



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 100 OF 2015

HON. DR. EVANS KIDERO.....PLAINTIFF

VERSUS

STANDARD GROUP LIMITED.....1ST DEFENDANT

PAUL WAFULA.....2ND DEFENDANT

DANIEL WESANGULA.....3RD DEFENDANT

NATION MEDIAL GROUP LTD.....4TH DEFENDANT

RAMENYA GIBENDI.....5TH DEFENDANT

RULING

1. This ruling is in respect of two applications. The first one is the Notice of Motion filed by the 1st, 2nd and 3rd defendants dated 7th October 2016 while the second one is the Notice of Motion dated 24th February 2020 filed by the 4th and 5th defendants. In both applications, the defendants (hereinafter the applicants) prayed that the plaintiff's suit be dismissed with costs for want of prosecution and that the injunctive orders granted by this court on 21st September 2015 be discharged.

As the applications sought similar orders, the court with the concurrence of all the parties directed that the applications be heard together.

2. The application dated 7th October 2016 is supported by the 1st defendant's Senior Legal Officer, *Ms Carolyn Cheruiyot* and a further affidavit sworn on 3rd July 2020 by *Mr. Chris Waitthaka*. The application dated 24th February 2020 is supported by the supporting and further affidavits sworn on 24th February 2020 and 3rd July 2020 by *Mr. Sekou Owino*, head of the 4th defendant's Legal Department.

3. A perusal of the two applications reveal that they are, by and large, premised on similar grounds. In both applications, the applicants contend that since obtaining an interlocutory injunction restraining them from republishing a report dated 8th July 2014 concerning forensic investigations of *Mumias Sugar Company* which report was allegedly defamatory of the plaintiff pending the hearing and determination of the suit, the plaintiff, *Hon. Dr. Evans Kidero* has not taken any action to facilitate hearing of the suit and he has lost interest in its prosecution.

4. The 4th and 5th applicants in addition averred that due to the plaintiff's inactivity in the matter, they filed an application dated 20th June 2018 seeking dismissal of the suit for want of prosecution but the motion was dismissed by this court (*Sergon J*) on 9th November 2018; that since dismissal of that application, the plaintiff without any justifiable reason failed or neglected to take any step towards prosecuting the suit within the period prescribed by the law; that his inertia has not only occasioned them prejudice but also runs contrary to the overriding objective of the *Civil Procedure Act* which *inter alia* emphasizes on the just, expeditious and affordable resolution of civil disputes.

5. The applicants further claimed that the continued pendency of the suit impeded their right to a fair trial particularly the 1st and 4th defendants who are corporate entities because they experience a high turnover of employees who are their potential witnesses and if there was further delay, these witnesses may leave their employment and it would be difficult to procure their attendance during the trial; the 1st applicant asserted that indeed the 2nd applicant had already left its employment; that the delay is causing escalation of costs and is inordinate and inexcusable.

6. In addition, the applicants averred that the plaintiff is deliberately delaying prosecution of the suit so that he could continue enjoying the benefits accruing from the interlocutory injunctive relief obtained against them on 21st September 2015; that the interim orders should be discharged as they are not only oppressive to the applicants but have also lapsed by operation of the law.

7. The two applications were contested by the plaintiff through lengthy replying affidavits sworn on 6th December 2016 and 4th June 2020. In the affidavits, the plaintiff in a nutshell reiterated his cause of action and the reliefs sought in his plaint dated 9th March as amended on 30th March 2015. He averred that he was still interested in pursuing his defamation claim against the applicants and that the delay in prosecuting the suit was not deliberate or intentional as alleged by the applicants.

8. With respect to the application dated 7th October 2016, the plaintiff apparently blamed the applicants for the delay. He deposed that after the court's ruling was delivered on 21st September 2015, the applicants' advocates filed and served his advocates with a notice of appeal dated 5th October 2015 expressing their intention to challenge the court's decision in the Court of Appeal; that his advocates were led to believe that an appeal had been filed and since they were not subsequently served with a notice of withdrawal of the appeal, they opted to give the applicants space to prosecute the appeal but when it became apparent that they were not diligently pursuing the appeal, his advocates wrote to the Deputy Registrar on 5th September 2016 seeking a mention date before a judge for directions as parties had not complied with pre-trial directions under *Order 11* of the *Civil Procedure Act*.

9. He gave a similar explanation for the delay subject of the application dated 24th February 2020. He in addition claimed that as the parties had not complied with pre-trial procedures and the suit had for that reason not been certified ready for hearing, his advocates wrote to the Deputy Registrar twice requesting for a mention date before the duty judge for directions but his letters did not elicit any response from the court. In support of his averments, he annexed to his affidavits letters dated 10th May 2019 and 14th October 2020.

