



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 164 OF 2016**

**JIMMY MUTUKU KIAMBA.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**NATION MEDIA GROUP LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**TOM MSHINDI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**JOHN NGIRACHU.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants/applicants have brought the Notice of Motion dated 14<sup>th</sup> February, 2020 supported by the grounds set out on its face and the facts deponed in the affidavit of Sekou Owino. The applicants are seeking an order for dismissal of the plaintiff's/respondent's suit against them for want of prosecution plus costs of the Motion and suit.
2. To oppose the Motion, Anthony Kinuthia advocate for the respondent put in a replying affidavit sworn on 19<sup>th</sup> May, 2020.
3. When the parties attended this court on 26<sup>th</sup> May, 2020, they were directed to put in written submissions on the Motion.
4. In their submissions dated 11<sup>th</sup> June, 2020 the applicants have argued that there has been inordinate delay for over two (2) years in prosecution his suit since the time of filing of the applicants' statement of defence on 25<sup>th</sup> January, 2018 and cited the case of **Nilani v Patel & Others [1969] EA** where the court dismissed a plaintiff's suit on account of inordinate delay.
5. The applicants have further argued that the respondent has offered no reasonable or sufficient explanation for the delay, thereby making such delay inexcusable. According to the applicants, both the respondent and his advocate are responsible for the inaction in the suit which is a clear indicator that the respondent has lost all interest in his case.
6. The applicants referred this court to various authorities. In the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] Eklr the Court of Appeal stated inter alia:**  
  
***It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.***
7. It is the submission of the applicants that they have suffered and continue to suffer prejudice arising from the delay in the prosecution of the suit since its commencement in 2016, with some of their witnesses standing the risk of memory lapses or even death, in addition to them running the risk of losing crucial documents to their case.
8. For the foregoing reasons, the applicants have urged this court to dismiss the respondent's suit and in tandem with the holding in the case of **E T Monks & Company Limited v Evans & 3 others [1974] eKLR** that the business of the courts ought to be handled expeditiously, otherwise a party responsible for hampering the prosecution of his or her case should not turn back and complain when the same is dismissed.
9. The respondent on his part submits that the delay in prosecuting the suit was unintentional and excusable, and expressed his willingness to prosecute his suit and argued that there has been compliance with pre-trial directions. The respondent quoted the case of **Naftali Opondo Onyango v National Bank of Kenya Ltd [2005] eKLR** where it was determined that a court will be hesitant to dismiss a claim upon the satisfaction that it can be prosecuted without further delay and that the defendant in question does not stand to suffer any prejudice.

10. It is the contention of the respondent that the applicants have not shown the manner in which they stand to be prejudiced should the suit be prosecuted as opposed to being dismissed.

11. The respondent also submits that the applicants have shown no intentions of summoning any witnesses to support their case.

12. In the end, the respondent urges the dismissal of the Motion so as to enable him prosecute his suit on merit.

13. I have considered the grounds set out in the body of the Motion, the affidavits supporting and resisting the Motion, and the rival submissions and authorities relied upon by the respective parties.

14. The applicable provision touching on the dismissal of suits for want of prosecution is **Order 17, Rule 2 (1) and (3)** of the **Civil Procedure Rules. Rule 2(1)** concerns itself with the dismissal of suits upon issuance of a notice to show cause by the court. The applicants have come under the proviso of **Rule 2 (3)** which expresses that:

***“Any party to the suit may apply for its dismissal as provided in sub-rule 1.”***

15. The guiding principles in determining an application seeking the dismissal of a suit for want of prosecution were discussed by the court in the case of **Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others [2014] eKLR** cited in the respondent’s submissions and are as follows:

*i. Whether there has been inordinate delay in the prosecution of the suit by the plaintiff;*

*ii. Whether the delay is intentional and thus inexcusable;*

*iii. Whether the plaintiff has offered a reasonable explanation for the delay;*

*iv. Whether the delay is an abuse of the court process;*

*v. Whether the delay prejudices the defendant(s);*

*vi. The prejudice that will be visited upon the plaintiff; and*

*vii. Whether justice can still be done notwithstanding the delay.*

16. Under the first principle, the applicants assert that there has been a prolonged and inordinate delay of over two (2) years in the prosecution of the suit. The respondent did not refute the presence of delay in prosecuting the suit.

