REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.114 OF 2005

JOHN HARUN MWAU……..PLAINTIFF

VERSUS

THE STANDARD LIMITED……..…….1ST DEFENDANT

TOM MSHINDI……..……2ND DEFENDANT

MUTUMA MATHIU……..……..3RD DEFENDANT

R U L I N G

The application for determination is the Notice Motion dated 31st May 2013 brought under Order 17 Rules 2 and Order 51 Rules1 of the Civil Procedure Rules 2010, seeking to dismiss the suit for want of prosecution as against the Plaintiff/Respondent.

The application is premised on the ground that it has been more than one year since the matter was in court and the respondent has failed to set it down for hearing. The Applicant claims that the matter was last in court on 28th September 2011.

During the oral canvassing of the application, Miss Kamau for the Applicant told the court that the last substantive action by the Plaintiff was on 9th November 2010 when a consent was recorded to settle a similar application and the matter was fixed for hearing of the main suit. On 28th September 2011 the matter was taken out of the cause list and the parties ordered to take fresh dates. Thereafter no action was taken until Plaintiff/respondent was served with the application to dismiss the suit.

Miss Kamau further stated that the current application was the third application to dismiss this case. The first application was dismissed in February 2006 and in the second application the parties entered consent allowing the parties to prosecute the suit. Counsel claims that four years down the line the Plaintiff has not prosecuted the suit forcing them to file the current application. She states that this being a defamation suit prompt prosecution was required while the facts and evidence is still fresh.

In reply, the Plaintiff/Respondent filed a replying affidavit dated 17th March 2014 opposing the application. The Plaintiff/respondent avers that they invited the Defendant's advocates to attend the registry on 3rd February 2012 with a view to fixing a hearing date .The dates were not taken since the court file could not be traced. Once again on the 23rd October 2013 the Defendants /Applicants were invited to attend the registry on the 5th day of November with a view of fixing the matter again which exercise was not successful.

The Plaintiff/Respondent states that the delay in prosecuting this matter is attributable to the fact that the High Court was hearing the election petition the better part of the 2013 and matters in the Civil Division were not being heard since the learned judges were engaged in the petition. Odera, counsel for the Plaintiff told the court they had filed and served their list of issues and documents in October 2008 and the Defendant have not filed any documents and therefore they have failed to comply with order 11 of the Civil Procedure Rules.

Having set out the respective parties' positions as above, I am of the view that the only issue for determination is whether on the facts and circumstances of this case the Applicant is entitled to the orders sought.

The law on dismissal of a suit for want of prosecution is set out in Order 17 Rule 2 of the Civil Procedure Rules which provides as follows:

> ***"2. (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."***

From the above provision of the law, thereare two tests to be satisfied for the dismissal of a suit for want of prosecution. The first one is whether the threshold of one year's delay in prosecuting a suit has been met. The second test is that the delay must be inexcusable.

In the instant case, it is common ground that the matter was last in court on 28th day of September 2011 although the court record shows that the matter was last in court on 9th November 2010 before Rawal J. The Plaintiff claims to have attempted to fix the matter for hearing in the year 2012 and again in 2013, but all in vain. He explains that in the first attempt the matter could not be fixed for hearing because the court file could not be traced. And in the second attempt, the courts were busy with election petitions. In my view the threshold of one year in this case has been met. The delay in this case is over one year.

In applying the second test that the delay must be inexcusable, the Plaintiff claims that the delay is attributed to the fact that election petitions were going on in the High Court and the judges in the civil division were engaged. While it is probably true to state that most judges in the Division were engaged in Election Petitions for six months, it is also true to state that there was sufficient space and opportunity before and after the elections to fix the case for hearing and prosecute the case.

It is further noted that the Plaintiff has before been guilty of the same conduct of sitting back and doing nothing to bring this litigation to an end. This court, minding the fact that its main purpose is to sustain suits, earlier dismissed or set aside applications brought for dismissal filed by the Defendant.

To answer the second issue therefore, whether the delay herein was inexcusable the test applicable is that one applied in **Ngwambu Ivija Vs Akton Mutua Khumbu HCCC 340 OF 1991 (unreported)** where the court said thus: -

> ***"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. The Defendant must, however, satisfy the court that he will be prejudiced by the delay. He must show that justice will not be done in the case due to 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. Where the Defendant satisfies the court that there has been prolonged delay and the Plaintiff does not give sufficient reason for the delay, the court will presume the delay is not only prolonged but it is also inexcusable and in such a case the suit may be dismissed."

In this case, the Defendant has indeed satisfied this court that the delay is prolonged. The Plaintiff has not satisfied the court that the prolonged delay was excusable. The suit is a defamation suit which should be prosecuted while the facts and evidence are still fresh. The facts upon which this suit is based are alleged to have occurred in the year 2004 – a period about ten years ago. The witnesses may have been affected by age and health and even if they could be alive, their memories may not as human beings, sustain the facts as they ought. It is very unlikely that justice will be done in such a case.

The conclusion this court reaches, therefore, is that the Defendant has demonstrated that the proven delay is inexcusable and the court should exercise its discretion to dismiss this suit for want of prosecution. Accordingly, the suit is hereby dismissed with costs to the Defendants. Orders accordingly.

Dated and delivered at Nairobi this 19th day of February, 2015.

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D A ONYANCHA

JUDGE