10. Further, the plaintiff deposed that his suit had high chances of success and urged the court to give him an opportunity to have it determined on merit. He added that if the application was allowed, he would suffer great prejudice whereas if it was dismissed, the applicants are not likely to suffer any prejudice.

11. Regarding the prayer for discharge of the orders of interlocutory injunction, the plaintiff (respondent) denied that the orders were oppressive to the applicants as alleged and maintained that they were serving their objective of protecting his reputation pending hearing of the suit; that discharging the orders would give the applicants a leeway to destroy his reputation by republishing the defamatory material subject matter of the suit which will give rise to new causes of action. He invited me to find that it would be in the best interest of justice to sustain the suit and to dismiss the prayer seeking to have the interim injunctive relief discharged so as to maintain the status quo pending hearing and determination of the suit.

12. At the hearing, the parties consented to having both applications heard by way of written submissions. The 1st to 3rd applicants had on 11th July 2017 filed written submissions in support of their application dated 7th October 2016 and with leave of the court, they filed supplementary written submissions dated 29th November 2020.

13. On their part, the 4th and 5th applicants filed their written submissions dated 16th November 2020. The court record shows that the respondent had on 20th December 2016 filed written submissions in opposition to the motion dated 7th October 2016. He also filed written submission dated 9th November 2020 in opposition to the motion dated 24th February 2020.

In their submissions, the advocates on record restated and expounded on the positions taken by their respective clients in support and in opposition to the applications as summarized above.

14. I have carefully considered the two applications, the affidavits on record, the parties' rival written submissions and all the authorities cited. Having done so, I find that the key issue which arises for my determination is whether the applicants have demonstrated that they are deserving of the exercise of the courts discretion in ordering dismissal of the respondent's suit for want of prosecution as sought. I say so because if the court agreed with the applicants and dismissed the suit, the other prayer seeking discharge of the interim injunctive relief will fall by the wayside since it will automatically be resolved. It is basically an alternative prayer to the main prayer for dismissal of suit for want of prosecution.

15. The law governing dismissal of suits for want of prosecution is set out in *Order 17 Rule 2 (1) (2) and (3)* of the *Civil Procedure Rules* (the Rules). These provisions empower a court to dismiss a suit for want of prosecution if no application had been made or other step taken by either party for a period of one year. The court can dismiss the suit either upon application by any party or upon giving notice to the parties and sufficient cause is not established to its satisfaction why the suit should not be dismissed for want of prosecution.

16. The test in applications of this nature was well captured and articulated by *Chesoni J* (as he then was) in *Ivita V Kyumbu, (1984) KLR 441* when he stated thus:

“The test applied by the courts in an application for the 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 available time. It is a matter in the discretion of the court.”

17. From the foregoing, it is clear that the court has wide discretion in deciding whether or not to dismiss a suit for want of prosecution. Like any other judicial discretion, that discretion must be exercised judiciously taking into account the facts and circumstances of each case and the wider interests of justice. Over time, courts have developed several principles to guide them in the exercise of their discretion in determining applications such as the present one.

18. Some of the factors to be considered are the nature of the case, whether the delay is prolonged and inordinate or whether it is sufficiently explained and excusable and most importantly, whether despite the delay, justice can still be done to the parties. These factors which no

doubt are not exhaustive as each case must be determined on its own merits were among those captured by the court in *Mwangi S. Kimenyi V Attorney General & Another, [2014] eKLR* when enumerating the principles which should guide the court in exercising its discretion under *Order 17 Rule 2 and 3* of the Rules. The court identified the following principles:

- a) *Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
- b) *Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- c) *Whether the delay is an abuse of the court process;*
- d) *Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
- e) *What prejudice will the dismissal occasion to the plaintiff?*
- f) *Whether the plaintiff has offered a reasonable explanation for the delay;*
- g) *Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?*

19. Guided by the above principles, I will now proceed to address the question whether the respondent has demonstrated sufficient cause or given good reason why his suit should not be dismissed for want of prosecution as prayed by the applicants.

By way of background, the court record shows that the respondent instituted suit against the applicants vide a plaint dated 9th March 2015 which was amended on 30th March 2015. In the suit, the respondent sought several reliefs for alleged defamation arising from publication of articles by the applicants between 9th and 18th February 2015 in reference to him related to the management of *Mumias Sugar Company*.

20. Contemporaneous to the filing of the suit, the respondent filed an application seeking orders of temporary injunction to restrain the applicants from republishing the alleged defamatory material pending hearing and determination of the suit. In its ruling dated 21st September 2015, the court determined the application in the respondent's favour.

