REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 680 OF 2002

JAMES MUCHENE NGEI..PLAINTIFF/RESPONDENT

VERSUS

JOSEPH GILBERT KIBE..1ST DEFENDANT

BOC KENYA LIMITED..2ND DEFENDANT

RULING

This suit was filed on 22nd April, 2002 by the plaintiff against the defendants for damages for libel and slander alleged to have been committed against the plaintiff by the defendants. The defendants denied the plaintiffs claim in their defences. Subsequently issues were drawn and filed on 30th April, 2009. For over 10 years now, this suit has not been heard and finalised. The record shows that on 4th April, 2013 the defendants filed an application for the dismissal of the suit for want of prosecution. That application was withdrawn on 15th October, 2014. Thereafter the defendants filed yet another application dated 13th August, 2018 seeking the same orders and that is the subject of this ruling.

There is no explanation as to why from 15th October, 2014 when the earlier application was withdrawn, up to 28th September, 2018 when the present application was fixed for hearing, no action was taken. I have read the submissions by both counsel in this application. It is a cardinal principle of justice that the courts should be inclined to retaining a suit rather than dismissing the same.

In considering applications under Order 17 Rule 2 Of The Civil Procedure Rules the court has to inquire whether or not the delay is prolonged and inexcusable, and if it is, whether or not justice can be done despite such delay. It should always be appreciated that justice looks at both sides and therefore the interests of both parties must be considered. Underlining all these considerations is whether or not any prejudice may be visited upon either party, and therefore it is a delicate balance in considering this subject.

The discretion of the court shall be invoked cautiously. Delay must not be intentional, neither should it be an abuse of the court process. If the plaintiff can offer a reasonable explanation for the delay, then the suit should be maintained. If no explanation is offered, and the defendants establishe prejudice on their part, then the suit should not be maintained.

Another question is whether or not the plaintiff can be given an opportunity to remedy his default. The conduct of the parties, the nature of the claim and the circumstances as a whole must be considered. The court must also bear in mind that dismissal of a suit has the ultimate effect of driving a party from the seat of justice without a hearing. – see **Mwangi S. Kimenyi vs Attorney General & Another (2014) e KLR, Ivita vs. Kyumbu (1984 KLR 441 and Moses Otyula vs. Children of God relieve Institute (2015) e KLR.**

Having gone through the pleadings herein and considered the rival submissions and the authories cited I observe that the delay herein is prolonged and inordinate. I have then considered the explanation for the delay as set out by the plaintiff from his affidavit and annexures. Several intervening circumstances have been presented, including the charging of the plaintiff in a criminal trial, which must have consumed a lot of his time. The totality of the circumstances is that, the delay has been explained and therefore excusable.

The anxiety of the plaintiff should not be taken alone because the defendants must be equally anxious to have this matter finalised. The defendants raised a counter claim; they are therefore plaintiffs in that counter claim. They had a duty also to move the court for the prosecution of their claim. They are equally to blame for the delay.

Weighing one thing against the other and doing the best I can with the material before me, I decline to dismiss the suit as prayed; instead the application is dismissed with an order that the plaintiff shall ensure the suit is prosecuted within 120 days from the date of this ruling. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 10th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE