



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 465 OF 2007

THE BOARD OF GOVERNORS UPPER HILL SCHOOL.....1ST PLAINTIFF

MICHAEL NGUJU MUHIA.....2ND PLAINTIFF

VERSUS

DR SAM NTHEYA.....1ST DEFENDANT

DR JOHN NGIGI.....2ND DEFENDANT

THE BOARD OF TRUSTEES NAIROBI WOMEN'S HOSPITAL.....3RD DEFENDANT

PAUL KINYUA CHURU.....4TH DEFENDANT

MARGARET WANGUI KINYUA.....5TH DEFENDANT

RADIO AFRICA LIMITED T/A KISS 100 FM.....6TH DEFENDANT

RADIO AFRICA LIMITED T/A CLASSIC 105 FM.....7TH DEFENDANT

ROYAL MEDIA SERVICES LIMITED T/A CITIZEN RADIO.....8TH DEFENDANT

ROYAL MEDIA SERVICES T/A INOORO.....9TH DEFENDANT

REGIONAL REACH LIMITED T/A KAMEME FM.....10TH DEFENDANT

ROYAL MEDIA SERVICES LIMITED T/A CITIZEN TV.....1TH DEFENDANT

KENYA BROADCASTING CORPORATION (KBC RADIO).....12TH DEFENDANT

THE STANDARD LIMITED T/A THE STANDA.....13TH DEFENDANT

NATION MEDIA GROUP T/A DAILY NATION.....14TH DEFENDANT

EAST AFRICAN MAGAZINE LIMITED T/A

DRUM PUBLICATIONS.....15TH DEFENDANT

THE PEOPLE LIMITED T/A THE PEOPLE DAILY.....16TH DEFENDANT

THE STANDARD LIMITED

T/A KENYA TELEVISION NETWORK.....17TH DEFENDANT

NATION MEDIA GROUP T/A NATION TELEVISION (NTV.....18TH DEFENDANT

KENYA BROADCASTING CORPORATION (CHANEL 1 TV)..19TH DEFENDANT

TIME NEWS SERVICES T/A KENYA TIMES.....20TH DEFENDANT

RULING (1)

INTRODUCTION

1. The 13th and 17th Defendants' Notice of Motion application dated 5th March 2018 and filed on 4th April 2018 was brought pursuant to the provisions of Order 17 Rule 2 (3), Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya and all other enabling provisions of the law. It sought the following orders:-

1. THAT the Plaintiffs' suit herein be dismissed with costs for want of prosecution as against the 13th and 17th Defendants.

2. THAT the costs of this application be borne by the Plaintiff.

2. The 13th and 17th Defendants' Written Submissions were dated and filed on 2nd July 2018 while those of the Plaintiffs were dated 9th July 2018 and filed on 10th July 2018.

3. When the matter came up on 15th October 2018, the parties requested the court to deliver its decision based on their Written Submission which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE 13TH AND 17TH DEFENDANTS' CASE

4. The 13th and 17th Defendants' present application was supported by the Affidavit of Millicent Ng'etich, their Head of Legal Department.

5. Their case was that the Plaintiffs had failed to set down the suit for hearing since 31st May 2016 when the matter came up for mention to confirm compliance with Pre-Trial Conference.

6. They also stated that the Plaintiffs had not filed their Written Submissions on the ground that they could not trace some of their witnesses who had since left the school.

7. It was their contention that the Plaintiffs' delay to fix the matter for hearing was inexcusable, inordinate and an abuse of the court process and that this delay had and continued to prejudice them as being companies, their employees left their employ from time to time and further, witnesses tended to forget due to passage of time.

8. They further averred that the Plaintiffs filed suit in 2007 which was a period of about eleven (11) years, an indication that they had lost interest in prosecuting the matter herein as they had not set down the same for hearing within a year.

9. It was their averment that it was only just and fair that they be relieved of the burden of this litigation as every case should be concluded one way or the other within a reasonable period of time.

10. They therefore urged this court to allow their application as prayed.

THE PLAINTIFFS' CASE

11. In response to the said application, Peter Orero, who was the Chief Principal of Upper Hill School at the material time, swore a Replying Affidavit on 16th May 2018. The same was filed on 17th May 2018. Michael Ngunju Maina, a retired Principal of the school also swore a Replying Affidavit on the same date.

12. The Plaintiffs' case was that the delay in prosecuting the suit herein was due to his sudden transfer from Upper Hill School to Dagoretti High School. They also attributed the delay to the changing policies by the former Cabinet Secretary for Education Mr. Matiangi and disbandment of Boards of Management (hereinafter referred to as "BOM") that completely paralysed the running of schools.

13. They further contended that although the deponent was transferred to a new school, the BOM resolved that he should proceed with the same. However, it became difficult for him to follow up the same due to pressing duties.

14. They also averred that the 13th and 17th Defendants did not comply with the court order of 23rd May 2016 issued by Rawal J (as she then was) which they ought to have complied with before filing the present application.

15. They therefore pleaded with this court to give them the last chance to prosecute the case herein and prayed for dismissal of the 13th and 17th Defendants' present application.

LEGAL ANALYSIS

16. The 13th and 17th Defendants submitted that it was the primary duty of a Plaintiff to take steps to progress his matter since they are the ones who drag a defendant to court, a position that was held in the case of **Utalii Transport Co Ltd & 3 Others vs NIC Bank & Another [2014] eKLR**.

17. They appreciated that the power to dismiss a matter for want of prosecution was discretionary and that no party should be denied access to justice or fair hearing as is contemplated in Articles 48 and 50 of the Constitution of Kenya 2010. They have relied on the case of **Agip (K) Ltd vs Highlands Tyres Ltd [2001] KLR 630** in this regard.

18. They, however, averred that the power to dismiss a matter for want of prosecution was donated by Order 17 Rule 2 of the Civil Procedure Rules and that Section 1A, 1B and 3A of the Civil Procedure Act and Article 159 (2) (b) of the Constitution of Kenya abhorred delayed justice and demanded that justice must be done without undue delay. In this regard, they placed reliance on the case of **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M.D. Popat & Others [2016] eKLR** amongst other cases to buttress their argument that the business of court must be concluded expeditiously.

19. It was their argument that the delay in prosecution the Plaintiffs' case had been inordinate, inexcusable and has the likelihood of prejudicing them.

20. On their part, the Plaintiffs argued that none of the parties had complied with the court's order of 31st May 2016 in which they were directed to file statements of issues and witness statements.

21. They added that there was no precise measure of what amounted to inordinate delay and urged this court to find that inordinate delay for purposes of dismissal of a suit for want of prosecution should be one which was beyond acceptable limits in the prosecution of the cases.

22. They stated that the abrupt transfer of Peter Orero and disbandment of BOM prevented them from complying with the court orders and hence the delay was excusable. They referred this court to the holding of **Ivita vs Kyumbu [1984] KLR 441** in which it was held that prolonged justice should not prevent the court from doing justice to parties and that it is best that a suit be set down for hearing at the earliest available time.

23. They relied on the case of **Agip (K) Ltd vs Highlands Tyres Ltd** (Supra) where Visram J (as he then was) stated that:-

“Where a reason for delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay”.

24. They were categorical that the delay had not caused the 13th and 17th Defendants any prejudice and that it would only be in the interests of justice that they be given an opportunity to clear the name of the school which had been said to have had sodomy cases. They averred that the Pre-Trial Directions were yet to be complied with.

25. They also distinguished the cases of **Margaret Isutsa Kirui vs Elijah Chebelyn [2017] eKLR**, **Orion East Africa vs Mugana Farmers Co-op Union Ltd & Another [2015] eKLR** and **Jaribu Credit Traders Ltd vs Mumias Sugar Co Ltd [2013] eKLR** that the 13th and 17th Defendants had relied upon on the ground that the same dealt with striking out of an originating summons, setting aside of interlocutory judgment and failing to fix a hearing date after a case has been certified as ready for hearing respectively.

