



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 279 OF 2016**

**MARTHA KOOME.....PLAINTIFF**

**VERSUS**

**RADIO AFRICA KENYA LTD.....DEFENDANT**

**RULING**

1) The subject matter of this ruling is the motion dated 24<sup>th</sup> March 2021 taken out by the defendant/applicant whereof it sought for this suit to be dismissed for want of prosecution. The application is supported by the affidavit sworn by Linda Musita, the defendant's legal officer. The plaintiff filed the replying affidavit sworn by N. W. Amolo to oppose the motion.

2) When the motion came up for interpartes hearing, this court directed the same to be disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion plus the facts deponed in the rival affidavits. I have also taken into account the rival submissions filed by the defendant plus the authorities cited and relied by the defendant.

4) It is the submission of the defendant that it is now more than a year since pleadings were closed and the plaintiff has not taken any step to have the suit prosecuted. It is pointed out that the suit was last in court on 3rd October 2019. The applicant stated that the failure by the plaintiff to take any action to have the suit set down for hearing amounts to an abuse of the court process. This court was urged to find that it is just and expedient in the circumstances to have the suit dismissed for want of prosecution.

5) In response, the plaintiff pleaded with this court not to dismiss the suit because the delay to prosecute the suit is solely attributed to her advocates. The plaintiff beseeched this court not to let her suffer for the mistakes of her advocate. In the replying affidavit N. E. Amolo deponed that his clerk who was tasked with the duty to mark the file to his attention failed to do so hence the delay to prosecute the suit.

6) The learned advocate further averred that the delay was inadvertent on the part of his office and that his client, the plaintiff herein had no role. The learned advocate also deponed that he has since then prepared and filed the pre-trial questionnaire together with the case management checklist and what remains is compliance with the provisions of Order 11 of the Civil Procedure Rules and for the certification that the suit is ready for hearing.

7) This court was urged to excuse the mistakes of the plaintiff's advocate and permit the plaintiff to proceed and address pre trial issues.

8) In response, the defendant argued that the plaintiff only came to file her case management checklist upon receipt of the

instant application. It is said that the delay to prosecute the matter is inordinate. It is also pointed out by the defendant that the plaintiff has failed to demonstrate any substantial reason for the inaction in the matter and that the reasons advanced by the plaintiff's advocate are lame excuses. It is also argued that it is the plaintiff's duty to follow up her case with her advocate to have the case prosecuted but she chose to neglect to do so.

9) The substantive law applicable to this case is Order 17 rule 2(3) of the Civil Procedure Rules which provides that a party may apply for the dismissal of a suit if a year passes and no application has been made or step taken towards the prosecution of the suit.

10) It is apparent that pleadings closed on 28<sup>th</sup> November 2016. It is also admitted that no action was taken to have the suit prosecuted. It is only after the instant was filed that the plaintiff's counsel was woken up from his slumber.

11) The learned advocate has stated that he has now taken up steps to prepare and file a pre-trial questionnaire together with the case management checklist. It is also clear that the delay is long. The question is whether there was any plausible explanation given for the delay. The plaintiff's advocate has expressly admitted that the delay was caused by his office. I am satisfied the plaintiff has given a good reason to explain the delay. I am therefore of the opinion that though the delay is long, there is a plausible explanation hence the same is excusable.

12) The plaintiff's advocate has stated that the file was not marked to his attention by his clerk by way of bring-ups. This court takes judicial notice of the fact that such occurrences usually arise in offices. I am also satisfied that the omission is inadvertent and is not attributable to the plaintiff.

13) In the circumstances of this matter, I think a fair order is to decline the defendant's request and instead give the plaintiff a chance to prosecute the suit. Consequently, the defendant's motion dated 24<sup>th</sup> March 2021 is dismissed. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF OCTOBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant