

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 514 OF 2013

WYCLIFF AMBETSA OPRANGYA.....1ST PLAINTIFF

PHILIP MSEVE KUTIMA2ND PLAINTIFF

VERSUS

CITIZEN TELEVISION1ST DEFENDANT

ROYAL MEDIA SERVICES2ND DEFENDANT

FAIZA MAGANGA3RD DEFENDANT

RULING

This suit was filed on 6th December, 2013. Upon service the defendants filed an appearance and a statement of defence. Thereafter the plaintiff filed a reply to the statement of defence on 3rd February, 2014. The plaintiff having failed to prosecute the case thereafter, the defendants filed an application by way of Notice of Motion dated 28th June, 2017 under Order 17 Rule 2 and 3 and Order 51 of the civil Procedure Rules alongside Section 1A, 1B and 3A of the Civil Procedure Act seeking the dismissal of the suit.

That application as opposed by the plaintiff and it later transpired that both parties had not complied with Order 11 of the Civil Procedure Rules. However, on 27th February, 2018 the Deputy Registrar noted that both parties had then complied and the case was ready for hearing.

Subsequently however, the plaintiff issued the defendants with a notice to produce dated 19th February, 2018 which, it appears, has not been complied with to date. There is evidence that the defence had indicated the plaintiffs ought to file a formal application for such an order. That application has not been filed to date.

On 13th March, 2020 the defendants filed yet another application dated 12th March, 2020 seeking the same orders, that is the dismissal of the plaintiff's suit for want of prosecution. Both parties have filed submissions to address that application which I have considered. The pleadings in this case were closed 14 days after the filing of the reply to the defence by the plaintiff. There is no formal application lodged by the plaintiff to produce the evidence required during the trial. However, that cannot be held against the plaintiff. Order 17 Rule 2 (3) cited in the application is relevant provided that the applicant justifies the conditions upon which such an order may be given. It is now generally accepted that for a suit to be dismissed, the delay must be inordinate and or prolonged and where there is no excuse for the same. The court however, may still deny such an order if it is satisfied justice can be done to the parties. – See **Ivita vs. Kyumbi (1984) KLR 441.**

On the other hand however, the court must ensure that no prejudice is occasioned to the defendant by such a delay in the form of disappearance of evidence, or lapse of memory resulting from such a delay. The record shows that this matter was last in court on 3rd October, 2018 and the present application was filed on 12th March, 2020. In effect the delay can be said to be one and half years at most.

This cannot be said to be inordinate delay although the plaintiff may be blamed for failing to comply with directions given by Kamau J on 3rd October, 2018 where the defendants were directed to comply with the plaintiffs notice to produce failure of which the plaintiffs were to move the court for appropriate orders. I note however that both the plaintiffs and the defendants had the duty to comply and therefore, the delay cannot be attributed to the plaintiffs alone.

I also note that dismissal of a suit is a drastic measure which should be invoked cautiously because, it has the effect of driving a party out of a judgment seat. I further note that, the nature of evidence sought by the plaintiffs from the defendants is in the form of **“televised news bulletin”** which technologically may not be subject to loss of memory or lapse of time, because storage thereof may be ensured by placing it in the archives.

I shall give the plaintiff's another chance to advance this matter by ordering that they file a formal application within 60 days from the date of this ruling to compel the defendants to produce whatever evidence that may be required or list the matter for hearing within 120 days from the date of this ruling.

In the event they fail to comply with either of the above steps the suit shall stand dismissed. The costs of this application shall be in the cause.

Dated, signed and delivered at Nairobi this 23rd day of July 2020.

A. MBOGHOLI MSAGHA

JUDGE