



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 31 OF 2012**

**DOREEN MBIRO WALLACE.....PLAINTIFF**

**VERSUS**

**JAMES KENNEDY MUTIA.....1<sup>ST</sup> DEFENDANT**

**POLARIZE ENTERPRISES LIMITED.....2<sup>ND</sup> DEFENDANT**

**NIC BANK LIMITED.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. The Notice of Motion before me is dated **21<sup>st</sup> February 2014** and filed in Court on **25<sup>th</sup> February 2014**. It is expressed to be brought under **Order 17 Rules 2(1) & 3** and **Order 51** of the **Civil Procedure Rules**. The Applicant, being the **3<sup>rd</sup>** Defendant seeks for the following orders:-

1. *That the Plaintiff's suit be dismissed with costs for want of prosecution.*
2. *That the costs of this application and of the entire suit be awarded to the 3<sup>rd</sup> Defendant.*

2. The application is based on the grounds stated on the face of the application and is supported by the affidavit of **Irene Wanjiru Mburu**, an Advocate, sworn on **21<sup>st</sup> February 2014**.

3. The Advocate depones that this matter was last in Court on **6<sup>th</sup> November 2012** when the Court delivered a ruling allowing the Plaintiff's injunction application dated **23<sup>rd</sup> January 2012**. Since the said date the Plaintiff has not taken any steps to fix the matter for hearing. She further depones that the Plaintiff has also failed to take out summons to enter appearance or serve the same on the **3<sup>rd</sup>** Defendant since the filing of the suit.

4. According to the Advocate, the delay by the Plaintiff to take necessary steps to set down the suit for hearing for a period of over one year now is inordinate, unreasonable and prejudicial to the **3<sup>rd</sup>** Defendant. The deponent avers that the delay is prejudicial to the **3<sup>rd</sup>** Defendant as they were restrained from disposing off the suit property pending the hearing and determination of the instant suit. She further avers that the **2<sup>nd</sup>** Defendant is now indebted to the **3<sup>rd</sup>** Defendant in excess of Kshs. 5,895,952.24/= and has not made any payments since the filing of the suit.

5. The application is opposed vide the Replying affidavits of the Plaintiff and **Emily Oyaro** both sworn

on **21<sup>st</sup> March 2014**.

6. The delay in this matter is explained in the Replying affidavits of the Plaintiff and Emily Oyaro, Advocate. It is explained that the previous Advocate on record, Ms. Sijeny, was nominated to the senate sometime in April 2013. It is then that the Plaintiff instructed the firm of E.A.O Oyaro to take over the conduct of the matter. Upon making inquiries at the current Advocates' offices on the progress of her matter, the Plaintiff was informed that Ms. Emily Omondi was sick and had travelled to India to seek specialized medical treatment.

7. The Plaintiff had hoped that her Advocate would recuperate in time and pursue the matter to its logical conclusion. However, the same did not happen and the Plaintiff confirms that the Advocate is still recuperating at her home in Nairobi.

8. It is the Plaintiff's case that she should not be held responsible for the inordinate delay in prosecuting the suit. The reason being that she issued peremptory instructions to her Advocate to act in her best interests and failure to do so has been explained.

9. On the other hand, Ms. Emily Oyaro reiterated the fact that she fell sick and had to seek specialised medical attention in India. This occurred sometime in July 2013 before she could file the requisite papers to come on record on behalf of the Plaintiff. She averred that the delay in prosecuting the matter was not in any way deliberate neither a mistake of the Plaintiff. She further averred that the delay was occasioned by her poor health at the time the Plaintiff's file was handed over to her.

10. The Application was canvassed before me on **4<sup>th</sup> April 2014**, where Mr. Oyambra appeared for the Plaintiff while Ms. Mburu appeared for the 3<sup>rd</sup> Defendant.

### **ANALYSIS**

11. I have considered the application herein as well as the affidavits on record. Having done so, I take the following view of the matter.

12. It is not in dispute that this matter was last in Court on **6<sup>th</sup> November 2012**. Therefore on the date the current application was filed, it had been over one year since the matter was prosecuted.

13. I have considered the account given by the Plaintiff and her Advocate for the failure to prosecute the matter for over a year. While the illness of the Advocate is a credible reason for the delay and would attract the sympathy of this Court, the circumstances therein leave much to be desired. On record is a document to show that the Advocate indeed went to India to seek medical attention. The dates indicated therein show that the Advocate was admitted on 16<sup>th</sup> January 2014 to 22<sup>nd</sup> January 2014. Strictly speaking there is no account for the period between July 2013 when the file was handed over to the Advocate and 16<sup>th</sup> January 2014 when she was admitted.

14. The Advocate has stated that she fell ill in July 2013. The 3<sup>rd</sup> Defendant has not disputed the same and reasonably so as they were not privy to the information of her illness. At this juncture, the best this Court can do is to give the Advocate the benefit of the doubt with regard to the Period in July 2013 and the date she was admitted that has not been accounted for.

15. However, it is good practice and courteous for an Advocate to inform the opponent and the client as well of any circumstances that may affect or stall the case. The Plaintiff's Advocate did not correspond with the Defendants, a step which could have prevented the current application.

16. Nevertheless, it has been stated over and again that the mistake of the Advocate should not be visited upon the Client. There is an abundance of cases to this effect. I take note of the observation of Apaloo J.A (as he then was) in **Philip Chemwolo & Another -Vs- Augustine Kubede [1982-88] KAR 103** where he posited:-

*“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”*

17. I also take note of the observation of the Court of Appeal in **Richard Ncharpi Leiyagu -Vs- Independent Electoral Boundaries Commission & 2 others (2013)eKLR** where it was observed:-

*“...The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”*

18. In view of the above observations, it is only fair and just to allow the Plaintiff to prosecute this matter to its logical conclusion. The Plaintiff has aptly explained the circumstances of the delay of the case. There is nothing to show that she contributed to the said delay and therefore she ought not to be punished for the conduct of Counsel.

19. There is no prejudice to be suffered by the 3<sup>rd</sup> Defendant that cannot be compensated by way of costs. On the issue of availability of witnesses, the 3<sup>rd</sup> Defendant has stated that the Company may have problems securing witnesses who may have left the Company. This has not been expounded. The 3<sup>rd</sup> Defendant is not particular as to whether the witnesses have already left its employment, or the weight of their testimony to the case. The 3<sup>rd</sup> Defendant’s witnesses, even if they have left the 3<sup>rd</sup> Defendant’s employment, will still be reachable, even by orders of this court.

20. In the upshot, the 3<sup>rd</sup> Defendant’s Notice of Motion dated **21<sup>st</sup> February 2014** and filed in Court on **25<sup>th</sup> February 2014** is hereby dismissed. However, the Plaintiff shall bear the 3<sup>rd</sup> Defendant’s costs for this application. I further order that the Plaintiff do take out summons and serve them upon the Defendants within 30 days from the date of this Ruling.

**DATED, READ AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Mburu for Plaintiff

No appearance for Defendants

Teresia – Court Clerk