REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 175 OF 2014

MARY ROSE NAMU ..... PLAINTIFF

VERSUS

JANE MUTHONI NGOROI ..... DEFENDANT

R U L I N G

1. The application before me for determination is a Notice of Motion dated 16.12.2020 and filed on 17.12.2020 It is expressed to be brought under Sections 1A, 2A and 3A of Civil Procedure Act (Cap 21), Order 17 Rule 2 of Civil Procedure Rules, 2010 and all other enabling provisions. The applicant – **JANE MUTHONI NGOROI** – is the defendant in the suit while the respondent – **MARY ROSE NAMU** – is the plaintiff.

2. The application has three prayers and they are as follows:-

i. The plaintiff's suit be dismissed for want of prosecution.

ii. Any further or better relief the court may deem fit and just to grant.

iii. Costs be provided for.

3. The grounds advanced in support of the application include, inter alia, that the matter is an old one, having commenced way back in the year 2008 as HCCC No. 66 of 2008 before being consolidated with another, namely HCC No. 78 of 2007 (OS). The suit was originally against the respondent's husband but the husband died and the respondent took his place. According to the applicant, the respondent has failed to take steps to prosecute the matter and over one year has lapsed since the matter was last in court in the year 2018. This is said to have prejudiced the applicant as she has always had this suit hanging over her head. The application came with a supporting affidavit which, in tenor, substance, and purport, is an elaboration of the grounds advanced.

4. The respondent opposed the application via a replying affidavit dated 19.3.2021. She acknowledged that the suit was indeed filed in the year 2008 and was later consolidated with another suit HCC no. 78/2007 (OS) in the year 2009. She stated that her husband passed on and she substituted him. Later on, the consolidated suit became ELC No. 175 of 2014 which, if you like, is this suit itself. The suit was then transferred to Kerugoya and then back to Embu. According to the respondent this to and fro movement of the suit caused confusion and served to delay it. Then the presiding judge (Angima J) directed that hearing would be given to matters that were 10 years or older. This caused further delay. Her final reason is that her former advocate on record got another job. The respondent said she was keen to prosecute the suit and asked the court to allow her to do so.

5. The application was canvassed by way of written submissions. The applicant filed her submissions on 4.5.2021. She reiterated the reasons given in her application and she also challenged the respondent's right of audience for the reason that the respondent had not paid costs as ordered for non-attendance. The respondent was further accused of dragging her feet in responding to the application. According to the applicant, all this depicted a reluctant litigant.

6. In support of the application, the applicant cited the case of ***NILESH PREMCHAND MWIJI SHAH & Another t/a KETAN EMPORIUM VS M.D. POPAT & Another [2016] eKLR***, where the court stated standards to be considered in dismissal of a suit for want of prosecution. The applicant called upon the court to exercise its discretion in the context of the circumstances of the case. She submitted that the discretion should be in her favour as no tangible reasons have allegedly been given to counter her application.

7. The applicant disputed the reason proffered by the respondent to the effect that her advocate got another job. She wondered why the same advocate continued being on record long after getting the alleged job. She further submitted that no document was made available to support this.

8. The respondent's submissions were filed on 3.4.2021. She reiterated what she stated in her response to the application. She then cited the

case of ***GEORGE KIBATA VS GEORGE KURIA MWAURA & Another [2017] eKLR*** which spelt out the grounds to be considered in an application urging for dismissal of a matter for want of prosecution. She further cited the case of ***Ivita vs Kyumbu [1984) KLR 441*** where the court held, inter alia, that the applicant must show that justice will not be done in the case due to prolonged delay on the part of the respondent.

9. Further, the respondent averred that the delay in fixing the matter for hearing was not deliberate. She said it was excusable and expressed her willingness to prosecute the case without delay. She ultimately asked the court to dismiss the application.

10. I have considered the application, the response made, and the rival submissions. I have also looked at the court record. In my view, the sole issue for determination is whether the application has merits.

11. Dismissal of suits for want of prosecution is provided for in order 17 of Civil Procedure Rules, 2010. Rule 2 (3) of that order provides that a party may apply to court for such dismissal. Such dismissal is always in the discretion of the court. In **Halsbury's Laws of England, 4th Edition, Volume 37, paragraph 448,** the factors to consider are stated to be the following:

a) That the default has been intentional and contumelious

b) That there has been prolonged or inordinate and inexcusable delay on the part of the applicant or his advocate.

c) That such delay will give rise to substantial risk that it will not be possible to have a fair trial of the case or is such as it likely to cause or to have caused severe prejudice to the defendant

d) That except in case of contumelious conduct by the applicant, the power to dismiss an action for want of prosecution should not be exercised within the currency of any relevant period of limitation as the plaintiff could then simply file another action.

12. The philosophy that underlie Order 17 of Civil Procedure Rules, 2010 is that the rules in it were designed in the public interest to promote expeditious conclusion of litigation. But courts have always approached the issue with a lot of circumspection. It's always appreciated that while expeditious hearing is desirable, some justifiable factors can sometimes impede it.

