REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE 133 OF 2003

REV. JOHN MUNGANIA ….....…….....
……..PLAINTIFF

VERSUS

KENYA METHODIST UNIVERSITY BOARD OF TRUSTEES……1ST DEFENDANT

PROF. M. MUGAMBI…….....
……2ND DEFENDANT

R U L I N G

The defendants by an application dated 17th June, 2011 brought under Order 51 Rule 1 of civil procedure Rules seeks the following orders:

1.That the plaintiff to show cause why this suit should not be dismissed for failure to take any steps with a view of proceeding to hearing for more than one year from the date when the same was last mentioned in court.

2. That the costs of this application be borne by the plaintiff.

The application is based on the following grounds:-

a.Matter was last in court for hearing on 10/2/2010.

b.No other steps taken by plaintiff from that day to date.

c. The matter is very old for about eight (8) years.

d.Plaintiff's indolent in prosecution of this case.

e.Further grounds are set out in the affidavit sworn by defendant's Counsel herein.

The application is also supported by two affidavits one by Mr. Kaumbi advocate and the other by

Philomena Karwitha a Clerk in the firm of M/S. M. M. Kioga & Co. Advocates.

The application is opposed by the plaintiff/respondent through his replying affidavit dated 22nd May, 2012. The applicant's case is that this suit is considerably old, having commenced since 2003 which is now about 8 years since the filing of this suit. That the last time the suit was set down for hearing was on 10th February, 2010 when the case was taken out to be heard by any Judge. That since then the applicant has been waiting for the Counsel for the respondent to invite them to take a hearing date without any avail.

The applicant averred that the delay is of about 15 months and no explanation has been advanced by the respondent for such a long delay. The applicant therefore sought that the plaintiff/respondent do appear in court to explain why the suit cannot be dismissed for that long delay. The applicant's Counsel deponed that the delay is inordinate and the defendants are very anxious to have the matter finalized in order to be able to render other services to Public and the academic community. In the additional affidavit by Philemon Karwitha it is deponed that the Court Clerk of the firm of M/S M. M. Kioga & Co. Advocates, who handles the matters of taking dates in court together with other Advocate's clerk that it is true that they did not receive invitation letters of whatsoever from the firm of M/S GikundaAnampiu's offices at any time until this application dated 20th June, 2011 was filed. The Clerk further deponed that the letters exhibited by the plaintiff as "JMI" and "JMII" are not genuine and further they had not been served upon their offices and that they do not bear their firm's office stamp. That the applicant's application was also delayed as the court kept the application for almost one year without allocating a date. The defendant further challenged the respondent's contents of Paragraph 9 and averred that the same is not true as a party represented by an advocate cannot proceed to registry on his own to take a hearing date.

The clerk further averred the delay in serving the application was caused by failure to have their application allocated a hearing date.

On the other hand, the respondent in his replying affidavit dated 22nd May, 2012 stated that the applicants' application dated 17th June, 2011 was served upon his advocates on 8/5/2012 almost a period of a year since filing. That the respondent has been very vigilant to have this matter fixed for hearing and heard and that the chronology of events in this matter vindicate him and his advocates.

That at one stage defendant initially applied for this matter to be referred to the Chief Justice whereas the Chief Justice granted dates but the defendant and his Advocates declined to attend and then Chief Justice ordered the matter to be heard by the then Resident Judge Justice Ouko. That since then the respondent averred he has always tried to fix the suit for hearing and annexed invitation letters marked "JMI" dated 2/3/2011 and "JM2" dated 1/2/2011. That from 10th February, 2010 the respondent deponed the court diary for the year 2010 became full and awaited for the diary of the following year 2011 when the respondent attempted to fix the case for hearing in vain as the diary was again full very early in the year and that there was a general direction not to add more cases in the diary. That on 2/02/2012 when the respondent attended court to fix the suit down for hearing they discovered that there was an application filed by the applicants and court declined to fix the case for main hearing pending the hearing of the said application which application was subsequently served upon the respondent's advocate on 8/5/2012. The respondent averred therefore the sequence of events explains why this matter has been pending for many years and which events he deponed cannot be blamed on the respondent or his advocate. The respondent stated that he would indeed be happy if this Honourable Court can allocate dates for hearing of this matter at the earliest possible date. The respondent stated that his claim is genuine and he was an employee of the defendant as a Lecturer and his services were terminated without any payment of his benefits. He averred that justice of the matter demand that he should be heard and he is willing to be heard but it is unfortunate as no suitable date has been available.

When the application came up for hearing Mr. Muthamia, Advocate appeared for the applicant; in his arguments in support of this application he relied on the application and supportive affidavits.

On the other hand Mr. Kaimenyi, Advocate who appeared for the respondent similarly relied on the

contents of the replying affidavit deponed upon by the respondent.

I have considered the application, affidavits for and against the application, Counsel submissions and the only issue for determination in this application is whether the delay in prosecuting this suit is prolonged and inexcusable and if it is, whether justice can be done despite such a delay?

Under Order 17 Rule 2(3) of Civil Procedure Rules it is provided:-

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.

Any party to the suit may apply for its dismissal as provided in Sub-Rule 1.

