



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

ELC CASE NO. 1960 OF 2007

MARY MUTHONI NDUNG'U
T/A FASHION CRAZE SALONPLAINTIFF

VERSUS

JOAN NJOKI NDUNGI 1ST DEFENDANT

STEPHEN KIMANI T/A KIRIIYU MERCHANTS 2ND DEFENDANT

RULING

The plaint herein was filed on 28th July, 2006. The record shows that on 18th March, 2009 the plaintiff applied for leave to amend the said plaint. The court granted the said order but the amended plaint was never filed. There is now before me an application by way of Notice of Motion under Order 17 Rule 2 (3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders,

1. That the plaintiff's suit herein be dismissed for want of prosecution.
2. That the costs of the suit be awarded to the defendants.

The grounds set out on the face of the application are as follows,

- a) It is now over one year since this suit was in court.
- b) The plaintiff has failed to prosecute this matter which was filed in the year 2006.
- c) This is an appropriate case for dismissal under Order 17 Rule 2(3) of the Civil Procedure Rules.

It is further supported by the affidavit of the 1st defendant Joan Njoki Ndungi. The plaintiff has filed an affidavit in reply opposing the application and in particular stated that, after the ruling was delivered allowing her to file an amended plaint, she left the country and returned in November, 2010. During her one year absence, she was in touch with her advocate and it was agreed that any action be withheld because she did not want the case to be fixed for hearing in her absence.

It is also her case that she has not been able to compile all documents in support of her claim because some of them were carted away by the 1st defendant. She is still interested in prosecuting her suit and seeks a chance to fix the hearing dated instead of the suit being struck out on a technicality.

Counsel agreed to address the application by way of written submissions but only the defendants filed submissions. Order 17 Rule 2 (1) provides that in any suit in which no application has been made or steps taken by either party for one year, the court may give notice in writing to both parties to show cause why

the suit should not be dismissed, and if no cause is shown to its satisfaction may dismiss the suit. Order 17 Rule 2 (3) provides that any party to the suit may apply for its dismissal as provided in sub rule 1.

The defendants are perfectly in order to apply for the dismissal of the plaintiff's suit in the application before me. They are parties to

this suit and have given reasons for the said application. The failure to file the amended plaint after the court order allowing the plaintiff to do so, has not been explained. Even in the affidavit in reply to the present application there is no expression of interest by the plaintiff to file the said amended plaint. It can hardly be believed that she is still interested in prosecuting the suit when in the first place she has shown no interest in taking advantage of a court order which is in her favour. Additionally, even if one were to believe that some of the documents in support of her claim are not available, she should have at least filed whatever documents that she has in her possession to facilitate the fixing of the case for hearing. She has also not attempted to draw any issues for determination in line with her pleadings.

With respect she has lost interest in this matter and any continued delay is likely to be prejudicial to the defendants. I know that the dismissal of any suit is a drastic measure but in deserving cases, that should be done. This is one such case and therefore find that the plaintiff's suit should be and is hereby dismissed for want of prosecution. The defendants shall have the costs of this application and the suit.

Orders accordingly.

Dated, signed and delivered at Nairobi this 21st Day of July, 2011

**A. MBOGHOLI MSAGHA
JUDGE**