



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 493 OF 2013**

**ELIZABETH ANNE BUKUSU..... PLAINTIFF/APPLICANT**

**VERSUS**

**LUBANO KIZITO.....DEFENDANT/RESPONDENT**

**RULING**

The matter herein was filed on the 22<sup>nd</sup> November, 2013 but due to the slow pace at which it was being prosecuted, the court on its own motion issued notices to the respective parties to appear before it, on the 22<sup>nd</sup> February, 2019 to show cause why the matter should not be dismissed for want of prosecution. On the said date, counsel requested for time to file affidavits in response to the notice to show cause, which they duly filed and vide its ruling delivered on the 18<sup>th</sup> day of July, 2019, the court ordered the plaintiff to prosecute her suit within six (6) months from the date thereof failing which, it would stand dismissed.

The plaintiff did not comply with the said order and on the 13<sup>th</sup> day of January, 2020, she filed the notice of motion dated the 10<sup>th</sup> day of January, 2020 seeking an interim stay of the aforesaid ruling and/or order issued on the 18<sup>th</sup> July 2019 pending the hearing and determination of this application; an order for enlargement of time within which to prosecute the suit and leave to file a supplementary list of documents.

The application is premised on the grounds appearing on the face of the motion and on the annexed affidavit sworn by Nyamumbo Ondieki, Advocate, on the 10<sup>th</sup> day of January, 2020.

In the supporting affidavit, the deponent avers that after the ruling was delivered on 18<sup>th</sup> July, 2019, the plaintiff invited the defendant's counsel to the registry on 6<sup>th</sup> August, 2019 and on 28<sup>th</sup> August, 2019 to fix the matter for hearing but on both occasions, the court file was not available and hence they could not fix a hearing date. That it was not until 10<sup>th</sup> September, 2019 when counsel for the plaintiff managed to fix a date for 5<sup>th</sup> November, 2019.

He further depones that when the matter came up for hearing on 5<sup>th</sup> November, 2019, counsel for the defendant sought for an adjournment to enable her file a supplementary list of documents which were pivotal to her case, which application he did not object to, primarily to afford the defendant a fair and reasonable opportunity to participate in a fair trial.

He avers that when the matter next came up for hearing on 9<sup>th</sup> December, 2019, the plaintiff took to the witness stand but was stood down as some documents that were to be produced were missing from her list of documents. He sought an adjournment to enable him file a supplementary list of documents on behalf of his client which documents he was not able to file before the 18<sup>th</sup> January, 2020 as the court was going on vacation and he could not obtain a hearing date as none was available before the said date.

He contended that he was unable to file the supplementary list of documents as per the court's directions due to the unavailability of the court file which file could not be traced until the 19<sup>th</sup> December, 2019.

He asserted that they have been pro-active in prosecuting the instant suit and the plaintiff is ready, vigilant and willing to have the matter heard to its logical conclusion.

He urged the court to grant the orders sought in the interest of justice and averred that no prejudice whatsoever will be caused to the respondent should the orders be granted.

The defendant/respondent has opposed the application by way of a replying affidavit sworn by Victoria Wambua, an Advocate, on the 6<sup>th</sup> day of February, 2020.

In the said affidavit, she depones that the application is frivolous, vexatious, lacking in merits in that, in the ruling of 18th July, 2019, the court while granting the plaintiff a 6 months opportunity to prosecute the instant suit used the mandatory term “**SHALL STAND DISMISSED**” which meant that there was no further opportunity to prosecute the suit to be granted.

In paragraph 6 of the affidavit, she highlighted the events before the ruling of 18<sup>th</sup> July, 2019 and deponed that despite the ruling of 18<sup>th</sup> July, 2019, it still took the plaintiff a further several months to fix a hearing date. She further deponed that whereas the plaintiff has shown letters for fixing of dates dated 6<sup>th</sup> August, 2019, 29<sup>th</sup> August, 2019 and 10<sup>th</sup> September, 2019, the plaintiff ought to have been more zealous and aggressive in seeking a hearing date and that no evidence was adduced to show that the plaintiff sought the assistance of the Deputy Registrars with regard to any challenges that they were facing.

