



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 74 OF 2009

HOSEA K. KILI.....PLAINTIFF

V E R S U S

THE NAIROBI STAR PUBLICATIONS LTD

NZAU MUSAU.....DEFENDANT

RULING

This is an application (Notice of Motion dated 10th June 2014) by the Defendants seeking an order for dismissal of the Plaintiff's suit for want of prosecution. It is brought under Section 1A, 1B and 3A of the Civil Procedure Act (the Act); Order 17, rule 2 (3) and Order 51 Rule 1 of the Civil Procedure Rules (the Rules).

It is the Defendants' case that since 19th July 2011 when the suit was last set for hearing, the Plaintiff has not taken any steps to prosecute the suit. A chronology of events is set out in the supporting affidavit sworn by William Pike, the Chief Executive Officer of the 1st Defendant.

The Plaintiff has opposed the application as set out in the replying affidavit filed on 26th November 2014 which is sworn by Richard Malebe counsel for the Plaintiff. The grounds for opposing the application as disclosed by the replying affidavit are:-

1. That when the suit was last set for hearing it was not confirmed during the Call-Over for the month of July 2011.
2. That when the parties attempted to fix it for hearing in January 2012, they were asked to comply with the requirements of Order 11 of the Rules.
3. That it is the Defendants who afterwards on various occasions prevented prosecution of the suit by inviting the Plaintiff to seek an out-of-court settlement.
4. That it is the application herein which manifested the failure of the out of court settlement.
5. That in the year 2013 the High Court in fulfilment of constitutional dictates determined election petitions and sparingly gave hearing dates to litigants in other suits.
6. That the Plaintiff has since complied with pre-trial requirements and thus the court should exercise its discretion to have the matter set down for hearing to be determined on merit.

The parties filed written submissions addressing the contentious issues herein.

The Defendants contend that the Replying Affidavit is defective for being sworn by an advocate acting in

the matter, and that therefore it is incompetent.

It is common ground that the suit was removed from the cause list of 19th July 2011 in a call-over held before that date. It also appears from the court record that since then, the Plaintiff has not set down the suit for hearing.

Before considering the merits of the application, the issue raised about the alleged defect of the Replying Affidavit must be dealt with. It is submitted on behalf of the Defendants that paragraphs 13, 14, 15, 16, 20 and 22 of the Replying affidavit deposes to contentious matters concerning the direct communication between the parties, and that therefore the affidavit is defective and the paragraphs ought to be struck out.

Rule 3(1) of Order 19 of the Rules requires that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove,

“Provided that in interlocutory proceedings, or by leave of the court, an application may contain statements of information and belief showing the sources and grounds thereof.”

Though there is no rule of procedure or law barring an advocate acting in a matter from swearing an affidavit therein, where a party is available to swear an affidavit it is not desirable for an advocate to swear the affidavit because he thereby risks embarrassment by being cross-examined on the affidavit he has sworn. However, where the facts are such that he is able of his own to prove, or as provided for in the proviso to rule 3(1) above, the advocate may swear an affidavit, especially if his client is not readily available to swear the affidavit. Paragraphs 13, 14, 15, 16, 20 and 22 of the replying affidavit must therefore be struck out.

Regarding the merits of the application, the court will not dismiss a suit for want of prosecution unless it is satisfied:-

1. That the default has been intentional.
2. That there has been prolonged or inordinate and inexcusable delay on the part of the Plaintiff or his advocate.
3. That such delay will give rise to a substantial risk that it will not be possible to have a fair trial of the case, or is such as is likely to cause or to have caused serious prejudice to the defendant.
4. That except in cases of unbecoming conduct by the plaintiff, the power to dismiss an action for want of prosecution should not be exercised within the currency of any relevant period of limitation as the plaintiff could then simply file another action or these principles see **“HALSBURY’S LAWS of ENGLAND”, 4th Edition, Volume 37, paragraph 448**. The power to dismiss a suit for want of prosecution being so drastic, should be exercised only as a last resort, and where the suit can be heard without further delay, an application for dismissal ought to be refused.

Having considered the application at hand, there is no evidence that the Plaintiff has failed to prosecute the case due to some ulterior motive. Nor has he been in disobedience of any court order requiring him to take some action towards prosecution of the case.

But there has been a fairly long delay of some three (3) years between the removal of the suit from the hearing list of 19th July 2011 and the filing of this application on 9th June 2014. The Plaintiff did not take any action at all in those three years towards prosecution of the suit. There is no satisfactory explanation for the delay, which delay is inordinate and inexcusable in the circumstances of this case.

It has not, however, been demonstrated by the Defendants that the delay will give rise to a substantial risk; that it will not be possible to have a fair trial of the case, or that the delay is such as is likely to cause or has caused serious prejudice to them. For this reason alone the application must be refused. It is hereby dismissed. The Plaintiff should be condemned to pay costs for the delay to the Defendant. The same shall be paid within fourteen (14) days of delivery of this ruling.

The Plaintiff should within thirty (30) days of delivery of this ruling, take a demonstrable step towards prosecution of the suit. In default the suit shall stand dismissed for want of prosecution without necessity of any further application.

Dated, Signed and Delivered at Nairobi this 18th Day of March, 2015.

A MBOGHOLI MSAGHA

JUDGE