REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 359 OF 2004

JOYCE MUKUHI NJENGA........ ....PLAINTIFF

- VERSUS –

EQUITY BUILDING SOCIETY LIMITED............1ST DEFENDANT

PATRICK KUNGU KIMATA t/a

MARCHET AUCIONEERS.................................2ND DEFENDANT

AGNES WANJIRU MUCHAI..............................3RD DEFENDANT

RULING

1. This case, as the title will show, was filed in the year 2004. Todate it has not been disposed.

2. Before court is the Notice of Motion application dated 2nd December 2019. It is filed by the 1st and 2nd defendants. They seek the dismissal of this suit for want of prosecution. The application is brought under the provisions of section 3A of the Civil Procedure Act and Order 17 Rule 2 (3) of the Civil Procedure Rules. The application is premised on the grounds that the plaintiff had failed to fix this case for hearing within one year, that the delay was inordinate and execusable, that the pendency of this case is prejudicial to the 1st and 2nd defendants and that the application should be granted in the interest of justice.

3. In the affidavit of Charles Njenga filed in support of the application it was stated that this case was dismissed for want of prosecution on 7th May 2009 but on the plaintiff appealing it was reinstated by the court of appeal judgment of 15th July 2016. But that after that reinstatement the plaintiff has failed to take any step for more than one year.

4. The plaintiff opposed the application through the affidavit of her advocate, Simon Theuri Wanjohi dated 10th February 2020. By that affidavit the plaintiff's advocate stated that he did not receive a notice of the delivery of the court of appeal judgment on 15th July 2016. That he had written to the court of appeal registrar, by letter dated 18th April 2017 inquiring about the delivery that judgment but that letter had not been responded to by the court of appeal. The advocate then deponed:

> ***"That in the circumstances we did not deliberately fail to take steps to set the suit down for hearing and neither have we or our client lost interest in prosecuting the suit as we were awaiting communication from the court of appeal on delivery of the judgment."***

ANALYSIS AND DETERMINATION

5. Order 17 Rule 2(1) to (4) of the Civil Procedure Rules provides:

> ***Order 17 Rule 2 of the Civil Procedure Rules*** which provides as follows:

> ***"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 direction given under this Order."

6. As stated before this case was filed by the plaintiff in the year 2004. That is now 16 years ago. This suit was dismissed for want of prosecution on the application of the defendants on 7th May 2009. The plaintiff being dissatisfied with that dismissal filed an appeal against it and according to the plaintiff she is to date waiting the court of appeal's judgment to that appeal. This is however incorrect statement, because annexed to the 1st and 2nd defendant's application, it can be seen the court of appeal delivered its judgment on 15th July 2016 allowing that appeal. Surprisingly the plaintiff stated, opposing the application that she did not receive notification of that delivery of that judgment.

7. The plaintiffs' argument is entirely unconvincing. It is unconvincing that a party would argue an appeal and merely write one letter, dated 18th April 2017 to the Court of Appeal Registrar, and then keep mum upto the time that party is stirred from its slumber two years later by an application to dismiss the suit for want of prosecution.

8. Order 17 Rule 2(1) of the Civil Procedure Rules provides a suit may be dismissed for want of prosecution of no steps are taken for one year. No action has been taken in this suit since the court of appeal delivered its judgment on 15th July 2016. And further no steps have been taken since the plaintiff wrote to the court of appeal Registrar on 19th April 2017 seeking information on the pending judgment. Apart from stating that the court of appeal failed to notify the plaintiff of the delivery of the judgment, which was delivered on 15 th July 2016, the plaintiff offered no other reason for failing to take steps in the prosecution of this suit. It is instructive to note that this matter was listed on 16th June 2015, on the court's own motion, for dismissal for want of prosecution. On that date plaintiff's learned advocate informed this court that there had been no action taken to prosecute this suit because the court of appeal had not delivered its judgment. The matter was adjourned on that date by this court in view of that information. It is inconceivable that a plaintiff who knew that this court, as far back as June 2015 wanted to dismiss this case for want of prosecution would sit back and not prosecute this suit despite the fact that the court of appeal delivered its judgment on 15th July 2016, reinstating this suit. The plaintiff did nothing to proceed with this case and was only awoken from her slumber in December 2019, three years later, by the defendants by the present application under consideration.

9. What then should a court say to a party such as the plaintiff hereof who fails to get on with his/her case? Such a party should be reminded that the overriding objective of the Civil Procedure Act and its Rules is to facilitate the just, expeditious, proportionate and affordable resolution of Civil dispute. This objective cannot be achieved, as in this case, where the plaintiff fails to expeditiously prosecute her suit. Further as was stated in the case of court of appeal **IVITA V KYUMBU [1975] eKLR** both the plaintiff and defendant must receive justice in a case. This is what the court of appeal stated in that case:

" 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 evidence is weak due to the disappearance of human memory resulting from lapse of time. "

10. The 1st and 2nd defendants in making the present application stated:

"That pendency of this case is prejudicial to the 1st and 2nd defendants/applicants profile and business."

11. The plaintiff responded to that contention, in the replying affidavit, by stating:

"That I verily believe that since the 1st defendant is a large organization and the matter is backed by records it will not suffer prejudice that cannot be compensated by an award of costs if the plaintiff is granted an opportunity to prosecute the case and the plaintiff is ready and willing to pay such costs as the court will order."

12. What is astonishing in that deposition by the plaintiff is that she failed from 15th July 2016, when the court of appeal delivered its judgment, to prosecute this suit. She fails to inform this court what she will do with any extra time given by the court of appeal to her in prosecuting this suit. In this regard I will refer to the holding in the case **Thika Coffee Mills Limited v Gakuyu Farmers Co-operative Society & 2 Others [2019] eKLR** thus:

"16. The delay occasioned in the prosecution of this case is similar to that which was considered in the case **BEVERAGE BOTTLERS (SA) LTD (IN LIQUIDATION) & ARVO – V- ABODE ENTERPRISES PTY LET (2009) SASC 272** a case of South Australia, which case I find persuasive, where the judges stated:

"There must come a time when the party has so conducted the litigation that it would be appropriate to shut that party out of that party's litigation even if the point is arguable. Justice delayed can be justice denied. Both the Plaintiff and the Defendant are entitled to justice.

If the Plaintiff has conducted his or her case so that the Defendant has suffered prejudice or will suffer injustice in defending the case then the Defendant is entitled to justice, and justice can only be achieved by shutting the Plaintiff out of his or her case."

There comes a time when (the Defendant) is entitled to have some piece of mind and to regard the incident as closed.

The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose."

13. The plaintiff has failed to prosecute this case now for three years without any reasonable excuse. Even if the 1st defendant is a large organization that is no reason to have a suit endlessly hanging over it. There is in my view merit in the prayer sought in the application. The costs of the application will follow the event and will be awarded to the 1st and 2nd defendant.

CONCLUSION

The following are the orders in respect to the Notice of Motion dated 2nd December 2019:

> ***a. The plaintiff's suit is hereby dismissed for want of prosecution.***
>
> ***b. The 1st and 2nd defendants are awarded the costs of the application and the costs of this suit.***

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of SEPTEMBER 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Appellant

For the Respondent

ORDER

This decision is hereby virtually delivered this **30th** day of **September 2020.**

MARY KASANGO

JUDGE