She contended that the plaintiff has explicitly depicted a vey lax and casual character in prosecuting the suit despite being fully aware of the time frame in place which laxity was further exhibited when the matter came up in court on 5<sup>th</sup> November, 2019, when she casually did not object to the defendant’s application for adjournment.

She averred that, during the hearing of the matter on 9<sup>th</sup> December, 2019, it was indeed a surprise that seven (7) years after the filing of the suit, in the year 2013, the plaintiff realized that she had not filed some of the documents she intends to rely on yet, the matter went through a vigorous pre-trial and was mentioned severally to enable the parties to comply which goes a long way to prove that the plaintiff has lost interest in the matter. She asked the court to dismiss the application.

The court has considered the application, the affidavits and the oral submissions that were made by counsel when the application came up for hearing.

Indeed, the court on 18<sup>th</sup> July, 2019 made orders for prosecution of the suit within a period of six(6) months which orders were not complied with and hence the application herein. The court notes that the ruling dated 18<sup>th</sup> July, 2019 was given following a notice to show cause which was issued by the court on its motion under order 17 Rule 2 of the Civil Procedure Act. As the court observed in that ruling, the matter had been fairly active until 4<sup>th</sup> day of December, 2017, when it was certified ready for hearing but thereafter no action was taken by the plaintiff causing the matter to be listed for notice to show cause.

The explanation given by the applicant is that the court file was not available for some time until 10<sup>th</sup> September, 2019 when a hearing date was fixed for 5<sup>th</sup> November, 2019. Though counsel for the plaintiff has annexed the letters dated 29<sup>th</sup> July, 2019, and 19<sup>th</sup> August, 2019 inviting the other counsel to fix hearing dates, there is no evidence availed to the court to prove that the court file was missing.

This court concurs with the defendant’s submission that the plaintiff has not been eager to prosecute the matter but I also note that when the matter came up in court on the 5<sup>th</sup> November, 2019, counsel for defendant sought for an adjournment to enable her file a supplementary list of documents thus delaying the matter further.

The court has noted the defendant’s sentiment on the prejudice that the delay has caused him and the fact that it is in the interest of justice and fairness that litigation must come to an end. However, the court also appreciates that the orders sought herein are discretionary in nature and the discretion of the court is wide and it’s entrenched in Sections 1A, 1B and 3A of the Civil Procedure Act. At the same time, the court is also alive to the fact that such discretion should be exercised judicially and not capriciously. In the case of **Alimohammed Haji Suleiman Body Builders Limited vs. Jivraj & Another (1990) KLR 224** the court held;

*“The exercise of judicial discretion to set aside is unlimited provided it is exercised judicially..... The court is vested with the discretion so that in the exercise of its injustice or hardship resulting from..... in advertence or excusable mistake or error may be avoided.”*

Similarly, as the court held in the case of **Philip Chemomolo & Another vs. Augustine Kubede (1982 – 88) KAR TO3 at 1040**

*“The administration of justice should normally require that the substance of all the disputes should be investigated and decided on merit, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights..... It would seem that the main purpose of litigation namely the hearing and determination of disputes, should be fostered rather than hindered. See the case of **Branco Arabe (espano vs. Bank of Uganda (1999) 2 EA 22 (SCU).***

The same sentiments were echoed in the case of **Bamanya Vs. Zaver (2002) 2E.A 329 (CAV)** where the judge observed;

*“The other principle governing the application..... is that administration of justice requires that all substances of disputes should be heard and decided on merits and for the aforesaid reasons, errors or faults of the counsel should not necessarily debar a litigant from enforcing his/her rights.”*

The court finds that though there was some laxity on the part of the plaintiff, she took some steps towards prosecution of the suit within the time given by the court. In the interest of justice and fairness, I will allow the application in terms of the following orders;

- a) Time within which to prosecute the suit be and is hereby enlarged by a further period of three (3) months from the date the normal business of the court shall resume.
- b) Leave is granted to the plaintiff to file a supplementary list of documents. The said documents to be filed and served within 14 days from the date as shown in (a) above.

c) The defendant is awarded the costs of the application assessed at kshs. 15,000/= to be paid within 7 days from the date as shown in (a) above.

It is so ordered.

Dated, signed and delivered at **NAIROBI** this **7<sup>TH</sup>** day of **MAY, 2020**.

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant