



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 631 OF 2009**

**MACHARIA WAIGURU .....PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED & 3 OTHERS .....DEFENDANT**

**RULING**

The plaintiff filed this suit against the defendants jointly and severally for general and exemplary damages for defamation. He alleged that the defendants had published an article alleging that he was no longer an advocate, his name having been removed from the role of advocates for dishonesty and theft, which the defendants knew was false and malicious.

The defendants denied the plaintiff's claim in the statement of defence and pleaded fair comment and public interest. At some stage the plaintiff filed an application to strike out the defence, but in a ruling dated 27<sup>th</sup> September, 2010 Mwera J, (as he then was) dismissed the application with costs. Thereafter, no steps have been taken to prosecute the suit.

The defendants then filed an application dated 3<sup>rd</sup> June, 2015 under Order 17 Rule 2 (3), Order 52 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, seeking the dismissal of the plaintiff's suit against the defendants for want of prosecution. The defendants have also asked for costs. The reasons set out on the face of the application are that the plaintiff has never set down the suit for hearing or pre-trial directions; the plaintiff has lost interest in prosecuting the suit and that it would be in the interest of justice to allow the application.

There is an affidavit sworn by the advocate for the defendants in support of the application. The application is opposed and there is a replying affidavit sworn by the plaintiff. The application was heard by Ombija J on 4<sup>th</sup> February, 2016 where both parties addressed the court and the ruling reserved for delivery on 31<sup>st</sup> March, 2016. The ruling was not delivered on the appointed date and subsequent thereto, the judge retired.

I have looked at the cited provisions of law, the affidavits and submissions on record. It is true that there has been inordinate delay on the part of the plaintiff to prosecute this suit. The excuse pleaded by the plaintiff that the suit was filed under the old provisions may not go very far, in view of the provisions relating to dismissal of suits under the Civil Procedure Rules. That notwithstanding, the dismissal of a suit is a very drastic measure, which should be invoked only in deserving cases.

There is no submission that the suit requires any amendment. Mwera J addressed most of the issues relating thereto. In particular, in the rulings cited above the judge said as follows,

***“In this stage of pleadings it is only proper, prudent and fair that parties be heard in a trial. Evidence being tendered would be subjected to the rigours of cross-examination thereby enabling the court to determine whether the publications complained of targeted the plaintiff and they defamed him. It is a very draconian stance indeed at the interlocutory stage in a defamation suit to urge the court to strike out a pleading, here a defence, and then move to find for the plaintiff. Claims of malice, recklessness, and falsehoods can be better determined on evidence laid and appreciated at a trial not on affidavits. That is what the plaintiff appears to seek at this point.”***

Courts are inclined to sustain a suit rather than dismiss the same. Rules of natural justice require that no party should be driven out of the seat of judgment or in other words, be locked out of court before a hearing. While agreeing that the plaintiff has been indolent in the prosecution of the suit, it is my considered view that he should be given another chance.

Accordingly, the application is dismissed but the plaintiff shall pay the defendants the costs occasioned by this application.

**Dated and delivered at Nairobi this 26<sup>th</sup> Day of April, 2017**

**A. MBOGHOLI MSAGHA**

**JUDGE**