



Bwanamaka & 14 others v Nation Media Ltd & 7 others (Civil Suit 13 of 2017) [2023] KEHC 1562 (KLR) (24 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1562 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 13 OF 2017
DO CHEPKWONY, J
FEBRUARY 24, 2023**

BETWEEN

MAUR BWANAMAKA & 14 OTHERS PLAINTIFF

AND

NATION MEDIA LTD & 7 OTHERS DEFENDANT

RULING

1. This ruling determines the 5th Defendants’ (Nation Media Ltd) and 7 Others (herein referred to as “The Applicants), Notice of Motion application dated September 30, 2020 which seeks this suit to be dismissed for want of prosecution and the costs of the suit be borne by the Plaintiffs.
2. The application is premised on eight (8) grounds set out on its face and further supported by the affidavit of the 5th Defendant’s advocate, Augustus Khisa Wafula sworn on September 30, 2020. The Applicant’s case is that the Plaintiff filed the present suit on February 7, 2017 contemporaneously with an application of even date seeking interim orders of injunction and on March 17, 2017 filed yet another application seeking to cite the 1st Defendant for contempt. The later application was however withdrawn and a date was set for the matter to be mentioned on July 27, 2017 for directions to issue on hearing of the pending application as well as the main suit. The court did not sit on July 27, 2017 and since then, the Plaintiffs have not bothered to take any active step in prosecuting the suit. Thus the Defendant avers that the Plaintiffs have lost interest in the suit given that as at the time of filing the present application, three (3) years had passed since the inception of the suit without any active step to prosecute it. The 5th Defendant craves for the suit to be dismissed since the interest of justice demands that litigation should come to an end.
3. The 1st Plaintiff, Maur Bwanamaka opposed the application vide his Replying Affidavit sworn on March 8, 2021. His case is that the delay in prosecuting the case was as a result of effects of Covid-19 which even caused him to be hospitalized for two (2) months. He avers that during this time he could



not attend to the case due to the pain he was going through and begs the court to allow the matter proceed for pre-trial.

4. On March 8, 2021 this court directed that the application be canvassed by way of written submissions and both parties committed to comply with the timelines set. Subsequently, parties were allowed opportunities on several occasions including the April 26, 2021, May 13, 2021, June 29, 2021, July 7, 2021, and September 16, 2021 to file their submissions but only the 5th Defendant/Applicant filed its submissions while none of the Plaintiffs filed their submissions.
5. The 5th Defendant's submissions on the other hand are dated the May 6, 2021 and they delve on only two issues for determination being, whether the delay occasioned by the Plaintiff was inordinate and inexcusable and whether the delay renders a fair trial impossible. On whether the delay was inordinate, in their submissions, the Applicant laid emphasis on the case of *Pravichandra Jamnadas Kakad v Kenya Bus Services Limited & another* [2014] eKLR, where the court stated thus: -

“The cornerstone of the power to dismiss a suit for want of prosecution is whether the delay is inordinate and inexcusable, there is however no precise measure of what amounts to inordinate delays as that would differ from each case; for instance, the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth. Nevertheless, inordinate delay which leads the court to an inescapable conclusion that it is inordinate delay and therefore inexcusable...”
6. In that regard the 5th Defendant submitted that the present suit being a defamation case ought to have been heard and concluded in a period of not more than two (2) years. However, the four years of inaction in this suit have not been satisfactorily explained for two reasons, one being that whereas the delay is attributed to Covid-19 Pandemic, the first Covid-19 case was reported in Kenya on March 12, 2020 while the suit was last in court on July 27, 2017, hence the delay before the striking of Covid-19 Pandemic has not been explained and in addition the 1st Plaintiff has casually stated that he was hospitalized without adducing any evidence. Secondly, it is argued that the suit herein was filed by 15 Plaintiffs and none of the other fourteen (14) Plaintiffs have made an effort to prosecute the case or in any way explained the inordinate delay in the matter.
7. On whether the delay renders a fair trial impossible, the 5th Defendant submitted that the failure for proper explanation of the delay only suggests that the Plaintiffs have lost interest in the matter. That the delayed justice on part of the Defendants amounts to justice denied. The court was further referred to Article 159(2) (b) of the *Constitution* which calls for expeditious disposal of suits and for justice to be done to all the parties. It is submitted that the suit be dismissed.

