REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 141 OF 2010

WANJUKI MUCHEMI ..... PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED ..... 1ST DEFENDANT

KIPKOECH TANUI ..... 2ND DEFENDANT

CYRUS OMBATI.....3RD DEFENDANT

RULING

1. In the Notice of motion dated 23rd March 2018, the defendants sought for dismissal of the plaintiff's suit for want of prosecution and that they be awarded costs of the application and the suit.

2. The application is premised on grounds stated on its face which are replicated in the supporting affidavit sworn on 23rd March 2018 by *Mr. Kevin Wakwaya*, an advocate practicing in the law firm of Rachier and Amollo Advocates LLP which is on record for the defendants.

3. The defendants contend that though the plaintiff instituted the suit in the year 2010, he has failed to take any step to have it prosecuted to date; that this is the second application the defendants are making to have the suit dismissed for want of prosecution, the first one having been made on 3rd April 2016; that though the court dismissed the application and gave the plaintiff a chance to prosecute the suit, he failed to utilize the opportunity and persisted in being indolent.

4. It is the defendants' case that the delay in prosecuting the suit is inordinate and inexcusable and is a clear pointer to the fact that the plaintiff has lost interest in his case; that the continued pendency of the case is prejudicial to the applicants as it will lead to escalation of costs and may affect the quality of evidence to be adduced in support of their defence because the memories of their witnesses may be compromised by age and health related factors.

5. The application is opposed through a replying affidavit sworn by the plaintiff's learned counsel *Mr. Joram Mwendwa Quantai*. Counsel deposed that the delay in prosecuting the suit was not intentional but was caused by confusion created by the defendant's failure to prosecute the first application for dismissal; that if the instant application was allowed, the plaintiff will suffer prejudice as he is ready and willing to prosecute his case within the time that the court will grant.

5. On the date fixed for hearing, the defendants withdrew their application dated 23rd February 2016 to pave way for hearing of the instant application. Parties then agreed to have the application canvassed by way of written submissions which they duly filed.

6. I have considered the application, the court record, the rival submissions made by the parties and the authorities cited. I find that the only issue which arises for my determination is whether the defendants have demonstrated that this is a suitable case for dismissal for want of prosecution.

8. The law governing dismissal of suits for want of prosecution is found in *Order 17 rule 2* of the *Civil Procedure Rules* (the Rules) which states as follows:

> **"(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.**

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1."

9. From the above provision, it is clear that the court has wide discretion in determining whether to dismiss or sustain a suit with or without conditions taking into account the facts and circumstances of each case. Needless to say, the exercise of this discretion is a judicial process which is guided by the law and is devoid of whim or caprice. There is a wealth of authorities that set out the principles which should guide the court in the exercise this discretion but for purposes of this application, it will suffice to cite just two of them.

10. I will start with the celebrated case of ***Ivita V Kyumbu, [1984] KLR 441*** in which *Chesoni J* (as he then was) laid the test to be applied in applications of this nature. He stated 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."**

11. In ***Jimmy Wafula Simiyu V Fidelity Commercial Bank Limited, [2014] eKLR*** which was cited with approval by *Gikonyo J* in **Patrick Ayisi Ingoi & Another V Madhau Bhalla T/A Taibjee & Bhalla Advocates & 2 Others, [2014] eKLR,** the court expressed itself in the following terms:

> **"No doubt the court has discretion to excuse a delay as long as it has been explained to the satisfaction of the Court. The satisfaction will come from the explanation given and the fact that the delay causes no substantial prejudice to fair trial or one of the parties or other or both. Therefore, the fact of delay per se does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay 1) is inordinate and inexcusable; and 2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. The Court will be interested in the nature and importance of the case, the right of the Plaintiff to be heard and the fact that summary dismissal of a suit drives away the Plaintiff from the seat of judgment; an arbitrary and draconian act comparable only to the proverbial ''sword of the Damocles''. And, for the Defendant, in order to complete the balancing, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice and Articles 48, 50 and 159 of the Constitution are the relevant guide here. Ultimately, as Chesoni J (as he then was) stated in the case of Ivita V Kyumbu, the Court should ask itself, whether, despite the delay, it is still possible to do justice for all the parties."**

12. From the above authorities, it is evident that the most important consideration the court should have in mind in deciding how to exercise its discretion is whether the applicant has given sufficient reasons to explain the delay in question to the satisfaction of the court; whether the delay is inordinate and inexcusable and even if the delay is prolonged, whether it will impede the fair trial of the action so that if justice can still be done to the parties despite the delay, the court should consider sustaining the suit on terms that will facilitate its expeditious disposal.

