



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 355 OF 2011**

**CECILY MBARIRE.....PLAINTIFF**

**VERSUS**

**PATRICK LUMUMBA.....1<sup>ST</sup> DEFENDANT**

**KENYA ANTI CORRUPTION COMMISSION.....2<sup>ND</sup> DEFENDANT**

**RULING**

On 9<sup>th</sup> October, 2017 the Court served the parties herein with a Notice to Show Cause why the Suit Should not be Dismissed. The matter was listed for dismissal on 3<sup>rd</sup> November, 2017. The Plaintiff did not appear on that day and Court ordered that the suit be dismissed with costs. Thereafter the Plaintiff filed a Notice of Motion dated 20<sup>th</sup> November, 2017 which is the subject for determination. The Plaintiff sought orders that the orders of 3<sup>rd</sup> November, 2017 be stayed pending the hearing and determination of the application. The Plaintiff also sought to have the said orders set aside pending the hearing and determination of the Application.

The Application Is supported by the Affidavit of **HELLEN WAIRIMU NJOROGE** an Advocate in conduct of the matter on behalf of the Plaintiff. sworn on 20<sup>th</sup> November, 2017. It has been deponed that the suit was scheduled for hearing on 28<sup>th</sup> September, 2017 before Justice B. Thurania Jaden but the matter was taken out as the judge was bereaved. That while in the process of fixing a date, they were served with the notice to show cause why the suit should not be dismissed. The Plaintiff averred that it is in the interest of justice that the orders issued on 3<sup>rd</sup> November, 2017 are set aside and the matter be litigated on merits.

The 2<sup>nd</sup> Defendant filed a Replying Affidavit dated 2<sup>nd</sup> January, 2018 sworn by **GRACE MAINA**, an Advocate on record for the 2<sup>nd</sup> Defendant who deponed that the suit was filed on 24<sup>th</sup> August, 2011 and previously on 3<sup>rd</sup> April, 2013, the 1<sup>st</sup> Defendant had filed an application to have the suit dismissed and that the 2<sup>nd</sup> Defendant filed an affidavit dated 19<sup>th</sup> September, 2017 in support of the Application. That the application was dismissed on 3<sup>rd</sup> October, 2014 affording the Plaintiff the opportunity to prosecute the suit which has never been prosecuted to date.

The 1<sup>st</sup> Defendant did not file a response to the application choosing to leave it to the court. The application was canvassed orally on 19<sup>th</sup> February, 2018 which submissions I have considered.

Order 17 Rule 2 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 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.”***

I have considered the Application together with the Affidavits and submissions of the parties. The Plaintiff has explained that the matter was scheduled for hearing on 28<sup>th</sup> September, 2017 but the same could not proceed as the judge was bereaved. Annexed to the Affidavit is the notice to that effect. The defendants have not denied the fact that the matter was listed for hearing on the 28<sup>th</sup> September, 2017 but could not proceed because of the reason aforementioned. The Defendants ground of opposition is that the matter was filed way back and the same has not been prosecuted to date.

The test for dismissal of a suit for want of prosecution is stated in the case of **Ivita -v- Kyumbu (1984) KLR 441**. The test was expressed as follows:

***“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the 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; the defendant must satisfy the court that he will be prejudiced by the delay or even that 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.”***

Justice is justice to both the Plaintiff and the Defendant and I find the Plaintiff has satisfactorily explained that the suit was to proceed for hearing on 28<sup>th</sup> when the matter was taken out and they were in the process of fixing another date when the notice to show cause was issued . The plaintiff has given a plausible explanation why the application should be allowed. I however note that this is an old matter that should be finalized without any further delay.

Therefore, the orders of this court are that the orders issued on 3<sup>rd</sup> November, 2017 are set aside. The Plaintiff is hereby ordered to prosecute the suit within the next 120 days from the date of this ruling failing which the same shall stand dismissed.

It is so ordered.

**Dated, Signed and Delivered at Nairobi this 23<sup>rd</sup> Day of February, 2018.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....For the Applicant

.....For the Respondent