REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 366 OF 2015

JOHNSON OTIENO ADERA.....PLAINTIFF

VERSUS

ANTI COUNTERFEIT AGENCY.....1ST DEFENDANT

JOHN EBENYO AKOTEN..... 2ND DEFENDANT

MICHAEL EKAI ANEMONE.....3RD DEFENDANT

ROYAL MEDIA SERVICES.....4TH DEFENDANT

RULING

1. In the Notice of Motion dated 10th March 2018, the 4th defendant (hereinafter the applicant) seeks that the plaintiff's suit be dismissed with costs for want of prosecution.

2. The application is premised on grounds stated on its face and the depositions made in the supporting affidavit sworn on 10th March 2018 by the applicant's learned counsel, *Mr. Karanja Munyori*.

3. The applicant contends that since filing the suit on 27th October 2015, the plaintiff has not taken any step to prosecute his suit; that the only action taken by the plaintiff in the matter was to file an application on 12th February 2016 seeking to strike out the pleadings filed by the 1st and 3rd defendants; that since then, no action has been taken to dispose of the application or to facilitate hearing of the main suit; that the plaintiff has lost interest in the suit and the same should be dismissed.

4. The application is opposed through a replying affidavit sworn by the plaintiff on 11th May 2018. In his affidavit, the plaintiff admitted that he filed the suit against the four defendants herein on 27th October 2015 but denied the applicant's claim that since then, he has not taken any action in the suit and that he has lost interest in its prosecution. He averred that pursuant to his application dated 12th February 2016, the Hon. Attorney General came on record for the 1st – 3rd defendants on 16th March 2016 and filed their statement of defence on 21st March 2016; that the application is now spent after the plaintiff and the 1st, 2nd and 3rd defendants entered a consent on 6th July 2016 striking out the 1st – 3rd defendants as parties to the suit; that he has already complied with *Order 11* of the *Civil Procedure Rules* and having noted that his previous advocates were delaying in prosecuting the suit, he engaged the firm of *Adera & Kenyatta Advocates* to take over conduct of the matter with express instructions to expedite hearing of the suit; that he is ready and willing to prosecute the suit once the 4th defendant complies with *Order 11* of the *Rules*.

5. By consent of the parties, the application was prosecuted by way of written submissions. The applicant filed its submissions on 22nd June 2018 while those of the plaintiff were filed on 3rd July 2018. I have carefully considered the application, the affidavits on record, the parties' rival submissions and the authorities cited. I have also perused the court record.

6. The law governing dismissal of suits for want of prosecution is set out in *Order 17 Rule (1) (2) and (3)* of the *Civil Procedure 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."

7. It is clear from the above provisions that this court has wide and unfettered discretion to decide whether to dismiss or sustain a suit with or without conditions where it is demonstrated that no action had been taken by the parties to prosecute a suit for a period of over one year. Like in any other judicial discretion, the discretion to dismiss or sustain suits must be exercised judiciously in accordance with the law taking into account the interests of justice and the facts and circumstances of each case.

8. There is a plethora of authorities that enunciate the principles which should guide the court in the exercise of its aforesaid discretion which includes the authorities cited by the parties herein. Most of these principles were summarized in the case of ***Ivita V Kyumbu, [1984] KLR 441*** which also laid down the test to be applied in applications such as the one under consideration. In that case the court held 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."

9. The most important consideration that the court should have in mind in deciding applications for dismissal of suits is the explanation given by the respondent for the delay complained about by the applicant; whether the delay is inordinate and inexcusable and whether it is likely to impede the process of a fair trial so that even if the delay is prolonged, 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.

10. In this case, it is not disputed that the plaintiff instituted a claim for *inter alia*, general and exemplary damages for defamation against the applicant and three other defendants on 27th October 2015. The court record confirms that the 4th defendant filed a memorandum of appearance and a statement of defence on 2nd December 2015. There are two sets of memorandum of appearance and statement of defence filed on behalf of the 1st, 2nd and 3rd defendants.

11. The first set was filed by the firm of *Sichangi Partners* on 11th November 2015 and 3rd December 2015 respectively while the second set was filed by the Hon. Attorney General on 21st March 2016. The record does not however show how the Hon. Attorney General came on record for the 1st – 3rd defendants and the context in which he filed a second set of memorandum of appearance and defence on behalf of the 1st – 3rd defendants. There appears to be an issue of legal representation for the 1st – 3rd defendants in this case but I choose not to delve into it now as it is not necessary for purposes of determining the current application. I have also noted from the record that though the firm of *Okoth & Company Advocates* who were previously on record for the plaintiff and the firm of *Sichangi Partners* filed a written consent dated 6th July 2016 to the effect that the plaintiff's suit be marked as settled against the 1st and 2nd defendants, that consent was not apparently adopted as an order of the court.

12. The plaintiff in explaining the delay of about two and half years in prosecuting the suit blamed his previous advocates for the delay and asserted that he has since taken remedial action by appointing another firm of advocates in June 2017 with express instructions to fast track hearing of the suit; that he has already complied with pretrial procedures and he is willing and ready to prosecute the suit once the 4th defendant complies with *Order 11* of the *Rules*.

13. I have confirmed from the court record that indeed the plaintiff filed two witness statements and a list of documents together with the plaint instituting the suit. The 1st – 3rd defendants also filed their list of witnesses, witness statements and list of documents on 8th December 2015 but the 4th defendant had not filed either a witness statement or list of documents by the date of filing the instant application. The 4th defendant has also not made any indication whether or not it intends to call any witness in this matter.

14. Though the reasons given by the plaintiff in his explanation for failure to prosecute the suit for over two years is not entirely satisfactory, I note from the record that it is indeed true that he appointed the firm of *Adera & Kenyatta Advocates* which took over conduct of the matter from the previous advocates on 14th June 2017. Given that the plaintiff has already complied with the pretrial directions and has shown interest in prosecuting his claim, in the interest of dispensing substantive justice, I am prepared to give him another chance to prosecute his suit so that the same can be heard and determined on merit.

15. I therefore decline to allow the application on condition that the plaintiff prosecutes his suit within the next six months from today's date in default of which the suit shall stand dismissed for want of prosecution with costs to the defendants.

16. The 4th defendant is awarded costs of the application.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 20th day of December, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Miss Nduta Kamau for the 4th defendant/applicant

No appearance for the 1st, 2nd and 3rd defendants

No appearance for the plaintiff/respondent

Miss Kavata: Court Assistant