13. In this case, the court record confirms the defendants claim that the plaintiff instituted this suit on 11th March 2010, seeking inter alia general and aggravated damages for defamation. The defendants filed their joint statement of defence on 9th April 2010 denying liability as alleged in the plaint. The record also shows that the plaintiff filed his list of documents on 17th September 2010 and witness statements on 9th September 2016. There is no record of any filing of bundle of documents or witness statements by the defendants.

14. The record also confirms the defendants' submissions that since 15th December 2016 when the suit was fixed for mention, the plaintiff has not taken any action to set down the suit for hearing. This is admitted by the plaintiff in his submissions. The plaintiff however contends that he was hampered from taking any action in the suit due to the pendency of the defendants' application dated 23rd February 2016 which was withdrawn on 31st May 2018. It was also submitted on behalf of the plaintiff that *Order 17* of the *Rules* presupposes that all parties had complied with *Order 11* and that the suit had been certified ready for hearing and where those procedural steps had not been taken, *Order 17 rule 2* should not be invoked.

15. Given the foregoing facts, I find that it is not disputed that since 15th December 2016 when the case was fixed for mention, no further step was taken by the plaintiff to progress the suit for hearing prior to the filing of the first application dated 23rd February 2016. The mention did not materialize on that day and it is apparent that the court file was not produced in court since no proceedings were recorded by the court on that date.

16. The plaintiff has sought to explain the delay of about two years by claiming that it was caused by the applicant's failure to prosecute their application dated 23rd February 2016. Even if it is true that the defendants' aforesaid application remained pending till 31st May 2018 when it was withdrawn, the pendency of the application should not have prevented the plaintiff from moving the court to facilitate hearing of his case by for example fixing the case for mention for directions on the way forward considering that he had already complied with *Order 11* of the *Civil Procedure Rules* and the time given by the court for the defendants to comply with the same order had expired. The plaintiff also had the option of applying for dismissal of the defendants' application for want of prosecution to clear the way for hearing of his suit. He did not take any of these options which were available to him as would be expected of any diligent and proactive litigant. In fact, the record shows that the plaintiff did not take any action in this suit for the whole of year 2017. He appears to have been awakened from slumber by the instant application.

17. The argument that *Order 17* of the *Rules* can only be invoked after a suit has been certified ready for hearing is clearly misconceived. A

reading of the provisions of *Order 17* reveals that it is open ended meaning that it can be invoked at any stage in the life of a suit provided that no action had been taken by any party for a period of one year before dismissal of the suit is sought. And in as much as both parties are under an obligation under *Order 17* to initiate steps to facilitate hearing of a case, the plaintiff having instituted the suit in search of a remedy and having dragged the defendants to court bears a greater responsibility of ensuring that the suit is prosecuted without undue delay.

18. It is important to note that though the applicants had alleged that the plaintiff had previously been given another opportunity to prosecute the case after their application dated 3rd April 2016 was allegedly dismissed, I did not come across any record in the court file to confirm that the defendants had filed another application dated 3rd April 2016 which was dismissed. The record shows that this is the first application for dismissal that was prosecuted by the parties.

19. Given the reasons given by the plaintiff as shown above, I must say that I am not entirely satisfied that the plaintiff has satisfactorily explained the delay in having this suit prosecuted considering that it was filed way back in the year 2010. I however note that the plaintiff had complied with all the pretrial requirements and he now asserts that if given another chance, he is ready and willing to expeditiously prosecute the suit.

20. Though the defendants have claimed that further delay in the prosecution of the suit will occasion them prejudice in the form of escalation of costs and compromise of the quality of evidence they intend to adduce in support of their defence, they have not adduced any evidence to substantiate this claim. It is worth noting that the defendants did not file any witness statement together with their statement in defence as required by *Order 7 Rule 5* of the *Rules*. There is therefore nothing in the court record that would support the defendants' claim that further delay of the case would expose them to prejudice in terms of quality of evidence in support of their defence since there is no indication from the court record that they intended to call any witness in the first place. It is thus my finding that as matters stand now, if the application was dismissed, the defendants are not likely to suffer any prejudice that cannot be compensated by an award of costs.

21. On the other hand, if the application was allowed, the plaintiff will be highly prejudiced and will suffer injustice as he will be driven away from the seat of justice without being given an opportunity to be heard which will fly in the face of the constitutionally guaranteed principles of access to justice and the right to be heard.

22. Having weighted the interests of both parties, I find that the ends of justice will be better served by sustaining the suit on conditions that will ensure the expeditious disposal of the suit. I therefore decline to dismiss the suit on condition that the plaintiff will prosecute the same within six months from today's date in default of which the suit shall stand dismissed with costs to the defendants.

23. Costs of the application are awarded to the defendants.

It is so ordered.

DATED, DELIVERED and **SIGNED** at **NAIROBI** this 29th day of November, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Ms Mulumba holding brief for Mr. Mwenda for the plaintiff

No appearance for the defendants

Mr. Fidel: Court Assistant