13. In our local jurisprudence, courts have held that dismissal of a suit for want of prosecution is a drastic action and should only be done in exceptional circumstances because it deprives the plaintiff of his cause of action against the defendant (**see Al Amin Agency vs Sharrif Omar & Another HCC 272 of 1996]**. It has been said that the test to be applied is whether there has been prolonged, inordinate and/or inexcusable delay in having the case heard and if there has been such delay whether justice can nonetheless be done **(see the case of Ivita vs Kyumbu [1984] KLR 441** or the remarks of **Edward Davies LJ** in the old case of ***PAXTON VS ALLSOP [1971] 3 ALL ER 370 at page 378].***

14. It is clear therefore that even though there is prolonged or inordinate delay, if the court becomes satisfied with the explanation given by the plaintiff, and forms the opinion that justice can still be done to the parties, the case will not be dismissed and will instead be ordered to be set down for hearing as soon as possible **(see Ivita's case (Supra)].**

15. The case of **Mwangi Nendangi S. Kimenyi vs Attorney General & Another [2014] eKLR** is particularly instructive in assessment of what is useful to guide the court. In the case, it was held inter alia, that invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which should be guided by the following:-

a) Whether the delay has been intentional or contumelious

b) Whether the delay or conduct of the plaintiff amount to an abuse of the process of the court

c) Whether the delay is inordinate or excusable

d) Whether the delay is one that gives rise to substantial risk to fair trial in that it is not possible to have a fair trial of issue in action or causes or is likely to cause serious prejudice to defendant; and/or finally,

e) What prejudice will likely be caused to the plaintiff. By this test, the court is not seeking to assist the indolent but is rather serving the interests of substantive justice to all parties.

16. In the matter at hand, the respondent explained that the matter has been doing rounds in various courts, particularly Embu and Kerugoya and this is reflected by the records. This seems to be true. She said further that this court has in the past had a policy of handling matter that are much older than this case. Again this is true. This court had prioritized the hearing of matters that are older than this case. Cases like this one were in effect put in abeyance as a matter of policy so that older cases could be concluded first.

17. The respondent also explained that her counsel on record got a government job, specifically at National Youth Service, and this also served to cause some delay. Add to all this the fact that for a long time now, courts in the country have not been operating optimally due to Covid-19 pandemic. All cases therefore including this one cannot move at the desired pace in our courts.

18. When all is considered therefore, the delay in this matter cannot be blamed on the respondent alone. Her explanations seem plausible to me and I find them excusable. My considered view is that fair trail is still possible and I don't see any serious prejudice that has been caused or is likely to be caused to the applicants. The circumstances prevailing seem to suggest to me that the delay has not been caused by any

intentional or contumelious conduct on the part of the respondent.

19. But there is also another crucial consideration: When the applicant's late husband filed the case, the applicant filed a defence and counter-claimed. The respondent then filed a reply to applicant's defence. She also filed a defence to the applicant's counter claim. The court is being asked to dismiss the respondent's case for want of prosecution. But even if this is done, the applicant's own counter-claim to which the respondent has filed a defence will still remain. The parties then will continue coming to court for hearing and determination of the counter-claim.

20. The objective of dismissing a suit for want of prosecution is to bring litigation to a closure. Given the scenario I have given here, this will not happen even if the respondent's case is dismissed. Dismissal therefore will not serve the desired purpose.

21. I think it is clear now that the court is not persuaded that dismissal of this matter is justifiable. The application under consideration should therefore not be allowed. But before I conclude, I need to say one more thing because of the directions I intend to give: In the case of **Chepsire vs Rosemond [1965]1 ALL ER 145,** the court held, inter alia, that in an application for dismissal for want of prosecution, the plaintiff can be made to give an undertaking that if the case is not set down for hearing within a specific time the same will stand dismissed.

22. In this matter, I dismiss the application but direct that the respondent should act with all due dispatch to set down the matter for hearing within the next six (6) months after delivery of this ruling. If that is not done, the case will stand dismissed at the end of the period. The applicant suggested that the respondent should pay throw-away costs if the application is not allowed. I think the applicant has a point. Although the court has found that the respondent is not to blame for some of the things that have caused delay, it is also true that the respondent has not shown herself to have been very active in moving the matter forward. She is therefore ordered to pay throw-away costs of 5000/= to the applicant.

Ruling read and delivered in open court this 10th day of June 2021.

In the presence of :-

Plaintiff/respondent absent

Defendant/applicant – absent

Interpretation – English/Kiswahili

Njeru Ngare for defendant/applicant

Asimuli (absent) for the plaintiff/respondent.

Ruling on application dated 16.12.2020 and filed on 17.12.2020 read and delivered in open court.

Right of Appeal 30 days.

A.K. KANIARU

JUDGE. – 10.6.2021.