



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 232 OF 2015**

**PATMOSE TECHNICAL SERVICES (K) LIMITED.....PLAINTIFF**

**VERSUS**

**KIPKOECH TANUI.....1<sup>ST</sup> DEFENDANT**

**THE STANDARD LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff filed this suit against the defendants jointly and severally following a publication in a newspaper owned by the 2<sup>nd</sup> defendant and allegedly authored by the 1<sup>st</sup> defendant. His cause of action is based on libel and therefore claimed damages occasioned as a result of the said publication, and also an unqualified apology, withdrawal and retraction of the remarks made in the said statement which was in the 2<sup>nd</sup> defendant's website.

The plaint was filed on 23<sup>rd</sup> June, 2015 and upon service the defendant entered appearances on 29<sup>th</sup> June, 2016. The defence was filed on 27<sup>th</sup> July, 2016 wherein the defendants denied the plaintiff's claim. In that statement of defence the jurisdiction of this court is admitted.

There is now before me an application by the defendant by way of Notice of Motion under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 5 Rule 1 (6) and Rule 2 and Order 17 Rule 2 (3) of the Civil Procedure Rules for Orders that the plaintiff's entire suit be dismissed for want of prosecution and in the alternative the suit be deemed to have abated pursuant to Order 5 Rule 1 (6) and Rule 2 of the Civil Procedure Rules.

The reasons for seeking such orders are set out on the face of the application alongside a supporting affidavit sworn by the advocate for the defendants. The same is opposed and there is a replying affidavit sworn by the advocate for the plaintiff. The plaintiff filed submissions following the court directions for counsel to do so, but the defendant applicant did not do so. I have considered the material before me.

Annexed to the replying affidavit to the application is an affidavit of service sworn by one Jackson Muthii Gaturu a court process server who deponed that the defendants were served with summons to enter appearance on 17<sup>th</sup> June, 2016. That would contradict the Defendants assertion that they were served on 17<sup>th</sup> July, 2016.

It is clear that the defendants' averment that the summons were not served until 17<sup>th</sup> July, cannot be true because their own memorandum of appearance is dated 23<sup>rd</sup> June, 2016 and filed on 29<sup>th</sup> June, 2016. They could not have filed a memorandum of appearance before service of the summons so to do. That answers the allegation that summons were not served within the time allowed by law. It is not true therefore that the suit has abated as a result.

On the other hand Order 17 Rule 2 (1) provides that where no application has been made or any step taken by either party for one year the court may give notice to show cause why the suit should not be dismissed. Under rule 2 (3) any party may apply for the dismissal of a suit as provided under sub rule 1.

I have looked at the record before me. The defendants' application was filed on 12<sup>th</sup> September, 2017. It is dated 8<sup>th</sup> September, 2017. There is the plaintiff's list of issues dated 16<sup>th</sup> November, 2016 but filed on 10<sup>th</sup> November, 2017.

The order sought by the defendants is discretionary and the court is mandated to look at the pleadings, cause of action, the defence thereto and the circumstance leading to the delay.

The plaintiff has gone ahead and filed a statement of issues for determination. Going by the pleadings herein, no substantial prejudice has been alleged shall befall the defendants if the suit is allowed to go on for hearing. The cause of action is libel where evidence is likely to be

in print form. Evidence in print form is most likely persevered in an electronic device which may not rely on human memory for sustainability.

To strike out a pleading necessarily drives out a litigant without a hearing. Over a period of time, courts have tilted in favour of sustaining a suit rather than striking it out. By drawing issues for determination, the plaintiff has demonstrated its willingness to prosecute the suit, and in my view that intention should be put into practice.

Accordingly the application to strike out the plaint is declined and therefore dismissed. The costs shall be in the cause.

Pleadings having been closed parties shall not comply with Order 11 of the Civil Procedure Rules so that the suit is listed for hearing.

**Dated, signed and delivered at Nairobi this 9<sup>h</sup> Day of March, 2018.**

**A. MBOGHOLI MSAGHA**

**JUDGE**