Analysis and Determination

8. I have considered the application, the response filed thereof, and the submissions filed by the 5th Defendant/Applicant. The central issue for determination arising therein is whether a case has been made for the suit to be dismissed for want of prosecution.
9. The power to dismiss a suit for want of prosecution is a matter within the discretion of the court which ought to be exercised judiciously. Article 159 (2) (b) of the *Constitution of Kenya, 2010* pertains to the import of expeditious disposal of suits once they are filed and it enjoins the court in exercising its judicial authority to ensure that justice shall not be delayed.



10. The pertinent provision of law regulating applications for dismissal of suits for want of prosecution is order 17 rule 2 of the [Civil Procedure Rules, 2010](#) which reads as follows:-

“Notice to Show Cause why suit should not be dismissed.

- 1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
- 2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
- 3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
- 4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

11. In considering the exercise of discretion in applications for dismissal of suits, the court in the case of [Nilesh Premchand Mulji Shah & another T/A Ketan Emporium v MD Popat and others & another](#) [2016] eKLR, held thus:-

“...that That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of [Ivita v Kyumbu](#) [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

12. Similarly, In the case of [Argan Wekesa Okumu v Dima College Limited & 2 others](#) [2015] eKLR, the court considered the principles for dismissal of a suit for want of prosecution, where it stated as follows:

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable, and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution”

13. Thus Order 17 Rule 2(3) of the [Civil Procedure Rules](#) and Article 159(2)(b) of the [Constitution of Kenya, 2010](#), grants the court the discretion to dismiss the suit where no action has been taken for one (1) year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. The test to be satisfied however is, first, requirement of one year threshold as stipulated



in Order 17 Rule 2 of the Civil Procedure Rules, secondly, the Applicant must show that there was inordinate and inexcusable delay in circumstances of that case and finally that the applicant will be prejudiced by the delay if the suit were to be allowed to proceed to trial and that a fair trial would not be achieved owing to the delay.

14. Applying those precepts to the facts of the present case, it is a common ground that this suit was filed on February 7, 2017 vide a Plaint of even date. The suit was then set for mention for directions on disposing an application contemporaneously filed with the suit culminating to a mention date set for July 27, 2017 but unfortunately the court did not sit. The matter was thereafter mentioned in court on October 9, 2017 but none of the parties showed up and directions were issued that a date be fixed at registry by either of the parties. Parties then went into a limbo until March 5, 2019 when Miss Muchiri for the Plaintiffs fixed a mention date at the registry for April 29, 2019. When the court reconvened on April 29, 2019, none of the parties showed up until November 10, 2020 when the present application was listed for hearing.
15. From the above chronology, it is evident that the last time the matter was in court was on October 9, 2017 when it was mentioned in the absence of the parties. The application seeking dismissal of the suit was filed on September 30, 2020 which is a period of two (2) years and eleven (11) months since the matter was last in court and I am persuaded that the one-year threshold stipulated under Order 17 Rule 2 has satisfactorily been met.
16. As for whether the delay is inordinate and inexcusable, the explanation advanced by the 1st Plaintiff is that he was hospitalized as a result of Covid-19 for two (2) months and endured much pain that he could not attend to the suit. However, the 1st Plaintiff did not offer any evidence in support of his allegations and the averments that he was sick and hospitalized are merely averments which have not been proved. I also agree with the 5th Defendant's submissions that the suit having been instituted by the 1st Plaintiff and fourteen (14) others, their failure to show cause why their claims should not be dismissed for want of prosecution or otherwise explaining the reason for delay in prosecuting the case displays the character of lethargic litigants who have lost interest in their case. I am not persuaded that the other fourteen (14) Plaintiffs have any interest in pursuing the suit. For those reasons, it is therefore my finding and holding that the delay in this suit is inordinate and inexcusable.
17. Balancing the interests of the parties in this suit, I am of further opinion that the unexplained delay of two (2) years and eleven (11) months is unreasonable and would obstruct from justice being done for the Defendants. Justice is a double-edged sword and cuts both ways. It operates against a party who drags another party to court and without proper explanation fails to expedite the prosecution of his or her case. Such behavior also drags the court's objective the guiding principles render justice without undue delay.
18. The upshot of all the arguments before court is that I find merit in the 5th Defendant's application and I am persuaded to grant the application dated September 30, 2020 which I hereby do with costs to the 5th defendant/applicant.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

D. O. CHEPKWONY

JUDGE

