REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 62 OF 2012

WILLIS ONKOBA……..……. PLAINTIFF/RESPONDENT

VERSUS

NATION MEDIA GROUP…….. DEFENDANT/APPLICANT

RULING

1. The applicant filed this application under a Notice of Motion seeking for orders:-

    i. THAT the plaintiff's suit against the defendant be dismissed for want of prosecution.

    ii. The cost of this application be awarded to the defendant.

2. The application is based on the ground that the plaintiff's advocate has never and/or failed to set down the suit for hearing since the close of the pleadings.

3. The plaintiff has lost interest in prosecuting the suit and therefore it would be in the interest of justice to allow the application.

4. The plaintiff has shown no interest in prosecuting this suit and the same has prejudiced the defendant on the basis that the alleged cause of action accrued over 4 years ago and witnesses tend to forget as times goes by and several of them are not available.

5. The respondent filed a replying affidavit sworn by WILLS ONKOBA and the grounds that he has been keen on setting down the suit for hearing and only learnt from his advocates on record that they were still waiting for the list of witnesses and documents as per the notices dated 21st May, 2015.

6. That in the absence of the promised notices the advocate on record was unable to set down the suit for hearing. The counsel's effort to set down the suit for hearing was constrained by the present application which was served on 23rd June, 2017.

7. Lastly, that the instant application is made in bad faith and is a rife with technicalities which have been generated by the applicant to defeat the plaintiff's suit which lacks any valid defence on record but mere denials.

8. The applicants submitted that the legal framework on dismissal of suits for want of prosecution is envisaged in order 17 Rule 2(1) and (3) of the Civil Procedure Rules.

9. The court may either dismiss a suit for want of prosecution *suo moto* or upon application by either party to the suit. There has been inordinate delay in prosecuting the plaintiff's suit.

10. That since the filing of the memorandum of appearance and defence on 21st May, 2012, no action has ever been taken. The applicant relied on the case of ***Nilani vs Patel and Others (1969)*** where the court went ahead and dismissed the plaintiff's suit on account of there having been inordinate delay occasioned by the plaintiff's failure to take action in the suit for a period of more than 12 months.

11. No credible, satisfactory and sufficient explanation for the delay has been given. Neither the plaintiff nor his counsel has placed before this court any reasonable or justifiable reason for the delay in prosecuting the instant suit.

12. Lastly, that the defendants have suffered great prejudice as a result of pendency of the instant suit owing to the plaintiff's inaction. Should this suit be allowed to proceed to trial, the defendant will continue to suffer substantial prejudice.

13. Further, considering that the alleged cause of action accrued nearly 8 years ago, witnesses' memory may fade and some possible

witnesses may die in the process. The instant suit acts as a liability which is pending in the defendant's account.

14. The Respondent submitted that his efforts to have the suit set down for hearing were shuttered when the court file at the civil registry went missing and his efforts to try and find it were futile.

15. That the circumstances leading to the delay of the prosecution of the suit were far beyond the control of the plaintiff/respondent.

16. Further, that in the case of ***Nairobi Hcc No. 1118/1999 Fredrick Kanyiri Weru vs East African Building Society & another (2015)eKLR*** the court stated that ***"but we are aware that sometimes court registries have not performed in optimum manner and files are misplaced or are not easily traceable in the registries.''***

17. The applicant has not furnished any evidence to show that he has suffered any injustice and that justice will not be attained by fixing the matter for hearing again.

18. Lastly, that dismissing the suit for want of prosecution without giving him an opportunity to argue his case shall amount to surmountable injustice upon him and that it is a draconian act which drives the plaintiff from the judgment seat.

19. The main issues for determination in this application is:-

a. Whether the plaintiff's suit should be dismissed for want of prosecution.

20. *Order 17 Rule 2(1),* which governs dismissal of suits for want of prosecution, provides as follows:

> ***"In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."***

21. Further *Order 17 Rule 2(3)* states thus:

> ***"Any party to the suit may apply for its dismissal as provided in sub-rule 1"***

22. There is no dispute, with respect to the law on dismissal of suits for want of prosecution. Whether to exercise the power of dismissal for want of prosecution under *Order 17* is, however, a matter that is within the discretion of the court.

23. In ***Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR***, the court stated as follows:

> ***"11. Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.*** *This is what the case of* ***Ivita vs Kyumba [1984] KLR 441*** ***espoused, that:***
>
> > ***"The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."***

24. In ***Argan Wekesa Okumu vs Dima College Limited & 2 others [2015] eKLR*** the court considered the principles for dismissal of a suit for want of prosecution and stated as follows:-

> ***"The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution; see the case of Ivita –vs-Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."***

25. In ***Naftali Opondo Onyango vs National Bank of Kenya Ltd [2005] eKLR,*** the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows:-

> ***"However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that***

there has been no flagrant and culpable inactivity on the part of the Plaintiff."

... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate." (Emphasis added)

26. In the present case, a period of 3 years had elapsed between the filing of the suit and the filing of the present application. *Order 17 Rule 2* provides that in a matter pending for more than 12 months, the court either on its own motion or on the application by a party, may make an order for its dismissal for want of prosecution.

27. The applicant latched on this provision in the application, to the effect that the period has long lapsed. It is evident that the respondent has no explanation for not taking steps to prosecute its claim. The period of delay has been inordinate.

28. The present suit was filed on 29th March 2012, since that time, the plaintiff never acted on it. This application was filed on 18th December, 2015 three years after the suit was filed and the response to it filed on 14th July, 2017 which is two years later. The respondent herein is guilty of laches.

29. The alleged letter to the civil registry asking about the whereabouts of this file was received by the Registry on 5th November, 2018, 3 years after the application was filed. I find that the plaintiff was not and is not keen in prosecuting this matter.

The application for its dismissal for want of prosecution is merited. It is allowed with costs to the applicant.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of November, 2019.

In the absence of:-

Mr. G.O Obudho for Plaintiff/Respondent

Archer & Wilson for defendant.

Ms Abigael - Court clerk