REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 3 OF 2017

DR. EVANS KIDERO...PLAINTIFF/RESPONDENT

VERSUS

JOHN KAMAU..1ST DEFENDANT/APPLICANT

NATION MEDIA GROUP LIMITED............................2ND DEFENDANT/APPLICANT

RULING

1. The 1st and 2nd defendants/applicants have brought the Notice of Motion dated 22nd August, 2019 supported by the grounds set out on its face and the facts deponed in the affidavit of *Sekou Owino*. The applicants are seeking an order for dismissal of the suit against them for want of prosecution and an alternative order that the suit be struck out as having abated. The applicants are also seeking for costs of the Motion.

2. The abovementioned deponent stated in his affidavit that the plaintiff/respondent instituted the suit together with the notice of motion dated 11th January, 2017 seeking temporary injunctive orders against the applicants. The deponent went on to assert that the Motion was heard and dismissed with costs vide this court's ruling delivered on 16th March, 2017.

3. Sekou Owino pointed out that soon thereafter, the respondent filed a notice of appeal on 20th March, 2017 showing his intention to appeal against the aforesaid ruling, but since then, he has neither lodged a substantive appeal with the Court of Appeal nor taken any further action in the suit, thereby causing the applicants grave prejudice since a majority of the intended witnesses have since left employment with the 2nd applicant while at the same time injuring the 2nd applicant's financial accounts.

4. He further stated that the applicants have never been served with summons to enter appearance in the suit since its institution.

5. In opposing the Motion, the respondent swore a replying affidavit on 6th November, 2019 asserting *inter alia*, that striking out a suit should as a matter of general principle be a measure of last resort.

6. The respondent further asserted that the applicants cannot purport to have been unaware of the suit and in any case, the essence of summons to enter appearance is to act as a notice to the relevant party of a subsisting suit against him or her. The respondent also faulted the applicants for failing to put in their statement of defence despite having knowledge of the suit against them.

7. Be that as it may, the respondent averred that the summons to enter appearance were earlier taken out by his advocate but are yet to be served upon the applicants.

8. The respondent explained the inaction in the suit by stating that his firm of advocates misplaced a number of files in the process of relocating offices and that soon thereafter, they lost several files and equipment which were damaged after a loose pipe broke in their offices. In this sense, the respondent mentioned that the delay was neither intentional nor inordinate, further adding that in any case, the delay will in no way hinder a fair trial to the applicants.

9. The Motion was disposed of through oral arguments made by the parties' counsels on 21st November, 2019. *Miss Kemunto* learned advocate for the applicants relied on the averments made in the Motion and supporting affidavit, save to reiterate that it has now been over two (2) years since the suit was last in court, which is an indication of disinterest on the part of the respondent in prosecuting his case. The advocate similarly referred this court to the provisions of Order 5, Rule 1(6) of the Civil Procedure Rules, 2010 which expresses the following:

"Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate."

10. From the foregoing, Miss Kemunto urged this court to find that the suit has since abated and is thus ripe for striking out. Additionally, the counsel contended that the replying affidavit does not contain any reasonable explanation as to why the suit has not been prosecuted by the respondent.

11. In reply, *Mr. Oriri* learned counsel for the respondent equally restated the facts deponed in the replying affidavit, adding that since the suit is pegged on documentary evidence, there is really no need for the applicants to call any witnesses at the trial. Consequently, the advocate urged this court to exercise its discretion in favour of the respondent.

12. *Miss Kemunto* rejoined with the contention that the respondent's counsel had more than two (2) years to apply for reconstruction of the office file if at all the same was destroyed as claimed.

13. I have taken into consideration the grounds set out on the face of the Motion, the facts deponed in the affidavits supporting and challenging the same, and the oral arguments by the respective counsels.

14. I wish to first address the issue of service of summons before proceeding with the merits of the application. It is not in dispute that the suit commenced by way of an application accompanying the plaint and which application was eventually dismissed. It is also not contested that the applicants were served with a copy of the application and plaint and that subsequently, they filed a notice of appointment of advocates and participated in the hearing thereof. It therefore follows that the applicants were admittedly aware of the existence of the suit and in the premises, they cannot be heard to purport that the suit ought to be struck out for the sole reason that they were not served with summons to enter appearance.

15. In considering the application, the applicable provision is **Order 17 Rule 2 (1)** of the **Civil Procedure Rules** which stipulates 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."

16. The applicants have brought the application under **Rule 2 (3)** expressing that:

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

17. From the foregoing, it is clear that the above provision is not couched in mandatory terms which therefore means that whether or not to dismiss a suit is a matter of judicial discretion. A similar position was taken by the court in **Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR** when it rendered itself thus:

"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."

