



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 19 OF 2009**

**MARY JOHN KIGETO .....PLAINTIFF/APPLICANT**

**VERSUS**

**NEW KENYA CO-OPERATIVE**

**CREAMERIES LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE HONOURABLE**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Notice of Motion before me is dated 4<sup>th</sup> September, 2018 and stands supported by the grounds set out on the face thereof and the affidavit of *Julius Nyakiangana*. The plaintiff/applicant is seeking orders for reinstatement of the suit and costs thereof.
2. Julius Nyakiangana deponed that parties had made several attempts to comply with pre-trial directions and when this was done, the matter was certified ready for hearing and the parties were directed to obtain hearing dates from the registry. He further stated that the matter proceeded for hearing and upon close of the parties' respective cases, the court gave directions for written submissions to be filed; that prior to the filing of submissions, the office file belonging to the plaintiff/applicant went missing and in the process, the notice to show cause was issued. That the deponent was unable to attend court on the date scheduled for the notice to show cause due to the wrong diarizing of the dates by his secretary. That further to this, the deponent was unable to fully attend to the matter due to the illness of his child.
3. It was the deponent's assertion that while attempting to file his submissions, he discovered that the court file had gone missing and only later on came to learn that the suit had been dismissed for want of prosecution.
4. The Motion stands opposed. *Nyathira Muthuma* swore a replying affidavit on behalf of the 1<sup>st</sup> defendant/respondent, averring that the Motion is made in bad faith; that the suit was fixed for hearing one (1) year after the current firm of advocates came on record; that while it is true that the parties were directed to file written submissions following the hearing of the matter, the plaintiff/applicant had not filed submissions and as a result, the suit was stood over generally. The deponent stated that the plaintiff/applicant has not tendered any evidence in support of the claim that the submissions were given to the court clerk for the purposes of filing.
5. There was no response from the 2<sup>nd</sup> defendant/respondent. Parties filed written submissions on the Motion. The plaintiff/applicant by and large reiterated the averments made in her application backed by judicial authorities, though I am doubtful the Court of Appeal case of **Kasturi Limited v Nyeri Wholesalers Limited [2014] eKLR** cited by the plaintiff/applicant is applicable in this instance since the same relates to dismissal for non-attendance whereas the matter before me is premised on a dismissal for want of prosecution.
6. The 1<sup>st</sup> defendant/respondent on its part was adamant in its submissions that the suit was rightly dismissed since the plaintiff/applicant had not taken any reasonable steps to prosecute the same for over four (4) years and without valid excuse.
7. I have taken to mind the averments raised in the Motion, the reply thereto, the rival submissions and authorities referenced therein. In the premises, mine is to decide on whether or not the plaintiff/applicant is deserving of the reinstatement of her suit.
8. It is correct that a notice to show cause was issued on 24<sup>th</sup> April, 2018 requiring the parties to show cause why the suit should not be dismissed for want of prosecution. The relevant parties were expected to attend court on 4<sup>th</sup> May, 2018 but the record shows that neither appeared in court on the said date; consequently, the suit was dismissed under Order 17, Rule 2 of the Civil Procedure Rules.
9. It is likewise correct that when the suit was last in court on 2<sup>nd</sup> October, 2015, the parties were directed to file written submissions and

obtain a mention date at the registry. I have perused the record and it is noted that while the plaintiff/applicant has annexed a copy of her submissions to the Motion, the same is merely a draft copy. Similarly, I have not come across the submissions of either of the defendants/respondents. It is therefore evident that there has been non-compliance with the court order of 2<sup>nd</sup> October, 2015 by all the parties.

10. The plaintiff's/applicant's advocate also explained that his office was served with a copy of the notice to show cause but that there was a confusion in diarizing the same and this led to the non-attendance on the scheduled date. The advocate further deponed that he had been attending to the needs of his ailing child during the pendency of the suit, which I have taken into account in view of the medical records annexed and find this to be a reasonable explanation given the circumstances. However, there is nothing to indicate that the court file went missing at any one point or that the issue was raised by the plaintiff's/applicant's advocate; as such, I am not convinced by this argument.

11. The application was brought exactly four (4) months after the suit was dismissed. The supporting affidavit alluded to the fact that the plaintiff's/applicant's advocate came to learn of the dismissal on 11<sup>th</sup> May, 2018 while attending to another matter in court. That said, while I appreciate that there has been a delay in bringing the application, I do not find the same to be inordinate. However, I must state that the plaintiff/applicant made no effort to explain the lateness in filing the application from the moment it was discovered that the suit had been dismissed.

12. In regards to the prejudice that will befall the defendants, it was the 1<sup>st</sup> defendant's/respondent's simple submission on this ground that it will be prejudiced if the suit is reinstated since it will be held captive by a suit that has been pending in court since 2009. The plaintiff/applicant on her part did not specifically address this subject in her submissions but instead drew reference from Article 159 of the Constitution and the case of *Mwangi S. Kimenyi v Attorney General & another [2014] eKLR* in advancing the argument that courts of law are obligated to do justice. I will draw from the reasoning in this particular case in this way:

***“I admit that a party should always take steps to progress his case to logical conclusion...So where the plaintiff commits acts of inordinate delay in prosecuting his case, he occasions injustice on the Defendants. But courts of law are courts of justice to all the parties. And as I stated earlier, dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. Any explanation for the delay which is given should be properly evaluated by the court to see whether it is reasonable. That notwithstanding, a court of law should not hesitate to dismiss a suit for want of prosecution where it strongly feels the sustenance of the suit will only breed extreme prejudice to the Defendant. But in ascertaining prejudice to the Defendant it must also weigh the prejudice the dismissal will cause to the Plaintiff...”***

13. With that in mind, I am alive to the fact that this is an old matter that ought to have been long determined. Both the plaintiff/applicant and defendants/respondents contributed to the delay by failing to file their submissions. Needless to say, the hearing has since taken place and the matter is near conclusion. In view of this, I am doubtful the defendants/respondents would be prejudiced at this stage. On the flip side, the plaintiff/applicant stands to suffer a greater deal of prejudice, seeing as this is a claim for malicious prosecution and some effort has been made towards prosecuting the suit at least until the close of the parties' cases; it would contravene the interest of justice to keep her locked out. The circumstances lead me to believe that it would be practical to have the suit reinstated for purposes of its conclusion, hopefully with expediency this time.

14. In view of the foregoing, I will allow prayer 1) of the Motion and order that the parties do file and serve their respective submissions within 7 days from the date hereof, and thereafter take a mention date on priority basis to confirm the same. Costs shall abide the outcome of the suit.

Dated, signed and delivered at **NAIROBI** this **1<sup>st</sup>** day of **March, 2019**.

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiff/Applicant

..... for the 1<sup>st</sup> Defendant/Respondent

..... for the 2<sup>nd</sup> Defendant/Respondent