



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 376 OF 2015

HON. ADAN KEYNAN WEHLIYE PLAINTIFF

VERSUS

STANDARD NEWSPAPER LIMITED..... 1ST DEFENDANT

NICHOLAS ASEGO 2ND DEFENDANT

RULING

1. The defendants in this suit moved the court by way of a Notice of Motion dated 9th February, 2018 seeking that the plaintiff's suit be dismissed with costs for want of prosecution. They also sought to be awarded costs of the application.

2. The application is anchored on grounds that since the defendants filed their statement of defence on 22nd March 2016, the plaintiff has failed to take any step to set down the suit for hearing and in the defendants' view, this is evidence that the plaintiff is not interested in prosecuting the suit. In the affidavit supporting the motion sworn by *Ms Caroline Cheruiyot*, a senior legal officer with the 1st defendant, it is deposed that this being a defamatory suit, it should be promptly prosecuted while both parties' evidence is fresh; when witnesses are available and have a clear recollection of the events leading to institution of the suit.

3. The application is opposed through an affidavit sworn on 20th April, 2018 by the plaintiff's counsel *Mr Patrick Kahonge*. Learned counsel deposed that the plaintiff has always been ready and willing to prosecute the suit as evidenced by his attendances in court on several occasions; that the defendants are yet to prosecute the preliminary objection raised in their statement of defence; that it is just and convenient that the plaintiff be given another chance to prosecute the suit.

4. The application was canvassed by way of oral submissions. Learned counsel *Mr Gitonga* and learned counsel *Mr Kahonge* made brief oral submissions buttressing the grounds relied upon by their respective clients in support of and in opposition to the motion.

5. I have considered the application, the affidavits on record and the rival submissions made on behalf of the parties. I have also perused the court record. The record does not support *Mr Kahonge's* claim that the plaintiff has always been ready to prosecute the suit and has attended court several times in the absence of the defendants. The record supports the defendants' submission that the last time the plaintiff attended court was on 18th February 2016 when he obtained injunctive relief against the defendants and then went to sleep only to be awakened by the instant application.

6. Under *Order 17 rule 2 (1), (2) and (3)* of the *Civil Procedure Rules (the Rules)*, the court has discretion to dismiss a suit for want of prosecution either on its own motion with notice to the parties or on application by any party if no application has been made or step taken by either party for one year and sufficient cause has not been shown to its satisfaction why the suit should not be dismissed.

7. The test in applications of this nature was laid down in the case of *Ivita V Kyumbu, [1984] KLR 441* as follows:

“The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.”

8. It is evident from the foregoing that in exercising its discretion under *Order 17 rule 2 (1)* of the *Rules*, the court must consider the length of the delay in question and whether there is a reasonable explanation for the delay; whether the delay impedes the fair trial of the suit and whether justice can still be done despite the delay whether prolonged or otherwise and if the court finds that justice can still be done despite the delay, it should sustain the suit and set it down for hearing instead of dismissing it.

9. In this case, it is admitted that the plaintiff has not taken any step to prosecute the suit since 18th February, 2016 when he obtained injunctive relief against the defendants. The explanation given for the delay that the plaintiff was waiting for the defendants to prosecute their preliminary objection and to comply with *order 11* of the *Rules* before fixing a hearing date is unsatisfactory since the pendency of a preliminary objection could not have prevented the plaintiff from taking steps to facilitate hearing of the suit. Secondly, if the defendants had not complied with order 11 of the rules, nothing stopped the plaintiff from fixing a mention date for directions on the way forward.

I am therefore not persuaded that the delay of about two years in taking any step towards prosecuting the suit has been satisfactorily explained.

10. It is however not lost on me that both parties to the suit have a duty to initiate steps to facilitate the hearing of a suit as can be seen from a reading of *Order 17 Rule 2 (1)*. But the plaintiff having instituted the suit and dragged the defendants to court has a greater responsibility of ensuring that the suit is prosecuted without undue delay.

11. The plaintiff has asserted that he is still willing and ready to prosecute the suit and requests this court to give him an opportunity to do so. In the new constitutional dispensation, courts are enjoined to administer substantive justice so that as far as possible, cases are determined on their merit. The Constitution at *Article 159 (2) (b)* also commands that justice shall not be delayed.

12. In this case, the court must balance the interests of the parties in a way that promotes the constitutional principles that guide the administration of justice and in a way that does not occasion the defendants much prejudice. Having this in mind, I think that the ends of justice will be served more by sustaining the suit but on conditions that would ensure its expeditious disposal than by dismissing it as prayed. I have also considered the fact that if the application was refused, the defendants are not likely to suffer any prejudice that cannot be ameliorated by an award of costs.

I therefore decline to allow the application. The plaintiff is given another chance to prosecute the suit but on condition that he shall prosecute it within the next six months in default of which it shall stand dismissed with costs to the defendants.

13. Since the defendants were entitled to move the court for dismissal of the suit owing to the plaintiff's lack of diligence in prosecuting the same, they are awarded costs of the application.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 21st day of June, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr Kiptum for Mr Gitonga: for the Defendant/Applicant

Ms Motuku for Mr Kahonge: for the Plaintiff/Respondent

Mr Fidel Salach: Court Clerk