REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 512 OF 2008

HON. NORMAN NYAGAH.....PLAINTIFF

VERSUS

THE STANDRAD LIMITED.....DEFENDANT

RULING

This suit was filed on 14th November, 2008 wherein the plaintiff claimed damages for defamation allegedly published against him by the defendant. The defendant denied the plaintiff's claim in its defence filed on 27th November, 2008. The record shows that on 10th June, 2011 the defendant filed an application dated 17th May, 2011 for the dismissal of the suit for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules. It was then alleged that the plaintiff was not keen to prosecute this suit.

On 7th October, 2011 the advocates for the parties appeared before Rawal J, whereby the application was compromised on condition that the plaintiff would comply with the pre-trial rules within 21 days, the defendant would do the same from the date of service of witnesses statement, documents and issues for determination within the same period of 21 days. In default of compliance on the part of the plaintiff within the prescribed time, the suit would stand dismissed. Costs were agreed at Kshs. 5,000/=.

On 25th October, 2011 the plaintiff complied. However the suit was not listed for hearing and the defendant did not comply until far much later. This suit was then listed for hearing, severally but could not proceed for various reasons recorded therein. On 2nd March, 2017 a date was taken for the hearing of the case on 2nd October, 2017. Although this date was taken by the plaintiff's advocate and a hearing notice served upon the defendant's advocate, when the matter was called out only the advocate for the defendant was present.

The court was ready to hear the case on that day and so was the defendant's advocate ready to proceed. In the absence of the plaintiff and or his counsel the suit was dismissed with costs, for want of prosecution.

Subsequently, the plaintiff filed an application dated 26th April, 2018 seeking orders that the proceedings of 2nd October, 2017 be set aside and the case be reinstated for hearing and determination. The court was also asked to give directions for expeditious hearing of the matter. The application was brought under Article 159 (2) (d) and (e) of the Constitution, Section 1, 1A, 3 and 3A of the Civil Procedure Act, Order 12 Rules 1, 2 and 7 and Order 51 Rule 1 of the Civil Procedure Rules.

The application was supported by two affidavits sworn by the advocate for the plaintiff in addition to the grounds set out in the face of the application. The application was opposed and the advocate for the defendant filed a replying affidavit. Parties have filed submissions which I have noted. The orders sought by the plaintiff are discretionary.

I have looked at the provisions of law and read the submissions by the parties and the cited authorities. It is the plaintiff's advocate who took the hearing date. The defendant's advocate was served with a hearing notice and duly attended the court ready to proceed with the case. The advocate for the plaintiff states that a wrong entry was made in the diary and failed to diarise the matter on 2 nd of October, but instead did so on 2nd November, 2017.

A doubt has been expressed by the advocate for the defendant that only a copy of the diary for 2 nd November, 2017 has been provided while excluding the one for 2nd October, 2017 when the case was supposed to have come up for hearing. It may or may not be true about such entries, and not much may turn on that issue because of the following reasons.

The plaintiff is reported to have called his advocate on 3rd of October,2017 to ask about the outcome of the matter. This is a clear demonstration that the plaintiff, who is the owner of the case, knew the case was coming up for hearing on 2nd October, 2017. That knowledge could only have come from his advocate and no one else. If that be the case, while the plaintiff knew of the hearing date, he

elected not to attend the court on 2nd October, 2017 when the case was coming up for hearing and instead waited until the following day to call his advocates.

The time has come when advocates shall stop carrying the cross of their clients for reasons of mistakes, errors or omissions on their part. It must be noted that an action lodged before the court is at the instance of the party and remains his or her property, not that of the advocate. Constant vigilance must therefore be exercised not by the advocate but the party.

Of course there are instances where clearly the advocate is to blame for nonattendance in court, hence the now tired submission that the mistake of an advocate should not be visited upon the client. Even after both the plaintiff and the advocate knew of the dismissal of the case, no action was taken until six months thereafter. This is yet another demonstration that there has been laxity in ensuring that this matter is prosecuted expeditiously. No explanation has been offered either by the plaintiff or the advocate for the delay in lodging the application.

The averment therefore by the advocate for the plaintiff in his affidavit that the plaintiff stands to suffer for a fault not of his own but the mistake/ oversight made by advocate cannot stand. If the plaintiff was keen to prosecute his case, it could not have remained inactive for this long.

Guided by the authorities cited, the plaintiff does not deserve the discretion of this court to set aside the dismissal order. The application is therefore dismissed with cots to the defendants. The net result is the plaintiff case stands dismissed with costs.

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

A. MBOGHOLI MSAGHA

JUDGE