Under the above-mentioned Section, in any suit in which no application has been made or step taken by either party for one year, court may give notice to parties to show cause why the suit should not be dismissed. In the instant suit, the applicant filed the application under Order 51,Rule 1 of Civil Procedure Rules, but not under Order 17 Rule 2(3) of the Civil Procedure Rules, which Order 17 Rule(2) stipulates after a period of one year without any steps being taken by a party the court can give notice to the parties to show cause why the suit should not be dismissed. A party at the same time can exercise his rights by seeking that the suit be dismissed for want of prosecution under Order 17 Rule 2(3) of Civil Procedure Rules.

In the case of **IVITA – VS – KYUMBU(1984) 441** which is a lead case in matters pertaining to dismissal of suit for want of prosecution sets out the principles for dismissal of a suit for want of prosecution, Hon. Chesoni, J, (as he then was) stated as follows:-

"So 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 defendant; so both parties to the suit must be considered and the position of the judge to, because it is no easy task for the document, 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 however satisfy the court that he will 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if 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 notwithstanding the delay the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in Allen V McAlpine at P.561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all-time saying, which will never wear out however often said that, justice delayed is justice denied."

The instant case was filed on 25th November, 2003. The suit came last to court on 10th February, 2010 when the Hon. Lady Justice Kasango stated that since parties had consented that the matter be heard by any Judge, it be heard on that day if the parties were ready. The respondent's Counsel applied for adjournment to which the applicants' Counsel has no objection; consequently the matter was stood over generally. The court record show that since then the respondent made no attempt to set the suit down for hearing.

Consequently the applicant filed the application dated 17th June, 2011 but was not given a hearing date of the application. The court record show that the applicant sent invitation to the respondent'sCounsel through a letter dated 30th June, 2012 to take a date for hearing of the application dated 17th June, 2011 on 20thFebruary, 2012. That following applicants' action the respondent's Counsel purportedly sent an invitation dated 1/2/2012 annexture "JM2" and a further invitation dated 2/3/2011 marked "JMI" to meet

the applicant's counsel at the registry to take a hearing date on 3/03/2011. The said invitation were challenged by the applicant's Counsel. The applicants' Counsel denied having received the same as none of them bears their office stamp. The respondent did controvert the allegation raised by the applicant that the said invitation letters were false and indeed were not served. I therefore agree with the applicant's Counsel "JMI" and JM2" were never issued and served upon the applicants' Counsel. The delay in fixing the suit for hearing since the it last came up for hearing upto the time of applicants' application is about 1 year and 4 months. The delay of 1year and 4 months without setting the suit down is a prolonged period.

The respondent's excuse for failure to set this matter down for hearing is that dates were not available in the year 2010 as the diary was said to be full when the respondent's Counsel sought a date after the matter was adjourned on 10th February, 2010. That also when the respondent sought a date in the year 2011 the court diary was once again said to be full. That when the respondent attempted to get a hearing date on 2nd February, 2012 he averred a date could not be given as the applicant's application dated 17th June, 2011 had to be determined first. Apparently the applicants' application dated 17th June, 2011 filed on 20th June, 2011 stayed without a date till on 21stFebruary, 2012 when the same was set down for hearing on 28th May, 2012. This court is aware of non-availability of hearing dates of civil matters at Meru High Court due to numerous civil matters at the High Court. The court is also aware that directions were given as to which matters could be given hearing dates due to congestion of pending matters. The station has numerous criminal and civil cases which cannot be speedily disposed of by the current number of Judges.

I am therefore satisfied that respondent has demonstrated the delay in setting this matter down for hearing was excusable though he did pursue the taking of the hearing dates with a lot of diligence.

In this case though delayed, justice can be done to both parties. It has not been demonstrated there would be difficulties in hearing this matter. There is no argument that it would be difficult to produce witnesses or that evidence is weak due to disappearance of human memory resulting to lapse of time.

The applicant has not satisfied the court that he will be prejudiced by the delay or that the plaintiff will also be prejudiced. The applicant has not shown that justice will not be done in this case due to the prolonged delay on part of the plaintiff before the court can exercise its discretion in his favour and dismiss the suit for want of prosecution.

I therefore find the delay in setting up this matter for hearing though prolonged the plaintiff/respondent has explained to the satisfaction of this court the prolonged delay and the court is satisfied with the excuse given by the plaintiff/respondent. The court is also satisfied justice can still be done to the parties in spite of prolonged delay.

The upshot of the matter is that in exercise of my discretion and for reasons given herein-above I refuse to grant the application but I have found the respondent was not diligent to pursue obtaining of a hearing date of this matter. The application is rejected but costs of this application is awarded to the applicant at any event.

Meanwhile to ensure that this matter do not stagnate any further the plaintiff is given 120 days to take steps to set the suit down for hearing before any Judge as earlier on ordered in default the applicant be at liberty to move court for dismissal of the suit for want of prosecution.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF JUNE, 2012.

J. A. MAKAU
JUDGE
DELIVERED IN OPEN COURT IN PRESENCE OF:

1. **Mr. Kiambi for the applicant**

2. Mr. Kaimenyi for the respondent

J. A. MAKAU
JUDGE