



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 369 OF 2013

GARE COMMUNITY DEVELOPMENT SOCIETY.....1ST PLAINTIFF

ALI NUR SHEIKH2ND PLAINTIFF

V E R S U S –

ISSAK ELMI.....1ST DEFENDANT

NATION MEDIA GROUP.....2ND DEFENDANT

RULING

1) The applicant **Nation Media Group Limited** took out a motion dated 16th December 2015 where it sought orders to wit:

- 1. THAT the plaintiff's suit against the second defendant be dismissed for want of prosecution.***
- 2. THAT the costs of this application and suit herein be awarded to the second defendant.***

2) The respondent have not responded to the application. An affidavit of service deponed by one **Josephine Kwamboka Obiri** was filed. According to the affidavit, the plaintiffs' advocates were served with the current application but they are yet to file a response to the application. When the matter came up for interpartes hearing before me on 29th February 2016, **Mr. Ochieng** appearing for the plaintiffs sought more time to put in a replying affidavit and claimed that the delay was occasioned by his failure to locate his client for instructions. He was granted an adjournment to put in his replying affidavit. He has not done so to date but has put in grounds of opposition.

3) I have considered the grounds as stated on the face of the motion plus the facts deponed in the affidavit sworn and filed in support of the motion and those of the ground of opposition. When the matter came up for interpartes hearing, the applicants advocate **Miss Serem**, submitted that since the plaintiff obtained injunction orders on 6th September 2013, the plaintiff has lost interest to pursue the matter which matter was last in court on 3rd October 2015. She argued that it will be difficult to secure witnesses who are journalists, which will be prejudicial to the defendant. She argued that there is no rebuttal to the 2nd defendants supporting affidavit since the plaintiff only filed grounds of opposition. She concluded that should the court indulge the plaintiff, then she should be given thrown away costs and strict timelines to comply with pre-trial conditions.

4) **Mr. Ouma**, counsel for the plaintiff on his part opposed the application and stated that he was unable to file a replying affidavit since his client is out of the country. He informed this court that the delay was occasioned by the fact that he had to obtain the client's file from the firm of S. Kuloba Advocates. He pleaded for time in court.

5) I have perused the court record. It is apparent that this suit was filed on 6th September 2013. The 2nd defendant filed his defence on 18th October 2013 and a response to the defence was filed by the plaintiff on 4th November 2013. The 1st defendant did not file his pleadings. Given that the reply to the defence was filed on 4th November 2013 then the pleadings closed as at that day. According to Order 11 rule 1 of the Civil Procedure Rules, the plaintiff is required after the close of the pleadings to file and serve the pre-trial questionnaire within 10 days. But he has not done so to date. There has been inactivity since the close of pleadings. Indeed, as inferred by the plaintiff, there was a notice of change of advocates filed on 15th October 2013. However, even with the change of advocates the next time there was any activity in the file was on 18th December when the current application was fixed for hearing. This was a span of approximately two years. Even at this juncture, learned counsel appearing for the plaintiff claims that the plaintiff is not in the country and that he does have not instructions from the plaintiff.

6) The test for dismissal of a suit for want of prosecution was restated in the case of **Rajesh Rughani vs Fifty Investment Limited & Another (2016) eKLR** when the Court of Appeal referred to the case of **Ivita v Kyumbu (1984) KLR 441**, where the court held as follows:

“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 the defendant so both parties to the suit must be considered and the position to the judge too, because it is not an easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time, the defendant must 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.

7) The question therefore is whether the plaintiff has given a satisfactory explanation for the over 2 years delay in prosecuting the suit and whether such delay is inordinate. In the instant case, the plaintiffs' advocates have blamed the delay on the change of advocates since they allegedly took time to obtain the clients file from the former firm of A. S. Kuloba & Wangila Advocates. As I stated earlier the notice of change of was filed on 15th October 2013, therefore it cannot have possibly taken the advocates a whole two years plus to obtain the clients' file. The plaintiffs are not being candid with the court. This explanation is not convincing nor plausible.

8) Moreover, a delay of over two years is inordinate, the late Justice Chesoni in the **Ivita v Kyumbu supra**, dismissed the suit for want of prosecution due to 4½ delay and he stated further that where an action has been dormant for 12 months or more, then a defendant is entitled to dismissal of the suit for want of prosecution unless the plaintiff shows sufficient reasons for non dismissal. It has been more than 12 months and no sufficient reasons have been shown in this case to justify the delay. The applicant is adamant that will be very difficult to secure witnesses due to lapse of time, sentiments that I agree with in light of the **Rajesh Rughani** case Supra.

9) In the end, I find that the plaintiff has not provided sufficient explanation for the delay and as such I allow the application as prayed. The applicant to have costs of the suit and application.

Dated, Signed and Delivered in open court this 28th day of October, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant