REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 1652 OF 2002

DR MOSES OTSYULA ……..…….PLAINTIFF

VERSUS

CHILDREN OF GOD RELIEF INSTITUTE …….DEFENDANT

RULING

This file is a consolidation of the suits **HCC 1652 of 2002** wherein the plaintiff is Dr Moses Otsyula suing Children of God Relief Institute a.k.a Nyumbani Watoto Wa Mungu claiming for general damages of character; **and HCC 318 of 2004** wherein the plaintiffs –Children of God Relief Institute and Rev. Dr. Angelo D' Agostino, SJ, MD sued Nation Media Group Ltd and Dr Moses Otsyula seeking for general damages; exemplary and aggravated damages; injunction; and special damages arising from alleged defamatory matter published by the 1st defendant at the instance of the 2nd defendant and concerning the plaintiff.

On 8th October 2007, the two suits were consolidated following an application dated 19th April 2007.On 26th July 2010, the parties appeared before Dulu J and Mr Kilonzo Junior for the plaintiff in HCC 213/2005 formerly HCC 318 of 2005 reported that the two suits had indeed been consolidated way back in 2007 but that ever since, the plaintiff in HCC 1652/2002 had been unwell with a stroke, making it impossible to proceed with the hearing because of the consolidation order. He proposed that the two cases do proceed to hearing separately. The matter was nonetheless adjourned to enable the parties advocates discuss and agree on the way forward and on 15th October 2010 the same issue was raised. On 12th November 2010 the parties were expected to reach and record a consent on separation of the two cases to allow one matter to precede the other owing to the ill health of Dr Moses Otsyula but no consent was forthcoming so it was stood over generally, with the court directing the plaintiff to apply for separation of suits. Since then, no action or steps were taken by either party to have the suits heard and it is that delay or inaction that prompted the 1st defendant/applicant to file the present application dated 24th October 2014 seeking to dismiss the suit for want of prosecution with costs to the 1st defendant Nation Media Group Ltd.

The application is predicated on the grounds that since 12th November 2010, no steps or action had been taken by the plaintiffs to set down the suit for hearing; the 1st defendant continues to suffer anxiety due to the pendency of the suit; the delay in prosecuting the suit will greatly prejudice the 1st defendant in terms of the accuracy of witnesses testimony and their availability as the matters concern publications made over 10 years ago; and that it is fair and just that the application be allowed.

The application is also supported by an affidavit sworn by Sekou Owino head of Legal of the 1st defendant/applicant Nation Media Group Ltd reiterating the history of the two suits following their consolidation on 8th October 2007 by Honourable Justice Onyacha and that since 12th November 2010 no steps have been taken by the plaintiffs to set down the matter for hearing and disposal. Mr Owino believes that the plaintiffs must have lost interest in their claims which was prejudicial to the 1st defendant hence it was fair, just and expedient that the suit be dismissed for want of prosecution.

The 1st plaintiff/respondent filed a replying affidavit sworn by Sister Mary Owens who deposes to the facts as set out by the 1st defendant adding that there was an attempt to have the mater settled out of court between the plaintiff Dr Otsyula and the institute but the latter declined. Further that their advocate had tried to set down the suit for hearing on several occasions as late as 3rd December 2013 hence she was opposed to the application seeking to dismiss the suit for want of prosecution as the 1st plaintiff was not responsible for the delay, since it is on record that the Dr Otsyula was ill and could not instruct his advocates in the matter.

Dr Otsyula did not file any replying affidavit or grounds of opposition as he was said to be stricken with a stroke and incapable of giving instructions. HIS ADVOCATE Mr Miyare nonetheless was allowed to submit on issues of law only.

The application was canvassed by way of oral submissions with Mr Khaseke advocate representing the applicant, Mr Miyare representing Dr Otsyula and Miss Makobu acting for the respondent in HCC 213/2015. Mr Khaseke reiterated the grounds in support of the application and the supporting affidavit, maintaining that there had been inordinate delay in setting down the suit for hearing. He blamed Dr Otsyula's counsel for their failure to apply to court for separation of the two suits to allow one case to proceed which delay had prejudiced the 1st defendant as the memory of witnesses fade.

