



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 89 OF 2013**

**JANE NYAMBURA.....PLAINTIFF/RESPONDENT**

**- VERSUS -**

**EQUITY BANK LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. The notice of motion dated **22nd June 2018**, filed by the defendant is for the order for the dismissal of this suit for want of prosecution.
2. This suit was filed on **14th January 2013**. By interlocutory notice of motion dated **26th February 2013**, the plaintiff sought an injunction to restrain the defendant from selling property **LR No. Ruiru township/ 149**, in exercise of its statutory power of sale. That application was subsequently withdrawn when the defendant exercised its power of sale and sold the property by public auction.
3. By notice of motion dated **29th January 2015**, the plaintiff sought to have the auction sale set aside. That application was dismissed through the ruling of this court of **7th May 2015**.
4. From the date of that dismissal, the plaintiff has not taken any action in this matter, other than asking for progress in the typing of the proceedings. It therefore follows that there has been no prosecution of this matter since the **7th May 2015**. It is on that basis the defendant seeks the dismissal of this suit for want to prosecution.
5. The plaintiff was served with the application for the dismissal for want of prosecution, through her advocate **Musalia Mwenesi & Company**, but there was no appearance and no documents were filed in opposition on behalf of the plaintiff.
6. This is a case that was filed in January 2013, and to date, the plaintiff has not proceeded with the hearing of the suit. Order 17 Rule 2 (1) of the Civil Procedure Rules the court is afforded a discretion to dismiss a suit where a party fails to show satisfactory cause why the suit should not be dismissed for want of prosecution. That discretion was discussed in the case of **"ET MONKS & CO. LIMITED VS EVANS [1985]KLR 584**. In that case Kneller; J, as he then was held, inter alia:

“whether an application for dismissal of suit for want of prosecution should be allowed or not is a matter for the discretion of the Judge who must exercise it judicially. The court shall among other things, consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was inexcusable. However, each case will turn on its own facts and circumstances.”

In the case of **MOSES MURIIRA MAINGI & 2 OTHERS – VS- MAINGI KAMURU & ANOTHER –NYERI CIVIL APPEAL NO. 151 OF 2010**. The Court of Appeal said-

“The power of the Court to dismiss a suit for want of prosecution is discretionary power, but which should be exercised judicially.”

7. The plaintiff in this case failed to show cause why this suit should not be dismissed for want of prosecution even though she was served with the application. This court therefore will exercise its discretion to dismiss this suit.
8. Accordingly, the orders of the court are:
  - a. This suit is hereby dismissed for want of prosecution.
  - b. The cost of the notice of motion dated **22nd June 2018**, are awarded to the defendant.

c. This file shall hence forth be closed.

**DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.**

**MARY KASANGO**

**JUDGE**

**Ruling read and delivered in open court in the presence of**

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

**MARY KASANGO**

**JUDGE**