26. This court carefully analysed the parties' Written Submissions and noted that they were all agreed that a suit will be dismissed if there has been inordinate and inexcusable delay in prosecution of the same and that such delay must have caused a defendant prejudice.

27. Notably, the suit herein was filed in 2007. Twelve (12) years have since passed. As was rightly pointed out by the 13th and 17th Defendants, there were high chances of their witnesses leaving their employ and the witnesses forgetting what exactly transpired twelve (12) years ago.

28. Going further, this court noted that the parties did not also file their statement of issues and witness statements when they were ordered to do so on 31st May 2016 by Rawal J (as she then was). However, the Plaintiffs filed their List of Documents on 30th May 2016. Together with the Defendants, they sought more time to file their Witness Statement on 19th July 2016. This was not complied with. They filed their Witness Statement on 22nd May 2018. None of the Defendants had filed their respective documentation as at the time of filing the present application.

29. Appreciably, a case belongs to a plaintiff. It is his responsibility to progress his matter to ensure that the same is concluded expeditiously as is contemplated in Section 1A, 1B and 3A of the Civil Procedure Rules and Article 159 (2) (b) of the Constitution of Kenya. A plaintiff cannot move at the pace of a defendant. Indeed, a defendant is not obligated to file any witness statements or file any list and bundle of documents. In other words, a defendant can opt not to call any evidence. The onus therefore lies with a plaintiff to comply with courts' directions in respect of progressing a matter for hearing.

30. A plaintiff who takes advantage of the failure of a defendant to comply with a court order does himself great disservice and risks his matter being dismissed for failure to prosecute his case.

31. This is what happened in this case. The Plaintiffs purported to equate themselves to the omission of the 13th and 17th Defendants not to

file their documentation much to their detriment. This court therefore determined that there had been inordinate delay on the Plaintiffs' part in prosecuting their matter.

32. This court also agreed with the 13th and 17th Defendants that the delay had great potential to prejudice them. The Sword of Damocles has continued to hang over their heads for over twelve (12) years without knowing when the case against them will come to an end.

33. The delay, however, appeared to this court to have been excusable due to the disbandment of the BOM and policies by the Cabinet Minister Ministry of Education. It took judicial notice that schools are run through BOMs and that if there is no BOM, then operations of a school might be affected.

34. Bearing in mind that the Plaintiffs had filed their Witness Statements albeit having been prompted by the filing of the 13th and 17th Defendants' present application, this court was nonetheless persuaded that there would be more injustice if the Plaintiffs were denied an opportunity to fully present their case in court and to have the same determined on merit. Dismissal of their suit would contravene Article 50 of Constitution of Kenya, 2010 which guarantees every person a right to a fair trial in court.

35. The Plaintiffs have since filed their List and Bundle of Documents and Witness Statements and all that remained was for the Deputy Registrar High Court Civil Division to confirm if the parties had complied with Order 11 of Civil Procedure Rules before the suit could be certified as ready for hearing.

36. Accordingly, having considered the parties' Written Submissions and the case law they each relied upon, this court found and held that although the delay by the Plaintiffs in prosecuting this case had been inordinate and it had the potential of prejudicing the 13th and 17th Defendants, the delay was excusable. Notably, a court should only dismiss a matter where all the three (3) ingredients to wit, inordinate and inexcusable delay and prejudice to an opposing party exist. If one (1) ingredient is absent, a court should lean towards saving a suit for determination on merit.

37. The case herein involves a school whose environment for learning ought to be interrogated to enable students and parents join the school fraternity from a clear position and not one with suspicion and/or trepidation.

DISPOSITION

38. For the foregoing reasons, the upshot of this court's decision was that the 13th and 17th Defendants' Notice of Motion application dated 5th March 2018 and filed on 4th April 2018 was not merited and the same is hereby dismissed. Costs shall be in the cause.

39. To progress this matter, it is hereby directed that the same be mentioned before the Deputy Registrar High Court Civil Division on 5th February 2019 with a view to him and/or her giving directions in respect of the Pre-Trial Conference.

40. It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of January 2019

J. KAMAU

JUDGE