Miss Makobu opposed the application on behalf of her client the **CHILDREN OF GOD RELIEF INSTITUTE** arguing that her client was not responsible for the delay in having the suit disposed of as Dr Otsyula was reportedly so ill that he was incapable of giving instructions even on a consent to separate the two files. She also submitted that in 2013 they tried to set down the matter for hearing, besides the parties attempting a negotiated out of court settlement which did not bear fruit.

Mr Miyare for Dr Otsyula submitted that the situation of this case was dire in that should the suit as consolidated be dismissed, innocent parties will be prejudiced. That his client was unable to give instructions and urged the court not to dismiss the suit as consolidated since Dr Otsyula deserved a chance to be heard in the matter.

In a brief rejoinder Mr Khaseke submitted that the letter dated 3rd December 2013 was never served or copied to them and neither was there evidence of what transpired on 6th December 2013. He maintained that the suits could not be pending forever and that is the reason why the court directed that an application be made to separate the consolidated suits. Mr Khaseke was categorical that his client was not opposed to the suit being maintained against the 2nd defendant Dr Otsyula who is also the plaintiff in HCC 1652/2002 since the suits continue to have separate numbers.

I have carefully considered the application by the 1st defendant Nation Group Ltd, the replying affidavit by the 1st plaintiff and oral submissions by the parties' respective counsels.

The only issue for determination is whether the suits herein as consolidated should be dismissed as against Nation Media Group Ltd for want of prosecution.

The power to dismiss a suit for want of prosecution is donated by Order 17 Rule 2 of the Civil Procedure (where no action or step taken for over one year and no cause is shown, Sections 1A,1B,3A of the Civil Procedure Act and Article159(2)(b) of the Constitution, which provisions all abhor delayed justice and command that justice shall be done without undue delay. Where there is delay,

undoubtedly, delay defeats equity and prejudices a party's legitimate expectation that the dispute shall be heard and determined expeditiously.

An application to dismiss suit for want of prosecution is reminiscent of a hunter being the hunted for inactivity. The power to dismiss suit for want of prosecution is nonetheless a discretionary power which should be exercised judiciously. See **Moses Muriira Maingi & 2 Others v Maingi Kamuru & Another Nyeri CA 151 of 2010,** citing with approval Chesoni J (as he then was) in **Ivita vs Kyumbu (1984) KLR 44** that :-

> ***"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 and the position of the judge too, because it is no easy task for the documents, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time.***
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> ***The defendant must however satisfy the court that he will be prejudiced by the delay or 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 before the court will execute its discretion in his favour and dismiss the action for want of prosecution. Thus , even if delay is prolonged if the court is satisfied with the plaintiff's explanation or excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."***

The above test can be summarized as under in **Halsbury's Laws of England VOL. 37 paragraph 448:**

> ***"The power to dismiss an action for want of prosecution, without giving the plaintiff the opportunity to remedy his default, will not be exercised unless the court is satisfied-***
>
> 1. ***That the default has been intentional and contumelious; or***
> 2. ***That there has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have cause serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."***

This court notes that the suits herein as consolidated are fairly old and there have been efforts in the past to have them heard and concluded including as at December 2013 after it became clear that a negotiated out of court settlement effort by Dr Otsyula with the Children of God Relief Institute failed to bear fruit. There is also every indication that immediately after consolidating the two suits, Dr Otsyula who is a plaintiff in one suit and a co-defendant with the applicant herein in the other suit fell ill. He developed a stroke which has disabled him from furnishing his advocates with instructions in the matter and all this happened before directions on the conduct of consolidated suits could be given by the court. It is therefore not possible to tell who is the plaintiff and who is the defendant since those positions overlap for some of the parties.

