



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 208 OF 2013

BETH WANJIKU MWANGI.....APPELLANT

VERSUS

MOSES MANYARA.....1ST DEFENDANT

CHARLES NJIRU t/a

HOMEREACH CONTRACTORS.....2ND DEFENDANT

HOUSING FINANCE COMPANY OF

KENYA LIMITED.....3RD DEFENDANT

RULING

1. Before the court for consideration is the application dated the 27th day of July 2016 seeking to dismiss the suit herein for want of prosecution. It has also sought the costs of the application and that of the suit. It is based on the grounds that the Plaintiff has not taken steps in the matter since 18th June 2015 which delay has occasioned undue prejudice to the 3rd Defendant in terms of loss of finances, evidence and fading memory.

2. It is supported by the affidavit of **Martin MaCHIRA** sworn on the 27th day of July 2016 wherein it is deponed that, the suit herein was filed on 20th day of June 2013 after which parties filed their respective pleadings. That the pleadings closed or about 2nd day of April 2014 when the court directed parties to list the matter down for hearing. That since then, the only time the plaintiff's advocate set down the matter for hearing was on 23rd April 2015 when the same did not proceed and thereafter the matter was listed for mention on 18th June 2015 when the court directed that a hearing date be taken at the registry. This is the last time action was taken in the matter.

3. The Applicant avers that the Plaintiff is not keen in prosecuting the matter and this has caused undue prejudice on the 3rd Defendant. It has urged the court to dismiss the matter.

4. The Plaintiff/Respondent filed a replying affidavit on 27th September 2016 sworn by **Susan Kibungi** who is the Advocate having the conduct of the matter on behalf of the Plaintiff. He deponed that their file had been misplaced in their registry and efforts to locate it had proved futile until 26th September 2016 when it was located. They were not able to fix a date for the matter. The plaintiff has urged the court not to dismiss the suit in the interest of justice as they are still keen and desirous of prosecuting the matter. She has regretted the delay and has urged the court to exercise its discretion and save the suit from dismissal.

5. In its further affidavit the 3rd Defendant/Applicant avers that the Plaintiff/Respondent has failed to disclose the exact date the file was misplaced and that, it is not clear the efforts that she undertook to retrieve the file and despite the allegations that the file got misplaced, the Plaintiff continued to transact and correspond with the 3rd Defendant and its advocate on record vide letters dated 20th April 2016, 4th March 2016 and 7th March 2016, which, according to them, clearly shows that they had access to materials that would enable them to set down the matter for hearing.

6. The Respondent avers that the reasons advanced by the Plaintiff's advocate are not genuine to justify the delay in that he could have obtained copies of the pleadings from the court file and from the other parties to the suit. That the 3rd Defendant will be prejudiced if the orders sought herein are not granted.

7. The application proceeded by way of written submissions. The first and 3rd Defendants filed their submissions but the Plaintiff and the 2nd Defendant did not. The court has considered the material before it including the list of authorities filed by the 3rd Defendant. In an application seeking to dismiss the suit for want of prosecution, the test to be applied by the courts are:-

(a) Whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay, see the case of **Ivita Vs Kyumbu, Civil Suit No. 340/1971.**

8. On the issue of the delay, the Applicant has relied on the case of **Kabansora Flour Millers Vs Jambo Biscuits Ltd Civil Case No. 5418/1992** wherein the court dismissed the suit for want of prosecution on the grounds that the Civil Procedure Rules are clear on the timelines within which an action ought to have been taken in the suit. The Applicant has argued that the delay from 18th June 2015 is prolonged. The Plaintiff has not denied that there is a delay in prosecuting the matter. Indeed, I find that there is a prolonged delay as submitted by the Applicant.

9. On whether the delay is excusable, it is the Applicant's contention that the same is not and has argued that counsel for the Plaintiff could have made copies of the pleadings from the court file and proceed to fix the matter for hearing as he continued tracing his office file. It is also averred that he continued to correspond with the Applicant's advocates over the subject matter of the transaction which gave the impression that the Plaintiff's advocates' office file was not missing as alleged. It is noted that the Plaintiff did not deny these allegations and in fact he did not file any submissions even after he was served with a mention notice informing the Advocate to file the submissions. Am persuaded by the 3rd Defendant/Applicant's submissions that it could not have been possible for the Plaintiff's Advocate to correspond with the 3rd Defendant's advocate without their physical file. In view of the foregoing there is a high possibility that the Plaintiff's advocates office file was not misplaced as alleged and therefore I find that the delay is not excusable.

10. On whether, justice can still be served despite the delay, the Applicant submitted that it will be prejudiced if the orders are not given and has relied on the provisions of Article 50 (1) of the constitution and has contended that it will be denied its constitutional right to a fair trial. It has been submitted that none of the 3rd Defendant's witnesses can be availed in short notice as they are no longer employed by the Applicant.

11. The court has also considered the submissions filed by the 1st Defendant and they support the dismissal of the suit on the same grounds as the Applicant.

12. Whereas there is a delay in prosecuting the matter and the same may not have been sufficiently explained, my considered view is that justice can still be done despite the delay. The Applicant has not demonstrated any prejudice that cannot be compensated by way of damages. While he submitted that he might not be able to trace his witnesses at a short notice, it was not deponed that they cannot be traced at all.

13. In exercising the court's discretion I take cognizance of the fact that dismissing a suit summarily is a draconian step. In the upshot, I do make the following orders;

- (a) The application dated the 27th July 2016 is hereby dismissed.
- (b) The Plaintiff/Respondent to pay costs of Ksh.5,000 to the 1st and 3rd Defendants. i.e. each Defendant to be paid Ksh.5,000/- within 14 days from the date of this ruling.
- (c) The matter to be prosecuted within 6 months from the date of this ruling failing which it shall stand dismissed.

Dated, Signed and Delivered at Nairobi this **7th Day of June 2018.**

.....

L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*