



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 832 OF 2003**

**LILIAN NAISENYA NDATHA.....PLAINTIFF**

**VERSUS**

**UNILEVER KENYA LIMITED.....DEFENDANT**

**RULING**

1. The Notice of Motion that is the subject of this Ruling is the one dated **12 May 2015**, filed by the Defendant/Applicant, **Unilever Kenya Limited**, for orders that the suit herein be dismissed for want of prosecution and that the costs of the application and the suit be borne by the Plaintiff/Respondent. The application is expressed to have been brought pursuant to Sections **1A, 1B and 3A of the Civil Procedure, Chapter 21 of the Laws of Kenya, Order 17 Rule 2(1) and (3)** as well as **Order 51 Rule 1 of the Civil Procedure Rules, 2010**. The grounds relied on in support of the application are as set out in the Notice of Motion thus:

- a) That the Plaintiff filed her **Plaint** on **3 December 2003** and the Defendant filed its **Defence** on **25 February 2004**.
- b) That the suit came up for mention before the Court on **2 May 2012** whereupon the Court confirmed that the parties had filed their witness statements.
- c) That the Plaintiff has subsequently not taken any steps to fix the matter for hearing and/or to prosecute this suit for a period of over 4 years now, an indication that the Plaintiff has lost interest in the matter.
- d) That the Defendant/Applicant continues to suffer immense prejudice due the Plaintiff's indolence; and
- e) That it is in the interest of justice that this suit be dismissed for want of prosecution.

2. In support of the application and the grounds aforesaid, the Defendant relied on the affidavit of **Arlentrice Shirley Gulenywa** annexed thereto, in which it was deponed that when this case came up for mention on **8 March 2012**, the parties were required to file a harmonized copy of the typed proceedings. In addition Defendant was directed to file and serve its witness statements, which was done on **22 March**

**2012.** She deponed further that the parties were yet to file the harmonized version of the proceedings by the time the matter last came up for mention on **2 May 2012**, and that since then, the Plaintiff has not taken any further steps to prosecute this matter. It is thus the Plaintiff's case that **4 years** having elapsed since the last step was taken in this matter, it would only be fair and just that the suit be dismissed for want of prosecution, as the Plaintiff has shown that he is no longer interested in its prosecution. Additionally, the Defendant averred that it will be greatly prejudiced as it will not be able to trace all its documents and call all its witnesses, some of whom have left its employment with the passage of time.

3. The application together with a Hearing Notice for **26 July 2016** were duly served on Counsel for the Plaintiff who thereafter wrote a letter dated **9 June 2016** to the effect that they no longer had instructions to act for the Plaintiff or take further steps in the matter, notwithstanding that they had not been served with any Notice of Change of Advocates. Accordingly, the court being of the view that service was properly effected and that Counsel was still validly on record, proceeded with the hearing of the application *ex parte*, there being no application by Counsel for an order to cease acting as required by **Order 9 of the Civil Procedure Rules**, nor any notice by or on behalf of the Plaintiff evincing his intention to act in person or employ another advocate herein. Indeed **Order 9 Rule 13(1)** provides that:

**"Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last-known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:**

**Provided that, unless and until the advocate has--**

**(a) served on every party to the cause or matter...or served on such parties as the court may direct a copy of the said order; and**

**(b) procured the order to be entered in the appropriate court; and**

**(c) left at the said court a certificate signed by him that the order has been duly served as aforesaid,**

**he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal."**

4. I have carefully considered the application, which is entirely uncontroverted, in the light of the proceedings to date, and note that the last order appears to be that of **8 March 2012**, when the matter was stood over to **2 May 2012** for further orders. The proceedings of **2 May 2012** do not appear to be on the record. Be that as it may, there is no denying that it has taken **over 4 years** since the last step was taken herein. By virtue of **Order 17 Rule 2(1)** as read with sub **Rule (3) of the Civil Procedure Rules**, any party to a suit the liberty to apply for its dismissal in instances where no application has been made or step taken by either party for one year. As **Lord Denning MR** stated in the case of **Allen vs. Sir Alfred McAlpine [1968] All E.R 543 at 546:**

**"The delay of justice is a denial of justice...all through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear...To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it."**

5. I have also given due attention to the approach adopted by **Chesoni J** (as he then was) in **Ivita vs Kyumbu [1975] eKLR** that each case must be considered and decided on its own facts, for the reason that such matters involve the exercise of discretion by the court, and to steer the court in the exercise of its discretion, the Judge proceeded to lay down the following guidelines:

**"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."**

6. A look at the court record herein shows that this suit was filed in **2003**. It has therefore been pending for **the last 13 years**. As has been pointed out hereinabove, the last step towards its prosecution was taken **over 4 years** ago. No attempt has been made herein to explain the delay. Accordingly, I find merit in the Defendant's application dated **12 May 2016** and would allow the same and grant orders as prayed therein for the dismissal of this suit with costs, including costs of the application.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF SEPTEMBER 2016**

**OLGA SEWE**

**JUDGE**