18. That said, the courts have developed specific principles to offer guidance in determining whether to dismiss a suit for want of prosecution. I will make reference to the principles as espoused in **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** and set out hereunder:

a) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;

b) Whether the delay is intentional, contumelious and, therefore, inexcusable;

c) Whether the delay is an abuse of the court process;

d) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;

e) What prejudice will the dismissal occasion to the plaintiff?

f) Whether the plaintiff has offered a reasonable explanation for the delay;

g) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?

19. In answering the question on whether there was inordinate delay, I turn to the record which shows that the suit was last in court on 16th March, 2017 when this court dismissed the respondent's application in the manner set out earlier in this ruling. It is thus evident that no steps have been taken in the suit for over (2) years now. The question therefore remains: does this constitute inordinate delay? The case of **Mwangi S. Kimenyi** (*supra*) brings perspective into what may be considered to be inordinate delay in the manner hereunder:

> ***"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable...Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases."***

20. From my reading and understanding of the above analysis, I am obliged to look into the nature and circumstances of the suit as well as the reasons given by the respondent.

21. It is well established that the claim arises out of the tort of defamation. That said, I have considered the explanation given by the respondent regarding the misplacement and consequently, the damage occasioned to a number of files being held by his advocates, including the file relating to the present suit.

22. However, I note that the respondent's advocate did not swear an affidavit to that effect or avail any evidence to support the averments made by the respondent. Were we to assume the above position to be true, I find that the respondent has not shown any efforts by his advocates to reconstruct the office file. It has been stated and restated that the responsibility falls on a plaintiff to ensure the prosecution of his or her case with expediency.

23. Further to the above, while I have seen a copy of the notice of appeal lodged by the respondent, there is no indication that a substantive appeal was subsequently filed or that the respondent has sought for and been granted an order for stay of the proceedings in the suit.

24. In the premises, I am of the view that the respondent has not supported the explanation behind the delay with any tangible evidence, thereby leading me to term the delay as prolonged and inordinate. However, there is nothing to indicate that the delay is intentional/deliberate.

25. I will now address the principle touching on prejudice, beginning with the prejudice that is likely to befall the applicants. In this respect, I turn to the court's analysis in **Mwangi S. Kimenyi** (*supra*) that:

> ***"…the Defendant must show he suffered some additional prejudice which is substantial and results to 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant. It must also be shown that the delay has worsened the Defendant's position in the suit. It will not, therefore, be sufficient to just make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out herein above."***

26. Likewise, the Court of Appeal in **Ivita v Kyumba [1984] KLR 441** had the following to say on the subject:

> ***"(the defendant) 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."***

27. I have taken into account the applicants' apprehension on unavailability of potential witnesses and the liability that reflects in the 2nd applicant's financial accounts. It is noteworthy that the suit was filed on 11th January, 2017 and pre-trial directions are yet to be taken. More importantly, I note that the applicants have not filed their statement of defence and accompanying documents to demonstrate the witnesses they intend to call to begin with. The applicants have similarly not brought forth any evidence to support their averments that the 2nd applicant's financial position is at stake owing to the delay in prosecution of the suit. I am therefore not convinced that the applicants will suffer substantial prejudice that will impede their right to a fair trial if the respondent is allowed to proceed with his suit.

28. On the flip side, I am required to equally weigh the prejudice that will be visited upon the respondent if his suit is dismissed. I am persuaded by the reasoning adopted in **Mwangi S. Kimenyi** (*supra*) thus:

> ***"The prejudice to the plaintiff will be ascertained by looking at a number of varying factors which, among the major ones are: the nature of the case-e.g. public litigation, representative suit etc., importance of the claim or subject matter, legal capacity of parties, rights of the parties in the suit and so on."***

29. On his part, the respondent did not explain the prejudice he stands to suffer should this court dismiss his suit. Nonetheless, being guided by the above-cited analysis, I have considered the subject matter of the suit as a defamation claim essentially arising out of injury to the respondent's reputation. I have likewise considered the age of the suit and the fact that it is still in its early stages. Drawing therefrom, I am satisfied that the respondent stands to suffer a greater deal of prejudice if a dismissal order is granted.

30. Having established that there has been a prolonged delay in prosecuting the suit, what does the interest of justice then dictate in the circumstances? I take the view that it would be in the interest of justice to extend an opportunity to the respondent to prosecute his case.

31. The upshot is that the Motion is dismissed. However, I make the following orders:

> *a) The defendants to file and serve their statements of defence and accompanying documents within 30 days from today.*
>
> *b) The applicant shall take a mention date from the registry to confirm compliance with pre-trial directions within 45 days from the date of service.*

c) The plaintiff shall then prosecute his suit within 60 days from the date on which pre-trial directions are taken, failing which the suit shall stand dismissed with costs.

d) The defendants shall have the costs of the Motion assessed at kshs. 15,000/= to be paid within 15 days from the date of this ruling.

Dated, signed and delivered at **NAIROBI** this 19th day of December, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

………………………………. for the Plaintiff/Respondent

………………………………. for the 1st and 2nd Defendants/Applicants