IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G.B.M. KARIUKI & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 4 OF 2010

BETWEEN

JOYCE MUKUHI NJENGA.....APPELLANT

AND

EQUITY BANK LIMITED.....1ST RESPONDENT

PATRICK KUNGU KIMATA t/a

MARCHET AUCTIONEERS.....2ND RESPONDENT

AGNES WANJIRU MUCHAI.....3RD RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya,

Nairobi (Khaminwa, J) delivered on 7th day of May 2009

in

H.C.C.C. NO.359 OF 2004)

****

JUDGMENT OF THE COURT

1. Joyce Mukuhi Njenga, **the appellant** in this appeal, filed in the year 2004 in the High Court at Milimani Commercial Courts in Nairobi a Civil Suit No.359 of 2004 against Equity Building Society Ltd and Patrick Kungu Kimata t/a Merchant Auctioneers and Agnes Wanjiru Muchai, **the 1st, 2nd and 3rd respondents**, respectively, seeking against them, inter alia, an order to stop the transfer of her 4 bedroomed property No.LR 209/10675/9 situate at Nairobi South C Estate, (**the said property**) which the 1st respondent sold through the 2nd respondent to the 3rd respondent allegedly pursuant to the 1st respondent's power of sale as chargee.

2. The appellant alleged that he had obtained a loan of shillings one million from the 1st respondent which was secured on the said property. She further alleged that although the agreed interest on the loan was 28% p.a., the 1st respondent charged interest that was far higher and raised other charges thus inflating the

debt.

3. The appellant also prayed in the suit for a declaration that the purported sale by auction and the transfer of the said property on 30th March 2004 to the 3rd respondent was null and void. She also prayed for an order for cancellation of the transfer of the said property to the 3rd respondent.

4. In their defence, the 1st and 2nd respondents contended that the interest charged on the loan was justified and that the suit property was sold pursuant to the charge.

5. After various applications to court by the parties to the suit which were determined one way or the other, the 3rd respondent finally filed a notice of motion seeking dismissal of the appellant's suit for want of prosecution. The application was supported by an affidavit sworn by the advocate for the 3rd respondent, Joseph Gathoga Wairegi. The appellant responded to it through her advocate, Simon Theuri Wanjohi.

6. On 7th May 2009, the learned Judge, J. N. Khaminwa, delivered a ruling in the application in which she made a finding that there were no satisfactory reasons for the delay in prosecution of the suit and accordingly allowed the 3rd respondent's application and dismissed the suit with costs for want of prosecution. The learned Judge delivered herself in the impugned ruling as follows –

> ***"Notice of motion dated 2nd March 2009 seeking orders to dismiss this suit for want of prosecution under the provisions of Order XVI Rule 5(d).***
>
> ***The grounds are that the last time this matter was in court was on 26th August 2008. It is over six months since and the plaintiff has not taken any steps to proceed to set down suit for hearing despite that the court diary for the year 2009 has been open since August 2008.***
>
> ***The application is supported by affidavit of Joseph Gathoga Wairegi which I have read. The replying affidavit of Simon Theuri Wanjohi which I have also read, it is admitted that on 26th August 2008 the ruling was delivered by court. It is also admitted that the court diary was opened in November 2008. It is also stated that the court diary was closed on 4th February 2009. It is also stated that the discovery is not completed. It is clear as admitted the plaintiff has had more than 6 months with which to ensure discovery is completed and also to ensure that the court registry did allocate a hearing date of this suit within that time in the circumstances.***
>
> ***I do not find the reasons for delay satisfactory. I allow the application and grant orders sought with costs.***
>
> ***It is ordered.***
>
> ***DATED and DELIVERED at Nairobi this 7th day of May 2009."***

7. It is against that ruling that the appellant appealed to this court. In the eight grounds of appeal in the memorandum of appeal filed on 18th January 2010, the appellant faults the decision of the learned Judge on the grounds, inter alia, that the material before the learned Judge did not justify the dismissal of the suit and that in any event, the court penalized the appellant for the judiciary's administrative weakness in not being able to give hearing dates.

8. Both counsel on record for the parties agreed to have this appeal determined on the basis of written submissions and the authorities filed. An order to this effect was recorded and this judgment is pursuant to that order.

9. In her memorandum of appeal, the appellant contended in the ten grounds proffered that the learned Judge in considering the application that gave rise to the ruling which is the subject of this appeal

failed to appreciate that Order XVI rule 5(d) of the Civil Procedure Rules did not apply; that she failed to consider and apply the relevant principles applicable to the matter before her; that she failed to consider the relevant circumstances of the case and the material before her; that the circumstances of the case did not justify the dismissal of the suit which should have been determined on merit.

