REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1032 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 31st July, 2017)

MARY WAMBUI NGAARI ……..…….....……..……...……CLAIMANT

VERSUS

CENTERS FOR INTERNATIONAL PROGRAMS KENYA ….. RESPONDENT

RULING

1. The Application before Court is dated 1st November, 2016, where the Applicant seeks for orders:

> ***1. That this Honourable Court be pleased to dismiss the Claimant's suit for want of prosecution.***
>
> ***2. That costs of the application and the main suit be borne by the Claimant***

2. The Application is supported by the grounds that:

> ***a. The Claim herein was filed on 20th June 2014, and the Respondent filed the Replying Memorandum on 31st July, 2014.***
>
> ***b. It is over (2) years and the Claimant has not taken steps in the case to set the matter down for hearing or in any way progress the matter.***
>
> ***c. The delay by the Claimant is inordinate, inexplicable, unreasonable and inexcusable.***
>
> ***d. It is apparent that the Claimant has lost interest and is no longer keen in pursuing this matter.***
>
> ***e. It is in the interest of justice that litigation comes to an end and the suit ought to be dismissed for want of prosecution.***

3. The Application is supported by an affidavit of one Martin Munyu the Advocate for the Respondent who reiterates the grounds on the face of the application and adds that continued delay in prosecuting the matter is prejudicial to the Respondent in regard to availability of witnesses and incurring of legal fees.

4. He further avers that as a result of the Claimant's inaction, the Respondent has been condemned to live with a suit hanging over its head causing anxiety.

5. That the Claimant has lost interest in the suit and it would only be just that the Orders sought be granted.

6. The Claimant has opposed the Application by filing a Replying Affidavit by one Patrick A. Jaleny who has conduct of the suit on his behalf. He states that it is not true that he Claimant has not made attempts to fix the matter for hearing as they had invited the Respondent to fix dates at the registry but there were no dates available for the whole of year 2015.

7. He state that in 2016, the Claimant got a job with a humanitarian NGO and was subsequently posted to Sanaa in the Islamic Republic of Yemen and had been unable to communicate until recently when their firm got communication that the Claimant would be in the country from the last week of July, 2017.

8. He states that the lack of communication from the claimant was due to the unanticipated communication lock down and harsh working conditions in the Islamic Republic of Yemen. He seeks for another opportunity for the Claimant to be allowed to ventilate his Claim when she is back in the Country.

9. The Claimant filed a notice of change of Advocates on 14.2.2017 who in turn filed an additional replying affidavit sworn by her on 3.3.2017. She denies the contents of the Affidavit by Patrick A. Jaleny and states that she has never relocated to Yemen or by any means left the Country for any reason.

10. She states that she had followed up the matter with her former Advocates, Jaleny & Company Advocates, who would not reply to her phone call or emails and any time she got through to the said advocates they would always tell her that there were no hearing dates available at the Court Registry.

11. She states that the mistakes of Counsel should not be visited on an innocent litigant and the Court should dismiss the Application and order for the matter to proceed for full hearing.

12. In Submissions the Respondent/Applicant submits that the excuse by the Claimant that there were no hearing dates available in the Year 2015 is not true as it is common knowledge date that dates were issued by the Registry and as such that explanation is unsatisfactory. They cite the case of **John Samuel Gachuma Mbugua & Another vs. Mary Ruguru Njoroge (2006)eKLR**; where the court dismissed lapses on the part of the Court registry as a reason for failing to prosecute a matter.

13. Further the Respondent submits that the claim by the Claimant that she had moved to Yemen and could not communicate in the year 2016 is not supported by evidence. In any event, they submit, relocation is not an excuse for failure to set down the claim for hearing. They rely on the case of **John Samuel Gachuma Mbugua & Another Vs Mary Ruguru Njoroge(supra)** where the Court held that it is the Claimant's responsibility to pressurize their Counsel to pursue the case vigorously. They state that in light of this the Court should not exercise its discretion in favour of the Claimant.

14. The Respondent also states that the delay of 2 years in the instant case is inordinate and cite the case of **Abdala Tairara Godoro vs. City Council of Nairobi (2008)eKLR** where a delay of 1 year and 3 months was considered inordinate.

15. The Respondent submit that the Court should give effect to the overriding objectives set out in Section 1A of the Civil Procedure Act with the purpose of attaining a just determination of proceedings, efficient disposal of the business of the Court, efficient use of the available judicial resources and timely disposal of proceedings. That the conduct of the Claimant has not furthered the overriding objectives and sufficient reasons for not doing so have not been proved. They pray for the Application to be allowed as drawn.

16. The Claimant/Respondent in submissions state that she appointed the firm of Jaleny and Company Advocates to act on her behalf. That the said advocates acted outside of instructions by replying to the instant application wherein they presented falsehoods to the Court. They rely on the case of **Bamanya Vs Zaver (2002)EA 329 at page 333** where it was stated:

"the conduct of former lawyers totally messed up the Applicant who was not a lawyer. He reiterated that mistakes, faults/lapses or dilatory conduct of counsel should not be visited on the litigant. Even if it is accepted that the applicant was somehow at fault lit was only 1% and the rest put on his former advocates…Errors or faults of counsel should not necessarily debar a litigant form enforcing his rights."

17. They further rely on the case of **Belinda Murai & Others vs. Amoi Wainaina (1978) KLR 2782**, where court described what constitutes a mistake and stated that a mistake is a mistake regardless of who commits it. The door of justice is not closed because a mistake has been committed by a lawyer who ought to know better. The Court should do whatever is necessary to rectify it.

18. The Claimant further submit that she still has interest in pursuing the suit to its conclusion and should be allowed an opportunity to do so. She states that the moment she was informed by her former Advocates that she needed to respond to a Notice to show cause why suit should not be dismissed while all along she had been following with the said elusive advocates on the progress of the matter, she appointed the firm of Mengich and Company to act on her behalf. This in her opinion is indicative of her interest in pursuing the suit.

19. It is submitted on behalf of the Claimant that, to allow the prayers sought would be to deny her, her right to a fair hearing for a mistake beyond her control. They cite the case of **Moses Muriira Maingi & 2 Ors Vs Maingi Kamuru & Another Nyeri Cad 151 of 2010** citing with approval the case of Chesoni J (as he then was) **Ivita Vs Kyumbu (1984) KLR 44**, where it was held:

"…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 the 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, 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 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 for want of prosecution. Thus even if delay is prolonged if the Court is satisfied with the Plaintiff's explanation or 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."

20. The Claimant submit that the Application ought to be dismissed in the interest of justice and that the case to proceed for full hearing.

21. I have considered the submissions of the parties. From the submissions of the Claimant, she is desirous of pursuing this case. It is the duty of this Court to ensure justice for all without undue regard to technicalities as provided for under Article 159(2(d) of the Constitution.

22. The Claimant has indeed explained how her Counsel has handled this case to her detriment and she should not be punished for mistakes of her Counsel.

23. In view of the fact that ends of justice would be met by hearing both parties, I will dismiss the application before Court. I will allow parties to ventilate this case and the Court to give a proper determination on merit thereafter.

24. Costs in the cause.

Read in open Court this **31st day of July, 2017**.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Chobika for the Claimant

No appearance for the Respondent