



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL CASE NO. 61 OF 2013**

**HERON HOTEL LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MIGUNA MIGUNA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**NATION MEDIA GROUP LTD.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**JOSEPH ODINDO.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. The Applications dated 16<sup>th</sup> March, 2016 and 4<sup>th</sup> May, 2016 filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant seek orders that this suit be dismissed with costs for want of prosecution.
2. It is stated in the affidavits in support that this suit was filed by the Plaintiff on 25<sup>th</sup> February, 2013. That since the close of the pleadings the Plaintiff has not set the suit down for hearing and/or pre-trial directions or taken any steps in these proceedings. The Defendants claim that the suit has prejudiced them since the cause of action accrued over 3 years ago.
3. The application is opposed. The Respondent through it's counsel deponed a replying affidavit. It is stated that though the suit was filed on 25<sup>th</sup> February 2013, the Plaintiff only managed to serve the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants with suit papers after which they filed their defence on 14<sup>th</sup> May, 2013. It is further averred that the 1<sup>st</sup> Defendant was seldom in the country and that they only managed to serve him on 7<sup>th</sup> February 2014 after several attempts to do so. The Respondent explained that the delay was occasioned by the planned merger of Hamilton Harrison and Mathews Advocates with Oraro & Company Advocates to HHMOraro. That the merger gave rise to a conflict of interest in a related suit hence the firm of Kemboy & Co. Advocates was requested to take over the matter. That shortly thereafter there was a demerger of HHMOraro. That this case temporarily and inadvertently escaped the counsel's attention. The Respondent apologized for the delay and stated that it is ready to prosecute the suit.
4. Order 17 rule 2 of the Civil Procedure Rules provides for dismissal of suits 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.**

**(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”**

5. The principles governing the dismissal of a suit for want of prosecution are that delay must be inordinate, the inordinate delay is in-excusable and the Defendant is likely to be prejudiced. In the case of **Ivita vs Kyumbu [1984] KLR 441**; the court stated that:

**“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 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 disappearance of human memory resulting from lapse of time. The Defendant must however 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”**

6. In another Court of Appeal case of **Rajesh Rughani v Fifty Investments Limited & another [2016] eKLR**, the court held thus:

**“Keeping the foregoing test in mind, we are cognizant of the decisions of this court on mistakes by counsel. In Phillip Chemowolo & another v Augustine Kubede (1892-88) KAR 103 at 104, Apaloo, JA observed that it does not follow that “because a mistake has been made a party should suffer the penalty of not having his case heard on merit; that courts exist for the purpose of deciding rights of the parties and not the purpose of imposing discipline.” In Belinda Murai & Others v Amose Wainaina (1978) LLR 2782(CALL) Madam, JA stated that “the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better.”**

7. In the present case, it is apparent that the suit was filed on 25<sup>th</sup> February, 2013. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their defence on 14<sup>th</sup> May, 2013 while the 1<sup>st</sup> Defendant filed his statement of defence on 14<sup>th</sup> February 2014. Indeed as alleged by the Plaintiff, there has been inactivity in the file since 14<sup>th</sup> February, 2014, a period of over one year. The Defendants have proceeded to file the applications for dismissal of the suit for want of prosecution. The Respondent/Plaintiff has explained that the delay was occasioned by the merger between the firm of Oraro & Company Advocates and that of Hamilton Harrison Mathews Advocates which gave rise to a conflict of interest in a related matter. The counsel has further explained that after the demerger, the matter escaped his mind as the firm re-organized internally.

8. The delay of more than a year can be termed as inordinate, especially in the spirit of Order 17 rule 2 of the Civil Procedure Rules quoted above. However, following the reasons for the delay advanced by the Plaintiff, which reasons are satisfactory, justice can still be done between the parties. The Plaintiff has averred that it is ready to prosecute the suit. The suit can be heard on priority basis to avert any further prejudice to the Defendants.

9. In the premises, the two applications are dismissed. Costs to the Defendants. The Plaintiff to take steps to have Order 11 Civil Procedure Act compiled with. The case to be fixed for pre-trial directions within 60 days from the date hereof. In default the suit to stand dismissed.

Dated, signed and delivered at Nairobi this 26<sup>th</sup> day of Jan., 2017

**B.THURANIRA JADEN**

**JUDGE**