

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 84 OF 2017

DR. KEN WYNE MUTUMA.....PLAINTIFF

VERSUS

STANDARD MEDIA GROUP LIMITED.....1ST DEFENDANT

VINCENT ACHUKA.....2ND DEFENDANT

RULING

1. The application dated 28th January 2020 seeks orders that the Plaintiff's suit herein be dismissed with costs for want of prosecution as against the Defendant.
2. It is stated in the grounds and the affidavit in support that the Plaintiff has failed to set down this matter for hearing for a period of over two years.
3. The application is opposed. It is stated in the replying affidavit that the Plaintiff has been pursuing this matter with the Media Council of Kenya Complaints Commission. That the Defendants are yet to file their witness Statements and the documents they intend to rely on. It is further averred that the Plaintiff is ready to comply with Order 11 Civil Procedure Rules.
4. In a further affidavit filed in response to the replying affidavit, it is averred that the matter before the Media Council of Kenya Complaints Commission though related to this one is totally different. That in any event, there was no application made herein for stay of proceedings. That the Plaintiff could have moved the court to proceed with the case, the noncompliance with Order 11 Civil Procedure Rules by the Defendant notwithstanding.
5. I have considered the application, the response to the same and the submissions filed by both parties.
6. The principles governing dismissal of a suit for want of prosecution are that delay must be inordinate, the inordinate delay is inexcusable and the Defendant is likely to be prejudiced. Chesoni, J. (as he then was) applied these principles in the case of ***Ivita v. Kyumbu [1984] KLR, 441***. He stated as follows in the said case:-

“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 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, and, or witnesses may be missing and evidence is weak due to 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 even 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 and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff's 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.”

7. A perusal of the court record reveals that no step has been taken by the Plaintiff to prosecute this matter since it's filing on 13th April, 2017. I would also agree with the Defendants that the Plaintiff is the prime mover of his case and could have moved the court to proceed with the matter even with the Defendants' lack of compliance with Order 11 Civil Procedure Rules.
8. This court is however inclined to give the Plaintiff a chance to prosecute it's case for the suit to be settled on merits. The Defendants ought to comply with Order 11 Civil Procedure Rules if they intend to file any statements and/or documents. This case should thereafter proceed without delay.
9. With the foregoing, I dismiss the application with costs in cause. The Defendants to file and serve their statements and/or any documents they intend to rely on within 30 days from the date hereof.

Date, signed and delivered at Nairobi this 29th day of Sept, 2020

B. THURANIRA JADEN

JUDGE