



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 298 OF 2011

EUSTACE GITONGAPLAINTIFF

VERSUS

DR. IDLE FARAH.....FIRST DEFENDANT

NATIONAL MUSEUMS OF KENYA.....SECOND DEFENDANT

RITA TININA.....THIRD DEFENDANT

JOE AGEYO FOUTH DEFENDANT

NATION MEDIA GROUP LIMITED.....FIFTH DEFENDANT

RULING

This court served the parties herein with a Notice to Show Cause why the Suit should not be dismissed for want of prosecution. The Notice is dated 9th October, 2017, issued under the provisions of Order 17 Rule (2) of the Civil Procedure Rules. When the suit came up for Notice to Show Cause on 3/11/2017, the Court gave directions that Counsel for the Plaintiff do file an Affidavit in response to the Notice. The Plaintiff filed a Replying Affidavit to the Notice, dated 10th November, 2017 whereas the 1st and 2nd Defendants filed a Replying Affidavit dated 12th January, 2018.

The Plaintiff's Replying Affidavit dated 10th November, 2017 was sworn by **EVANS ONDIEKI**, the Advocate in conduct of the matter on behalf of the Plaintiff. It was deponed that Order 17 Rule (2) (2) of the Civil Procedure Rules allows the Court to preserve the case in the larger interest of justice, that Article 159 (2) (d) (e) of the Constitution obligates the Court to adjudicate substantive justice and avoid resolving matters on technicalities, that the delay was occasioned by mistake on the part of the Plaintiff's Counsel which mistake should not be visited upon the Client. The Plaintiff's Counsel further deponed that he was appointed to serve the Nairobi County Government and as such his schedule was messed up. He also deponed that the same has global implications as the witnesses are from Namibia and South Africa and dismissing the case will be highly prejudicial to the Plaintiff. The deponent also stated that there were discussions between him and Mr. Frazer Advocate, for the 1st and 2nd Defendants to consider withdrawing the case against the 2nd Defendant in good faith and without prejudice. The above are among the grounds set out in the Affidavit and the Plaintiff urged the Court to be lenient and allow him to prosecute his case on merits since the matter is ready for hearing.

The 1st and 2nd Defendants filed their Affidavit dated 12th January, 2018 sworn by Kenneth Alison Fraser, the Advocate for the 1st and 2nd Respondents. The deponent gave a chronology of the suit annexing the correspondences between them, and the Plaintiff's Advocate since the suit was filed. From the Affidavit, it is clear that the deponent had on several occasions engaged the Plaintiff's Advocate to provide them with the witness statements for two of the Plaintiff's witnesses as well as some of the documents mentioned in the Plaintiff's list of documents. The deponent also confirmed that he had a conversation with the Plaintiff's advocate on 3rd February, 2016 with a view of having the case against the 1st and 2nd Defendants withdrawn.

The last time this matter was in court was on 6th April, 2016 when it was stood over generally as there was no appearance on the part of the plaintiff. From the affidavit, the last time the parties engaged was on 11th January, 2017 when the Plaintiff wrote to the 1st and 2nd Defendants' Advocate inviting them on 19th January, 2017 to fix a hearing date. However, on the said date no hearing date was fixed as the court file could not be traced and since then the Plaintiff failed to take any action to list the matter for pretrial directions. It was further deponed that the fact that the Plaintiff's Advocate was appointed to serve in the Nairobi County Government is not a reason for the delay.

I have considered the arguments by the Plaintiff and the 1st & 2nd Defendants in their Replying Affidavits. The 3rd, 4th and 5th Defendants

did not file their Replying Affidavits.

Order 17 Rule 2 of the Civil Procedure Rules, 2010 Provides that

“(1) 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.”

The last time the matter was in court was on 6th April, 2016 and a period of more than one year had lapsed by the time the Notice to Show Cause was issued on 9th October, 2017. The reasons advanced by the Plaintiff for the delay are that he was appointed to the Nairobi County Government which appointment affected his schedule. This is not a sufficient ground for the delay. If the Counsel was not able to carry on with the client’s instructions due to his new engagement, he ought to have withdrawn from acting for the Plaintiff. The fact that Counsels were discussing on the possibility of withdrawing the case against the 2nd defendant is also not a reason for failure to prosecute the mater.

The test for dismissal of a suit for want of prosecution was 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 Defendants and 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 though there is a prolonged delay justice can still be served despite the delay. The Defendants have not satisfied this court that they would be prejudiced by the delay. The fact that the Plaintiff had invited the Defendants for fixing a hearing date on 19th January, 2017 shows that despite the delay, the Plaintiff is still interested in prosecuting the matter and the reason why the date could not be fixed was because the file was missing as explained in the 1st and 2nd defendants’ Affidavit.

Therefore, the orders of this court are that the Plaintiff do prosecute the suit within the next 3 months from the date of this Ruling. The Plaintiff is also to supply the Defendants with any missing witness statements and documents which the Plaintiff seeks to rely on, within the next fourteen (14) days from the date of this Ruling. Failure to comply with any of the conditions hereinabove, the suit shall stand dismissed. Costs shall be in the cause.

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 1st Defendant

..... For the 2nd Defendant

..... For the 3rd Defendant

..... For the 4th Defendant

..... For the 5th Defendant

..... For the Plaintiff