REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 59 OF 2014

PHOEBE OLUOCH.....PLAINTIFF

VERSUS

FRANCIS NJUGUNA KIMANI.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion dated 23rd April 2019 and filed on 25th April 2019 was filed pursuant to the provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules, 2010 in which it had sought that the Plaintiff's suit be dismissed for want of prosecution and that it be awarded costs of the application and of the suit. The said application was supported by the Affidavit of Sekou Oumo that was sworn on 23rd April, 2019.

2. The Defendant's contention was that the Plaintiff served it with a Mention Notice for 7th February 2017 for Pre-Trial Directions but that the matter was not listed for Pre-Trial Directions. The matter was subsequently fixed for Pre-Trial Directions on 21st March 2017 but the same was taken out of that day's cause list by the court on its own motion.

3. It averred that since 21st March 2017, the Plaintiff had not taken any step to prosecute her case which was evidence that she had lost interest in her case whose alleged cause of action accrued close to five (5) years age. It said that she had also not demonstrated that the court file was missing.

4. It pointed out that it was greatly prejudiced by the delay because human **(sic)** memories fade and that being a corporate entity, its employees move jobs. It termed the delay inordinate and inexcusable.

5. It therefore submitted that the said application be allowed as prayed because the Plaintiff appeared to have shifted the duty on it to prosecute this case and she had failed to explain the cause for not fixing the case for hearing over twenty four (24) months since it was last in court. It relied on the case of **Ivita vs Kyumba** (sic) **(1984) eKLR** which it submitted set out the test to be applied by courts in determining if the delay in prosecuting a case was long and inordinate.

6. In response to the said application, the Plaintiff swore her Replying Affidavit on 13th June 2019. The same was filed on even date. She contended that from the onset, the Defendant had taken a very unco-operative approach which commenced with entry of interlocutory judgment against it, and which by consent, was set aside and the fact that it had not filed Witness Statements and Bundle of Documents in compliance with the provisions of Order 11 of Civil Procedure Rules, 2010.

7. She stated that she could not have taken any action in this matter as the court file could not be traced. She explained that this was the cause for the delay in prosecuting her case which, she said, was excusable under Order 17 Rule 2 of the Civil Procedure Rules.

8. She expressed her interest in the matter and urged this court to give her another opportunity to be heard. It was her averment that she would suffer more prejudice than the Defendant if the application was allowed she relied on Article 159 of the Constitution of Kenya 2010 that mandates courts to administer justice without undue regard to technicalities.

9. Order 17 Rule 2(1) of the Civil Procedure Rules, 2010 provides as follows:-

> **"(1) In any suit in which no application has been made or no step take 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) ……

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1"

10. This court agreed with the Defendant that the Plaintiff had been indolent and not vigilant in prosecuting her case. It is not for a defendant to take steps. Indeed, as counsel for the Defendant correctly submitted, a defendant not need file witness statements and/or file documents as the burden to prove a case lies with a plaintiff. The Defendant herein could opt not to call witnesses and/or not file any documents. The Plaintiff's assertions that the Defendant had not come to court with clean hands as it had not complied with Order 11 of Civil Procedure Rules therefore fell by the way side.

11. This court was persuaded to find and hold that long delays in a case prejudice parties. However, whereas the Defendant's counsel submitted that its witness had left its employ and that it had to pay insurance every year, those were matters of fact that were not contained in its Supporting affidavit. They were made from the bar. This court did not therefore attach much weight to those assertions.

12. Equally, this court found and held that the Plaintiff had been indolent in this matter as she had not enclosed any documentation in her Replying Affidavit to show that the court file was missing.

13. Having said so, she had taken the time to oppose the Defendant's application. Although the delay was long and/or inordinate and inexcusable, this court agreed with her that she would suffer more prejudice if she was not allowed to ventilate her case on merit. There was no proof that the Defendant had since suffered any prejudice on the ground that its witness could not be traced to testify.

14. While the court considered the case of **Ivita vs Kyumbu (1984) KLR 44** that was relied upon by the Defendant in support of its case, it noted that it was held therein that in a case where there was prolonged delay, that should not prevent the court from doing justice to parties and that it is best to set down the suit for hearing.

15. In the case of **Agip (K) Ltd vs Highlands Tyres Ltd (2001) eKLR,** Visram J (as he then was) stated as follows:-

"Where a reason for delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the defendant has been prejudiced by the delay."

16. It is therefore important to point out that whereas there was inordinate delay herein and that the same was inexcusable, balancing the Defendant's fundamental right to have the case determined expeditiously because justice delayed is justice denied as provided for in Article 159(2)(b) of the Constitution of Kenya and the equally important fundamental right under Article 50(1) of the Constitution of Kenya for the Plaintiff to be heard, this court determined that it ought to exercise its discretion in favour of the Plaintiff to prosecute her case as she would suffer more prejudice than the Defendant herein if the application herein was allowed. Indeed if prejudice cannot be ascertained in a case and only inordinate delay that is inexcusable is demonstrated, a court should lean more towards saving a matter.

DISPOSITION

17. For the foregoing reasons, the upshot of this court's decision was that the Defendant's Notice of Motion application dated 23rd April 2019 and filed on 25th April 2019 was not merited and the same is hereby dismissed but with no order as to costs as the Plaintiff was clearly asleep before been awoken by the Defendant.

18. To progress this matter further, it is hereby directed that the same be mentioned before the Deputy Registrar, High Court of Kenya, Milimani Law Courts Civil Division on 18th July 2019 with a view to her giving directions on the Pre-Trial Conference.

19. It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of June 2019

J. KAMAU

JUDGE