Dismissal of suit for want of prosecution is intended to prevent delayed justice or injustice and or abuse of court process. It is also trite that in any civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the steps at his disposal to achieve an expeditious determination of his claim. He should not b e guilty of laches. On the other hand, when the plaintiff fails to bring his claim to a speedy conclusion, a defendant ought to invoke the process of court towards that end as soon as is convenient by either applying for its dismissal or setting down the suit for hearing. Delay in deprecated by the law and more so, Article 159 of the Constitution which commands that justice shall be administered without undue delay. And it is the duty of the plaintiff to get on with the case. It is also trite that every year that passes prejudices the fair trial as witnesses may have died, documents mislaid, lost, destroyed and the memory tends to fade(see **Dickson J in Nilan v Pater (1969) EA Page 341.**

Nonetheless, it is also settled that delay is a matter to be decided on the circumstances of each case where a reason for the delay is offered,the court should be lenient and allow the plaintiff an opportunity have his case determined on merit (**see AGIP (K) Ltd v Highlands Tyres Ltd (2001) KLR 630.**

Whereas dismissal of a suit for want of prosecution is a matter of discretion of the court, a court of law should always avoid acting intuitively on such application or hastily dismiss a suit for want of prosecution, but rather, it should make further inquiries into the matter to establish whether

1. There has been inordinate delay on the part of the plaintiff in prosecuting the case.
2. The delay is intentional, contumelious and therefore inexcusable;
3. The delay is an abuse of the court process.
4. The delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant.
5. What prejudice will the dismissal occasion to the plaintiff?
6. The plaintiff has offered a reasonable explanation for the delay.
7. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court.

The delay herein is from 12th November 2010 when the case was stood over generally, which is over 4 ½ years. However, there was an attempt on 3rd December 2013 to invite the defence to fix a hearing dated but there is no evidence that parties attended court on 6th December 2013 to fix that date. Even if that were not to be the case, the record shows that since 2011 Dr Moses Otsyula suffered a stroke and cannot therefore testify.

There has been no attempt to file an application to enjoin a guardian ad litem to assist in prosecuting the suit on behalf of Dr. Otsyula who is also a defendant in one of the suits as consolidated. The plaintiff in the other matter has equally not set down the matter for trial and since they are also defendants and plaintiffs at the same time in different suits which are consolidated, they are webbed together in an inseparable cage.

In my humble view, therefore, If the 'suit' is dismissed, in the absence of clear directions as to whose 'suit' is being dismissed, I have no doubt in mind that an injustice will be occasioned to the parties hereto. This court is alive to the Constitutional dictates of Article 159 of the Constitution to render substantive justice to all parties to a dispute without undue delay, which principle, in my view, is overridden by the fundamental unlimited right to a fair hearing and the right to access justice.

Albeit there has been delay in setting down this matter for hearing this court appreciates the dilemma in which the parties find themselves in. It is not disputed that one of the parties is ill and cannot conduct proceedings on his own accord. On the other hand, the court while consolidating the two suits never gave directions as to how such a consolidated suit should be conducted. It has not been shown that the delay, though inordinate, is deliberate, contumelious and, therefore, inexcusable . It has also not been shown that the delay is an abuse of the court process.

This court is also alive to the fact that claims in both suits as consolidated are hinged on defamation of character, which tort is personal in nature, such that on the demise of a claimant, the cause of action abates as it does not survive a deceased claimants

In my view, in as much as there is delay, the interest of justice can still be served if the plaintiffs are given an opportunity to prosecute their case. I also find that the plaintiffs will be prejudiced if the suit is dismissed as it is not denied that Dr Otsyula, one of the plaintiffs is currently incapable of prosecuting the suit on his own. That explanation for the delay in my view is reasonable and acceptable to the court which must always accord parties a second chance and which in my view is not a lavish exercise of discretion.

The upshot of all the aforesaid is that the application on hand seeking for dismissal of the "suit" for want of prosecution is declined.

Nonetheless, to avoid a situation where pleadings are archived in court forever. I direct that either party may apply for separation of the suit herein as consolidated as there are special circumstances to warrant such separation. I further direct that counsel for Dr Otsyula do seek instruction from the ailing doctor's next of kin with a view to filing an appropriate application within the next 30 days from the date hereof.

Each party to bear their own costs of this application.

Dated, signed and delivered in open court at Nairobi this 15th day of September 2015.

R.E. ABURILI

JUDGE

15.9.2015

Coram R.E. Aburili J

C.A. Samuel

Mr Khaseke for the applicant

Miss Makobu for respondent

Court –Ruling read and delivered in open court at 2.30pm.

R.E. ABURILI

JUDGE

15.9.2015