



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 138 OF 2008**

**GEORGE OMONDI OBUDHO**

**T/A G.A. OBUDHO & CO. ADVOCATES.....PLAINTIFF**

**VERSUS**

**GEORGE KIPRONO KIMETTO.....1<sup>ST</sup> DEFENDANT**

**THE STANDARD LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> defendant prays that this suit be dismissed for want of prosecution. The grounds are set out in the notice of motion dated 15<sup>th</sup> December 2011; and, the deposition sworn by Stephen Ligunya, an advocate retained by the 2<sup>nd</sup> defendant. The pith of the motion is that the plaintiff has lost interest in the suit.

2. The plaintiff opposes the application. There is a replying affidavit sworn on 15<sup>th</sup> October 2014 by George Obudho. He avers that that his conduct is not dilatory. He enumerates the following steps that he has taken towards prosecuting the suit: that he filed a reply to the defence on 3<sup>rd</sup> December 2008 and served; that he filed a list of documents on 20<sup>th</sup> April 2009 and served; that a draft statement of agreed issues was served on 27<sup>th</sup> April 2009 but has never been returned; and, that he set down the suit for hearing for the 6<sup>th</sup> June 2012 when it was stood over to a further mention on 19<sup>th</sup> September 2012 to allow the parties to comply with Order 11. By that date, the parties had not complied. In the meantime, the defendants lodged the present motion for dismissal which was not set down for hearing for over two years. The plaintiff reads mischief and malice in the motion. He states that the motion is defective and an abuse of court process. In a nutshell, the plaintiff's case is that the delay is not deliberate; and, that he is keen on prosecuting the suit.

3. On 27<sup>th</sup> April 2016, learned counsel for the applicant and respondent made brief oral submissions. I have considered the rival arguments and the list of authorities filed by the plaintiff on 15<sup>th</sup> October 2014. I have also paid heed to the records before me, the pleadings, and depositions.

4. The plaintiff filed the suit over *seven* years ago. To be more precise, the plaint was filed on 17<sup>th</sup> October 2008. The plaintiff claimed that the defendants had defamed him in an article published in their newspaper on 16<sup>th</sup> July 2008. He prayed for damages, an apology and costs. The 2<sup>nd</sup> defendant filed a

statement of defence on 17<sup>th</sup> November 2008 denying the claim *in toto*. A reply to the defence was tendered on 3<sup>rd</sup> December 2008. The 1<sup>st</sup> defendant also filed a defence on 17<sup>th</sup> April 2009. He equally joined issues with the plaintiff.

5. Under Order 17 rules 2 (1), (2) and (3) of the Civil Procedure Rules 2010, if no step is taken in any suit by either party for *one year*, any party may apply to the court for dismissal of the suit.

6. I have studied the court record. The present motion dated 15<sup>th</sup> December 2011 bears no court stamp. But I can safely presume it was filed on or about 9<sup>th</sup> February 2012. I say so from the assessment of court filing fees of that date. So a period of *over two years* had passed since the close of pleadings. I find that the motion is properly before the court. It is thus a poor strategy for the plaintiff to attack the motion on technicalities.

7. I have also noted from the record that the suit was last in *court for mention* on 19<sup>th</sup> September 2012. It had earlier been fixed for hearing on 2<sup>nd</sup> March 2011; and, 6<sup>th</sup> June 2012 but could not proceed as all the parties had not complied with Order 11 of the Civil Procedure Rules 2010. There is also evidence that the plaintiff had drafted issues for determination by the court and served the defendants.

8. The court has inherent power to strike out a dormant suit. The power was well explained in *Mukisa Biscuit Manufacturing Company v West End Distributors Ltd* [1969] EA 696. The test in a matter of this nature was well laid out in *Ivita v Kyumbu* [1984] KLR 441. It is whether the delay is *prolonged* and *inexcusable*, and if it is, whether justice can still be done. In that event, instead of dismissal, the court may exercise its discretion to set the suit down for hearing.

9. From the record, it is *not* true that the plaintiff has never taken *any* step to fix the matter for hearing. The matter was listed for hearing but taken out for mention to allow parties comply with Order 11. But I accept that since the last *mention* on 19<sup>th</sup> September 2012, no further concrete *step* has been taken by the plaintiff to fix the suit for hearing. The truth is that the plaintiff is scapegoating. The bitter truth is that the plaintiff has gone into slumber. I accept that the delay was partly caused by the filing of the present motion. But the delay is still inexcusable in the circumstances.

10. This court is now enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Stephen Boro Gitiha v Family Finance Bank & 3 others*. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR. The instant suit relates to defamation of an advocate by a newspaper with national circulation. The 2<sup>nd</sup> defendant is itself guilty of laches in prosecuting this motion. I am *not* satisfied that it would be *just* to dismiss the suit for want of prosecution. However, I will grant the 2<sup>nd</sup> defendant thrown away costs and set some other conditions. That will perhaps assuage the 2<sup>nd</sup> defendant; and, keep the plaintiff wide awake.

11. The upshot is that the 2<sup>nd</sup> defendant's notice of motion dated 15<sup>th</sup> December 2011 is *dismissed*. The plaintiff shall however pay the 2<sup>nd</sup> defendant *thrown away* costs of Kshs 10,000 within the next *thirty* days. The plaintiff shall also ensure that the main suit is set down for *hearing* within *one hundred and twenty days* of today's date. If the plaintiff fails to meet *any* of the two conditions within the set *time*, the suit shall automatically stand *dismissed*.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 28<sup>th</sup> day of April 2016.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Gachoka for the plaintiff instructed by G. A. Obudho & Company Advocates.

Mr. Wambua Kigamwa for the 1<sup>st</sup> defendant instructed by Kairu Mbuthia & Company Advocates.

Mr. Oribo for Mr. Gichamba for the 2<sup>nd</sup> defendant instructed by Rachier & Amollo Advocates.

Mr. J. Kemboi, Court clerk.