



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 122 OF 2016

DR. PAUL MURGOR.....PLAINTIFF/RESPONDENT

VERSUS

NATION MEDIA GROUP LIMITED1ST DEFENDANT/APPLICANT

THE BUSINESS DAILY.....2ND DEFENDANT/APPLICANT

DAVID HERBLING.....3RD DEFENDANT/APPLICANT

RULING

The application before the court for determination is the Notice of Motion dated the 4th day of July, 2019 brought under Order 17 Rule 2(3); Order 40 Rules 6 and 7, Order 5, Rule (1) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The defendants/applicants have sought for orders;

- 1. That the plaintiff's suit against the first, second and third defendants be dismissed for want of prosecution.***
- 2. That the Injunction Orders issued by the court on the 6th of October, 2017 be deemed as discharged.***
- 3. That the first, second and third defendants be awarded the costs of this application and the suit.***

It is premised on the grounds set out on its body and on the Supporting Affidavit sworn by Sekou Owino, on the 4th day of July, 2019. In the said affidavit, he has deponed that the suit was filed on the 21st April, 2016 and upon service of the summons to the defendants they filed a defence on the 2nd day of September, 2016.

That on 18th April, 2016 the plaintiff /respondent filed a Notice of Motion dated 18th April, 2016 seeking Injunction Orders against the defendants which application was heard and vide a ruling delivered on the 6th day of October, 2017, the court granted the plaintiff the temporary injunction sought therein restraining the defendant from republishing any article complained of, as detailed in the plaint.

He further depones that the plaintiff/respondent has not taken any other action to prosecute the suit since the delivery of the said ruling. That the defendants are being prejudiced by the delay noting the age of the same and intended witnesses have since left the defendant's employment. That furthermore, the suit is causing the defendants/applicants unwarranted anxiety and accumulation of costs and has urged the court to have the Injunctive Orders to be deemed as discharged as the same has since lapsed by operation of the law.

The application is opposed vide a replying affidavit sworn by Dr. Paul Murgor, on the 13th day of September, 2019 in which he has deponed that it is not true that he has not taken steps to prosecute the matter, the true position being that the matter had been ordered to be subjected to a mediation process being Mediation Reference Number 26/2018. That the mediation process stalled as parties could not agree on fundamental issues pertaining to the mediation process and therefore, it is inaccurate, fallacious and an act of treachery for the applicants to present to this court that the respondent has failed to proceed with prosecuting of the matter.

On the principles to be considered by the court in seeking to strike out a suit for want of prosecution, counsel for the respondent relied on the case of Mwangi S. Kimenyi Vs. A. G & Another, civil Suit Misc. No. 720/2009 and the case of George Gatere Kibate vs. George Kuria Mwaura & Another (2017) eKLR.

The deponent averred that the delay in readying the suit for hearing has been reasonably explained and urged the court to consider the general prevailing circumstances within the judicial system at the time of the alleged inaction, and the grounds put forth by the applicant in advancing the view that he would be exposed to grave injustice if the suit were to proceed to trial.

On whether the conservatory orders should be vacated, the applicant relied on Section 95 of the Civil Procedure Act which states that; **for just causes, the court shall extend the orders**. The applicant also relied on Section 59 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya which gives the court power to extend time even in cases where the application for extension is not made until after the expiration of the time prescribed.

The deponent contended that enlargement of time is a matter of discretion for the court.

The respondent relied on the case of **Board of Trustees of African Independent Pentecostal Church of Africa Church vs. Peter Mungai Kimani & 12 others (2016) eKLR** on the factors to be considered by the court when dealing with an application for enlargement of time.

The deponent urged the court to disallow the application and give a chance to the respondent to litigate his grievances in the spirit of Article 159(2) (d) of the Constitution and the overriding objectives set out in the Civil Procedure Act. Reliance was made on the case **Shabbir Ali Jusab Vs. Annar Osman Gamrai & Another (2013) eKLR** to the effect that the courts in considering the rules of procedure, should not be encumbered to the extent that the rules do not become handmaidens of justice, and that the court should also be careful not to make draconian and drastic decisions that would impede access to justice.

The applicants filed a further affidavit on the 9th day of October, 2019, whose effect was to replace the ruling in Hccc Number 100/2015 **Hon. Dr. Evans Kidero vs. Standard Group Limited & 4 others** with that of **Hccc. No. 122/2016** between the parties herein.

The application proceeded by way of oral submissions. The court has considered the application and the affidavit in support of and in opposition to the same.

The court will first consider the prayer seeking to dismiss the suit. The same is provided for under Order 17 Rule 2(1) of the Civil Procedure Rules which provides;

“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”.

2) If cause is shown to the satisfaction of the court, it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

3) Any party to the suit may apply for its dismissal as provided in Sub-Rule 1.

As deponed by the Respondent, the principles to be considered by the court in seeking to strike out a suit for want of prosecution have been outlined in many decisions including the case of **Mwangi Kimenyi vs. The Attorney General & Another , Civil Suit No. 720/2009** as follows;

1. Whether the delay has been Intentional and contumelious.

2. Whether the delay or the conduct of the plaintiff amounts to an abuse of the court process.

3. Whether the day is inordinate and inexcusable

4. Whether the delay is one that gives rise to a substantial risk to a fair trial in that it is not possible to have a fair trial of issues in action or causes or is likely to cause serious prejudice to the defendant.

5. What prejudice will the dismissal cause to the plaintiff.

In explaining the delay, the applicant stated that the matter had been ordered to be subjected to mediation process vide Mediation Reference Number 26 of 2018 which process commenced and was ongoing until it stalled as parties could not agree on fundamental issues pertaining to the mediation process. In his submissions, counsel for the respondent gave the court the name of the mediator as one Anne Mwaura. He further stated that there have been three mediation sittings on 8th November, 2018, 24th November, 2018 and the last being on 16th November, 2019 when the mediation collapsed and the mediator was supposed to write a report on the failure of the mediation, which report she is yet to prepare.

In his submissions, counsel for the applicant denied that the matter was ever subjected to the mediation process. This court would like to believe that counsel for the respondent would have no reason to mislead this court by deponing that there was mediation going on, when there was none. On that ground alone, I will give the respondent the benefit of doubt and find that the delay in prosecuting the matter has been explained.

On whether the injunctive orders should be vacated, Order 40 Rule 6 provides as follows;

“Where a suit in respect of which an Interlocutory Injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

“An Order for an Injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such orders.”

The applicants have sought to have the orders discharged and have contended that the same has since lapsed by operation of the Law.

On his part, the respondent has relied on Sections 95 of the Civil Procedure Act and Section 59 of the Interpretation and General Provisions Act, Cap 2 law of Kenya.

My reading and understanding of Order 40 Rule 6 is that if a sufficient cause is given why the matter has not been prosecuted, the court can order otherwise, meaning the Injunctive Orders can be extended if a sufficient cause is given by the applicant. This is a matter of discretion by the court which discretion must be used judiciously and in so doing, the court will consider the circumstances of each case.

The court was told that the matter was last before a mediator on the 16th day of November, 2019 when the mediation collapsed. This means that the matter was active and it's not true that the plaintiff was not taking steps in prosecuting the matter. I find that no good reason has been given to the court to justify the variation or discharge of the Injunctive Orders.

In the end, the application dated the 4th day of July, 2019 has no merits and the same is dismissed. Costs of the application shall be in the cause.

The court, however, notes that this is an old matter, it is hereby ordered that the matter be prosecuted within six (6) months from the date of this ruling failing which, it shall stand dismissed.

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/Applicant

Mr. Muga for the Respondent