



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 536 OF 2008

POLYCARP OMOLO OCHILLO.....PLAINTIFF

V E R S U S

NATION MEDIA GROUP LIMITED.....DEFENDANT

RULING

The Plaintiff filed this case on 25th November 2008. It is a claim for damages for defamation. The Defendant entered appearance on 22nd December 2008 and filed defence on 20th January 2009. On 17th February 2009 the Plaintiff filed a Chamber Summons which sought to strike out the Defendant's defence which application was dismissed.

Then on 6th November 2013, the Defendant applied by a Notice of Motion dated 1st October 2013 for dismissal of the Plaintiff's suit for want of prosecution under Order 17, rule 2(1) & (3) of the Civil Procedure Rules (the Rules). That application is the subject of this ruling.

The grounds for the application appearing on the face thereof include –

- (i) That the plaintiff has refused, neglected and/or otherwise failed to take any steps for “over three (3) years and four (4) months since the close of pleadings”.
- (ii) That the suit has caused the Defendant great anxiety and it should not be allowed to hang over its head.
- (iii) That the plaintiff has lost interest in the suit and it is in the interest of justice that every litigation comes to an end.

There is a supporting affidavit sworn by one Maureen Maitai, the Advocate for the Defendant. She has deponed, *inter alia*, that it is more than Four (4) years Eight (8) months since the suit was filed in court; that there is no justifiable ground for the delay; the delay has resulted in abuse of the court process.

The Plaintiff through his advocate Elisha Ongoya has opposed the application by his replying affidavit filed on 21st May 2014. He has deponed -

- (i) That he got instructions to act for the Plaintiff while practicing at the firm of Asiema & Co. Advocates and took the necessary steps to have the matter filed in court including the Chamber Summons filed on 17th February 2010 for striking out defence.
- (ii) That when the application was dismissed he took steps to fix the matter for hearing on 14th December 2012 but the same did not proceed.
- (iii) That he left the firm of Asiema & Co. Advocates to establish Ongoya & Wambola Advocates and thus began 'the long winded administrative process of sharing clients which has not been fully completed to date'.
- (iv) That as this file was part of the matters affected by the change of firms, its prosecution was delayed.
- (v) That the Plaintiff's zeal to litigate this matter remains the same as it was when the matter was filed. The Plaintiff should thus not be driven 'out of the seat of judgment due to a process he was not in control of'.
- (vi) That the Plaintiff should not be visited with mistakes for which his advocate is responsible.

The court has considered the submissions of the learned counsel for the Defendant and those of the Plaintiff, including the cases cited.

Delay in prosecuting the case has been since 14th December 2011 when the suit was to come up for hearing.

The Defendant's counsel concedes that there has been delay in prosecution of the suit. He has explained the reason for delay in prosecuting the case as being the long-winded administrative process of change-over from one law firm to the other. That is a reasonable explanation. He has explained further that the firm of Asiema & Co. Advocates could not cease acting for the Plaintiff as that would have amounted to denying the Plaintiff representation during the negotiations. That is also believable.

The court must always endeavor to determine issues between parties upon a proper trial of the action. However, the court will not hesitate to dismiss an action for want of prosecution where a fair trial will no longer be possible because of the delay. But where no injustice will be occasioned to the defendant, the court's inclination should be to sustain the suit rather than to dismiss it unheard. In the present case there is no likelihood of prejudice to the Defendant and none has been pleaded.

In the event, the Defendant's application is refused, but upon the following conditions –

- (a) The Plaintiff must within sixty (60) days of today take demonstrable steps towards prosecution of the case. In default there will be liberty to apply.
- (b) The Plaintiff shall pay the Defendant's costs of this application, within fourteen (14) days of delivery of this ruling.

Those shall be the orders of the court.

Dated and delivered at Nairobi this 19th Day of March, 2015.

A.MBOGHOLI MSAGHA

JUDGE