21. There was apparently no other activity in the suit until the 1st to 3rd applicants filed the Notice of motion dated 7th October 2016. In the application, the applicants argued that the respondent went to sleep after obtaining the orders of interlocutory injunction since he did not take any action to prosecute the suit thereafter. It is however worth noting that when this application was pending hearing, the 4th and 5th applicants filed another application dated 20th June 2018 also seeking dismissal of the plaintiff's suit for want of prosecution. The application was heard and dismissed by this court (*Hon. Serگون, J*) on 9th November 2018.

22. I have considered the period of delay complained about by the 1st to 3rd applicants in the application dated 7th October 2016. The respondent has not disputed the delay referred to by the applicants. In his response, he offered the same explanation he gave when resisting the 4th and 5th applicants' Notice of Motion dated 20th June 2018. The court (*Sergon J*) in its ruling considered the respondent's explanation and found it satisfactory and excusable hence dismissal of the application on 9th November 2018.

23. Though I agree with the applicants' contention that the respondent ought to have been more proactive and diligent in seeking to establish whether or not an appeal against the court's decision of 21st September 2015 had in fact been filed and whilst I further agree with their submission that an appeal does not operate as a stay of proceedings, I agree with *Hon. Serگون, J* that the belief that the applicants had challenged the court's decision on appeal may have diverted the respondents focus from hearing of the main suit.

24. That said, I do not wish to further interrogate the parties' various positions regarding the merits or otherwise of the application considering that the period of delay complained of in the motion was the subject matter of the motion dated 20th June 2018 and the same was excused by the court in its ruling delivered on 9th November 2018.

25. As there is no indication that the ruling was subsequently set aside or overturned on appeal, I think that the issue regarding whether or not the plaintiff's suit ought to be dismissed on account of the delay subject matter of the motion was conclusively determined in that ruling and cannot be the subject of further litigation in this court. I find that though the motion was relevant at the time it was filed, it had already been overtaken by events at the time it was heard. In the circumstances, I find no basis upon which to order dismissal of the suit as sought in the motion. I do not therefore find merit in the application and it is hereby dismissed.

26. Regarding the delay cited in the motion dated 24th February 2020, I note that the delay comprises about 13 months. I have examined the two letters annexed to the respondents replying affidavit dated 10th May 2019 and 14th October 2020 addressed to the Hon. Deputy Registrar seeking a mention date for directions.

27. Although as correctly observed by the applicants' the letters do not have a court stamp confirming that they were received in the court registry and they are not copied to the applicants, there is no material placed before me to substantiate the applicants' allegation that the letters were not authentic and were fabricated to suit the plaintiff's response to the application. In the premises, I am inclined to give the applicant the benefit of doubt and find, which I hereby do, that he has demonstrated on a balance of probabilities that during the period in question, he had attempted to initiate action designed to progress hearing of the suit.

28. I however hasten to add that I entirely understand the applicants' apparent frustration at having the suit pending since its inception in

March 2015. It is apparent from the court record that most of the time was utilized in prosecuting the multiple applications the parties separately filed at different times which no doubt contributed, to some extent, to the delay in prosecuting the suit.

29. It must also be appreciated that although the respondent had the primary responsibility of ensuring that his suit was heard expeditiously being the person who instituted the suit in search for a remedy, the applicants also had a legal obligation to comply with pre-trial procedures to expedite the process of having the suit certified ready for hearing which they failed to do. Given this and the foregoing, it would be unfair to entirely blame the respondent for the delay in prosecuting the suit.

30. I have taken into account the applicants' apprehension that any further delay will prejudice their right to a fair trial as they are unlikely to trace their potential witnesses and procure their attendance during the trial if the suit was sustained. The 1st applicant specifically claimed that the second applicant has in fact left its employment. The 1st applicant did not avail any evidence to back its claim with any evidence nor did the rest of the applicants. The applicants have therefore failed to demonstrate that justice cannot still be done to both parties as a result of the delay.

31. In applications of this nature, the court is called upon to weigh and balance the competing rights and interests of the parties since all parties to a dispute are entitled to justice. In the constitutional dispensation brought about by the promulgation of the Constitution of Kenya 2010, courts are required to lean more towards sustaining rather than dismissing suits so that disputes, so far as is reasonably possible, are determined on merit unless doing so would cause substantial prejudice to the opposite party which may amount to a miscarriage of justice.

32. I have considered the subject matter of the suit which is a defamation claim alleging injury to the respondent's character and reputation. The respondent has maintained that he is still interested in pursuing his claim. If the court allowed the application, the respondent will definitely suffer grave prejudice since he will be removed from the seat of justice before his case is heard on merit. If on the other hand the application is dismissed, the applicants will no doubt suffer prejudice occasioned by further delay before the suit is determined but to my mind, this is a prejudice which can be ameliorated by an award of costs.

33. Having taken everything into account, it is my considered view that the interests of substantive justice dictates that the respondent is given the last chance to prosecute his suit so that his dispute with the applicants can be resolved conclusively on merit. I am thus inclined to sustain the suit on conditions which I will state shortly aimed at facilitating its expeditious disposal.

34. Considering the circumstances currently prevailing in the justice system owing to the Covid-19 pandemic which is ravaging not only our country but the entire world; the measures put in place to mitigate its spread which includes down scaling of court operations and suspending physical hearings in open court, I hereby exercise my discretion and decline to allow the application as prayed on condition that the respondent will take necessary steps to ensure that the suit is prosecuted within 120 days of date commencement of main hearing in civil suits either physically in open court or virtually is authorized failing which the suit will stand dismissed with costs to the applicants.

35. Having sustained the suit, I must now consider the question whether the injunctive orders issued in favour of the respondent should be discharged. The prayer to discharge the said orders is premised on *Order 40 Rule 6* of the *Civil Procedure Rules* which states as follows:

"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."

36. I fully appreciate the plaintiff's contention that the orders of interlocutory injunction issued on 21st September 2015 were meant to protect his reputation from further damage pending determination of the suit and that if they are discharged, nothing will prevent the applicants from republishing the alleged defamatory material. I have also considered the applicants' argument that the orders have lapsed by effluxion of time.

37. When interpreting *Order 40 Rule 6* of the *Civil Procedure Rules*, the Court of Appeal in ***Barclays Bank of Kenya Limited V Henry Ndungu Kinuthia & Another, [2018] eKLR***, reiterated the rationale behind the enactment of the provision by adopting the reasoning of *Hon. Gikonyo J* in ***David Wambua Ngii V Abed Silas Alembi & 6 Others, [2014] eKLR*** who had this to say:

"It is important to first deal with the scope and purpose of order 40 Rule 6 of the Civil Procedure Rules on lapse of an injunction. Order 40 rule 6 of the Civil Procedure Rules could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous Applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize in a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure."

38. The court went further to cite with approval its holding in ***Erick Kimingichi Wapang'ana & Another V Equity Bank Limited & Another, [2015] eKLR*** where it held as follows:

"Rule 6 Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months "unless", as the Rule provides, "for any sufficient reason the court orders otherwise.....In this case there was no subsequent order extending the injunction. Having been issued on 11th October 2011, the injunction lapsed on 12th October 2012."

39. In its decision in ***Barclays Bank of Kenya Limited V Henry Ndungu Kinuthia & Another, [supra]***, the Court of Appeal held that orders of interlocutory injunction automatically lapse by operation of the law after expiry of a period of 12 months from the date on which they were issued unless they were for sufficient reason extended by the court; that the fact that an order of interlocutory injunction was issued pending hearing and determination of a suit did not constitute sufficient reason to justify its extension beyond a period of 12 months; that the

issue of whether or not to extend interim injunctive relief has to be placed before the court for its consideration and determination.

40. As stated earlier, the interlocutory injunction was issued on 21st September 2015 which is slightly over five years ago. Applying the Court of Appeal's decision in the two authorities cited above, I find that the orders issued in this case automatically lapsed by operation of the law on 21st September 2016 unless they were extended by the court prior to that date. I have gone through the court record and I have not come across any evidence that the respondent at any time sought and obtained a court order extending operation of the orders. It therefore follows that the said orders automatically lapsed on 21st September 2016 or thereabouts. Consequently, it is my finding that there are no valid injunctive orders on record which are capable of being discharged by the court. I therefore find no basis upon which I can grant the applicants' alternative prayer.

41. The upshot is that the applications filed by the applicants dated 7th October 2016 and 24th February 2019 are hereby dismissed. The respondent's suit is sustained subject to compliance with the condition specified in paragraph 34 above.

42. In conclusion, costs follow the event and are at the discretion of the court. In my opinion, a fair order on costs in this case is that the respondent shall bear costs of each of the applications assessed at KShs.20,000.

43. Any party is at liberty to apply.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL 2021.

C. W. GITHUA

JUDGE

In the presence of:

Ms Omire holding brief for Prof Ojienda, SC for plaintiff/respondent

Mr. Leon Kalistu holding brief for Mr. Lutta for the 1st -3rd applicants

Ms Janmohammed for the 4th and 5th applicants

Ms Karwitha & Mr. Ichuloi: Court Assistants