17. The record shows that the parties were last in court on 8<sup>th</sup> December, 2017 when this court set aside an interlocutory judgment and granted the applicants leave to file their statement of defence. The record shows that the applicants complied by filing their joint statement of defence on 25<sup>th</sup> January, 2018. Since then, it is apparent there has been no action in the suit for over two (2) years now.

18. The question therefore remains whether this constitute inordinate delay? In the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** the court considered what constitutes inordinate delay as follows:

***“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; 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 should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable...Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.”***

19. From my reading and understanding of the above analysis, I am obliged to look into the nature and circumstances of the suit as well as the reasons given by the respondent in order to determine whether there has been inordinate delay and whether such delay is excusable, which brings me to the second, third and fourth principles that I will address hereinbelow.

20. On his part, the respondent explained that the delay was caused by inadvertence on the part of his advocate’s office clerk who was assigned with the responsibility of fixing the suit for pre-trials but that the said clerk took no action. The respondent urged that he should not be punished for the mistakes of the advocate’s employee.

21. On their part, the applicants are of the view that the respondent has not offered any proper explanation for the delay and that both the advocate and the respondent ought to have been proactive in following up on the suit.

22. There exists the legal principle that the mistakes or omissions of an advocate should not be visited on the client. There similarly exists the legal principle that a case belongs to the client, who then ought to demonstrate interest and diligence in following up on its progress.

23. In the present instance, while I am alive to the fact that the respondent's advocate has admitted to the inadvertence of its employee, he ought to have shown that he too followed up on whether dates had been obtained in the suit but he did not.

24. Further to this, the respondent was required to check in with his advocate to inquire on the progress of the suit but he did not. Parties must always ensure to keep in mind that their cases ultimately belong to them and not their advocates, and to show keen interest in pursuing them to the very end. This was the position stated by the Court of Appeal in the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR** quoted by the applicants as I have indicated hereinabove.

25. In my view therefore, both the respondent and his advocate are to blame for the delay since the suit was last in court. I am not satisfied that the respondent has given sufficient explanation for the delay or shown that the same was unintentional or caused by circumstances beyond his control. In the circumstances, I am inclined to find the delay in this instance to be inordinate and inexcusable.

26. In regards to fifth and sixth principles touching on prejudice, the applicants on the one part described the nature of prejudice they stand to suffer in the manner set out earlier in this ruling, while the respondent indicated that given the nature of the suit, he stands to be gravely prejudiced should the same be dismissed at this stage.

27. The courts have previously held that in an application for dismissal such as the one presently before this court, an applicant is expected to demonstrate in specific terms the prejudice he, she or it stands to suffer. For reference purposes, I draw from the court's analysis in the case of **Mwangi S. Kimenyi** (supra) thus:

***“...the Defendant must show he suffered some additional prejudice which is substantial and results to 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant. It must also be shown that the delay has worsened the Defendant's position in the suit. It will not, therefore, be sufficient to just make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out herein above.”***

28. Upon perusal of the pleadings in the suit, I note that the applicants have to date not filed any witness statements or bundle of documents despite filing a list of witnesses and list of documents together with their statement of defence on 25<sup>th</sup> January, 2018. I am therefore not convinced that the applicants have demonstrated that they will suffer substantial prejudice.

29. From my perusal of the pleadings, I established that the respondent's cause of action against the applicants is in the nature of defamation and for which he is seeking to recover various reliefs from this court. It therefore follows that should his suit be dismissed prematurely at this stage, the respondent will lose his day in court which may likely impede his right to substantive justice.

30. Concerning the seventh principle, the applicants did not bring any credible evidence to show that they stand to suffer an injustice should the suit be sustained. The respondent on his part has urged this court to do substantive justice by allowing him to prosecute his suit on merits.

31. From the pleadings, I am able to tell that the suit was lodged in 2016 and that the applicants filed their defence in 2018. I am therefore convinced from the circumstances of the case that justice can still be done notwithstanding the prolonged delay.

32. Moreover, courts of law are also courts of justice and I am duty bound to do substantive justice to the parties rather than to lock them out.

33. A fair order in the circumstances is to dismiss the motion, which

I hereby do for the broad interest of justice:

**Dated, signed and delivered online via Microsoft Teams at Nairobi this 30<sup>th</sup> day of July, 2020.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendants/Applicant