



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 371 OF 2014

BENSON AMBANI AKASI.....1ST PLAINTIFF/RESPONDENT

ALFRED MURANYA OGESI.....2ND PLAINTIFF/RESPONDENT

PROTUS SARARA MARIGO.....3RD PLAINTIFF/RESPONDENT

JULIUS OCHIENG.....4TH PLAINTIFF/RESPONDENT

-VERSUS-

PETER KIAMA.....1ST DEFENDANT/RESPONDENT

NATIONA MEDIA TRUST LIMITED...2ND DEFENDANT/APPLICANT

STANDARD LIMITED.....3RD DEFENDANT/APPLICANT

THE STAR LIMITED.....4TH DEFENDANT/RESPONDENT

RULING

This Ruling seeks to determine the application dated 13/11/2017 by the 2nd Defendant/Applicant brought under the provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules seeking to have the suit instituted by the Plaintiffs dismissed for want of prosecution and costs be awarded to the Applicant. The Application is supported by the Affidavit of **ZEHRABANU JANMOHAMED**.

The Application is premised on the ground that the last time the matter was in court was on 19th April, 2016. Since then the Plaintiffs have never taken any step to prosecute the case and the Applicant is apprehensive that the Plaintiffs have lost interest in the case. That it has been over one year since the matter was last in court and it would be in the interest of justice that the suit be dismissed for want of prosecution and the burden of the litigation be lifted off the Applicant. The Plaintiffs did not file a Reply to the Application.

When the Application came up for hearing, the Applicant sought to rely on the supporting affidavit which I have considered. Dismissal of Suits for want of prosecution is governed by **Order 17 Rule 2** of the Civil Procedure Rules. Sub rule 3 of Order 17 Rule 2 provides that *“Any party to the suit may apply for its dismissal as provided in sub-rule 1.”*

And sub rule 1 provides that

“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.”

The last time this matter was in court was on 19th April, 2016 for a mention. Since then, a period of more than one and a half years has lapsed with no step taken to prosecute the suit. The Applicant has averred that the continued pendency of the suit is prejudicial to them as their employees leave from time to time and the witnesses tend to forget as time goes by. I concur with that argument as a suit ought to be prosecuted while facts and evidence are still fresh in the memories of the witnesses.

The test for dismissal of a suit for want of prosecution is stated in the case of **Ivita -v- Kyumba (1984) KLR 441**. The test was expressed as follows:

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.”

Justice is justice to both the Plaintiff and the defendant. I find that the test in the case of **Ivita (supra)** as most suitable in this application. On whether the delay was prolonged and inexcusable and whether justice can still be done despite the delay, it is my view that the delay is long and the same has not been explained by the Plaintiffs despite the fact that the application was served upon them. This suit was instituted more than 3 years ago and it is true that witnesses could have left the employment of the Applicants and therefore expensive to procure their attendance.

The test in the case of Ivita (supra) was applied by the Court of appeal in the case of **Rajesh Rughani v Fifty Investments Limited & another [2016] eKLR** wherein it was held;

“Chesoni, J. in the persuasive decision of Ivita -v- Kyumba Civil Appeal No. 340 of 1971 dismissed a suit for want of prosecution due to a 4 ½ year delay and stated that where an action has been dormant for twelve months or more, a defendant is entitled to dismissal of the suit for want of prosecution unless the plaintiff shows sufficient reasons for non-dismissal. In Paxton -v- Allsopp (1971) 3 All ER 370 at 371 it was reiterated that when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straight away.”

I find that the delay in prosecuting this case has not been explained it is inexcusable considering that this is a defamation suit. The application is therefore allowed. The 2nd defendant is awarded costs of the application and of the main suit.

Dated, Signed and Delivered at Nairobi this 19th Day of March, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*