although the Court empathizes with the circumstances the Petitioner finds himself in and is alive to the reality that dismissal of a suit is a draconian step that drives the party suing away from the seat of judgment as was held in **John Nahashon Mwangi v Kenya Finance Bank Limited (on Liquidation) [2015] eKLR,** the material before the Court is insufficient for the Court to exercise its discretion to retain the suit.

20. **It is not in contest that no action has been taken since 25th January 2016 and evidence on record on the Petitioner's indisposition does not go beyond October 2017. The Court is persuaded that the delay from October 2017 to July 2021 when the notice to show cause was issued is not only unreasonable and inordinate but inexcusable in light of the evidence before the Court. As a consequence, the petition is dismissed for want of prosecution with no orders as to costs.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2022**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**