10. In her written submissions, the appellant contended that Order XVI rule 5(d) on which the 3rd respondent's application dated 2nd March 2009 was predicated (which the learned Judge allowed and struck out the suit) was not applicable; that more than six months had not elapsed since the last court appearance; that the suit had not come for hearing at any time due to applications filed by the parties; that the trial Judge did not apply the correct principles; that the court diary for hearing dates for 2009 cases was opened for only a short window of three months between November 2008 and 4th February 2009 and that the hearing dates were given for cases filed prior to 2003; that the circumstances obtaining in the suit did not justify its dismissal; that there was no inordinate delay to justify dismissal of the suit for want of prosecution; that the learned Judge misdirected herself on factual matters and failed to apply the law correctly.

11. In its written submissions, the 1st respondent focused on the merits of the suit and contended that it was in any case bound to fail, if it had gone to trial and further that the appellant delayed the setting down of the suit for hearing.

12. The 3rd respondent made submissions on a ruling (by Kasango J) which is not the subject of the appeal. However, she contended in her written submissions in relation to impugned ruling (by Khaminwa J) that the appellant failed within 3 months from the last time the matter was in court to set down the suit for hearing and that the Judge was justified in dismissing it for want of prosecution; that 6 months had elapsed without the suit being fixed for hearing from the date the suit was last in court; that the appellant's suit was doomed to fail; that the learned Judge exercised her discretion properly in dismissing it.

13. The appellant and the 1st respondent each filed a list of authorities.

14. We have perused the record of appeal, and the written submissions filed by the appellant and the 1st respondent's authorities.

15. The issue for our determination is whether the decision by the trial Judge in dismissing the suit for want of prosecution was correct. The application before the learned Judge from which the impugned ruling ensued was predicated on Order XVI rule 5(d). The rule stipulates:

> ***"5. If, within three months after-***
>
> *(a)* ***the close of pleadings; or***
>
> *(b)* ***In the High Court, an order for the hearing on a summons for directions; or***
>
> *(c)* ***The removal of the suit from the hearing list; or***
>
> *(d)* ***The adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.***

16. The above rule applies where a plaintiff fails to set the suit down for hearing within three months after the events referred to in (a), (b) (c) and (d). The application was predicated on rule 5 (d). The nomencture *"adjournment of the suit generally"* in rule 5(d) (supra) refers to postponement or adjournment of a hearing of a suit and presupposes (that all the preliminary steps in the suit have been taken to pave way for hearing and that the suit has come up for hearing and has been adjourned. If after 3 months after such adjournment it is not set down for hearing again, rule 5 (d) comes into play.

17. As rightly pointed out in **Victory Construction Co. v. A. N. Duggal** [1962] EA 697 this rule was intended to provide the court with administrative machinery to disencumber itself of case records in which the parties appear to have lost interest. The power conferred on the court to dismiss the suit for want of prosecution under the rule is discretionary. Such power should be exercised only where it is clear that the plaintiff has lost interest in the suit and the delay in setting it down for hearing is inordinate. The Court should be slow to dismiss a suit under the rule unless the delay is inordinate. Where it can be heard on merit without further delay, and there is no irreparable hardship or prejudice shown on the part of the defendant, the court should eschew dismissing a suit.

18. The record shows that the 3rd respondent applied by an application dated 26th March 2008 to have the suit struck out as an abuse of the process of the court. The court dismissed it on 29th August 2008. It also shows that the appellant made an averment that no hearing dates could be fixed between 28th August 2008 and November 2008 and that priority in hearing was being accorded to cases filed prior to the year 2003. This averment was not shown to be false nor was the averment that the opportunity to set the suit down for hearing came in January 2009.

19. In determining the application and dismissing the suit as she did, the learned Judge delivered herself as follows –

> ***"it is clear as admitted the plaintiff (appellant) has had more than 6 months with which to ensure discovery is completed and also to ensure that the court registry did allocate a hearing date of this suit within that time in the circumstances."***
>
> ***"I do not find the reasons for the delay satisfactory. I allow the application and grant orders sought with costs."***

20. It is implicit from the impugned ruling that discovery was yet to be made before a hearing date could be allocated. There is no sanction in Rule 5 (supra) for delay in discovery. Lack of or delay in discovery simply meant that the suit was not ripe for hearing. The rule did not permit dismissal of a suit on account of delay in discovery. If, therefore, there was delay in discovery as the learned Judge found, and if the rule did not provide for dismissal on account of delay in discovery, it seems to us the learned Judge went into error when she held as above not least because the suit was not ripe for hearing and the question of its dismissal for want of prosecution could not arise. In our view, the circumstances obtaining in this appeal show that this was not a case for dismissal of a suit for want of prosecution. We are satisfied that the learned Judge was in error and did not exercise her discretion properly because the suit was not ripe for hearing and the question of delay in setting it down for hearing did not arise. Moreover, there is no provision in rule 5 (supra) for dismissal of a suit where the reasons for delay in setting it down for hearing, however short, may not be satisfactory. Accordingly, we allow the appeal and set aside the order of the High Court contained in the ruling dated 7th May 2009. The suit is accordingly restored.

21. The costs of this suit shall be borne by the respondents.

Dated and delivered at Nairobi this *15th day of July, 2016*.

ALNASHIR VISRAM

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR