

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 4 OF 2015

NANCY WANJIKU GATUNA.....APPELLANT/APPLICANT

VERSES

EQUITY BANK LIMITED.....RESPONDENT

RULING

1. On the 20th September, 2018 this court dismissed this suit for want of prosecution. The Applicant has filed her notice of motion dated 17th January, 2019 praying that the said orders be set aside. The supporting affidavit of ELIJAH MOMANYI advocate for the Applicant states inter alia that the Applicant was not notified of the notice of dismissal despite her preparedness to prosecute the appeal.

2. The said counsel has argued that all along they have corresponded with the courts registry to inquire whether the lower courts file had been taken to the high court's registry. He thus prays that the dismissal has caused the Applicant great injustice as it was not her making.

3. The Respondent on its part has filed grounds of opposition in which it has supported the dismissal of the suit and contents that the reasons given by the Applicant are not plausible at all. It accused the Applicant of inordinate delay in prosecuting this appeal.

4. The court ordered that the matter be disposed by way of written submissions but the Applicant alone did file the same and the Respondent stated that they would rely on the grounds as they are.

5. This court having perused the record shall allow the application on one ground namely that there was no evidence of the service of notice to dismiss the suit. I have checked the notice issued on 28th August 2018 and I do not find an affidavit of service upon the Applicant.

6. Save for the above reason, I agree with the Respondent that the appeal has been delayed almost deliberately by the Appellant. The notice by the registry of this court dated 28th September, 2016 was issued almost two years before this court decided to dismissed the suit. This delay in my view was inordinate. Neither can the respondent cry out loud for it was equally permitted in law to apply for the dismissal of the suit or to take any pragmatic step to ensure that the suit is prosecuted,

7. In the premises, the application dated 17th January, 2019 is allowed on condition that the Applicant shall fixed this appeal for hearing within 60 days from the date herein.

8. The costs shall abide the outcome of the appeal.

Dated, signed and delivered in open court at Kitale this 18th day of November 2019.

H. K. CHEMITEI

JUDGE

18/11/19