

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 348 OF 2010

EUNICE SOKO MLAGUI.....PLAINTIFF

VERSUS

SURESH PARMAR.....1ST DEFENDANT

P.C. PATEL & PRAMOD PATEL (as Administrators of RAVINDER

K. PALL).....2ND DEFENDANT

ASHWIN PATEL.....3RD DEFENDANT

ASHWIN BROTHERS (Certified Public Accountants)....4TH DEFENDANT

RULING

[1] The Notice of Motion dated **30 November 2016** was filed by the firm of **Michuki & Michuki Advocates** on behalf of the 3rd and 4th Defendants for orders that the Plaintiff's suit herein be dismissed for want of prosecution; and that the costs of the application and the entire suit be awarded to the 3rd and 4th Defendants. The application was filed pursuant to **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 17 Rule 2(3)**, and **Order 51 Rules 1** of the **Civil Procedure Rules, 2010**, on the grounds that, it is now three years since this matter was last in court; and therefore that the Plaintiff has lost interest in this suit, having not taken any steps to prosecute her case.

[2] The application was supported by the affidavit of **David Muthee Michuki**, Advocate, sworn on **30 November 2016**, in which it was averred that, whereas this matter was filed by the Plaintiff way back in **2010**, no steps had been taken by the Plaintiff to set the suit down for hearing since **20 September 2013** when the Trial Judge, **Kamau, J.**, dismissed the Plaintiff's application for stay of proceedings. It was thus surmised by the Applicants that there is apparent lack of interest in the matter; and therefore that it would only be fair and just for the suit to be dismissed for want of prosecution.

[3] The Plaintiff/Respondent opposed the application and relied on the Replying Affidavit of **Claire N. Dawai**, Advocate, sworn on **7 February 2017**. The contention of the Respondent was that, upon the dismissal of her application on **20 September 2013**, she preferred an appeal from the Ruling vide **Civil Appeal No. 276 of 2014** between **Eunice Soko Mlagui and Suresh Parmar and 3 Others**; and therefore that the intervening time was well-spent pursuing the said appeal. Documentation evidencing the existence of the appeal were annexed to the Replying Affidavit and marked **Annexure CD-1**, on the basis of which the Court was thus urged to find that there has been no prejudice visited on the Applicants by reason of the apparent delay.

[4] The application was canvassed by way of written submissions, which were highlighted on **3 October 2017**. However, upon a careful perusal of the record, it emerges that the suit was dismissed on **18 June 2015** for want of prosecution Under **Order 17 Rule 2** of the **Civil Procedure Rules**. That Order has not been set aside, and was therefore subsisting as of **30 November 2016** when the instant application was filed. In the premises, the application dated **30 November 2016** is incompetent and is hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2018

OLGA SEWE

JUDGE