

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 247 OF 2005

IMMANUEL KURIA WA GATHONI. RESPONDENT/PLAINTIFF

VERSUS

EAST AFRICAN STANDARD LIMITED. APPLICANT/1ST DEFENDANT

MATTHEW MUTUMA. APPLICANT/2ND DEFENDANT

R U L I N G

This application dated the 20th May, 2013 and filed by the Defendants, seeks the dismissal of this suit for lack of prosecution. It is based on the grounds that it has been more than one year since action was taken in it to push the suit to a hearing. That the last action was on 5th March, 2005 and that, therefore, the Plaintiff is not interested in the suit.

The applicant further argued that on each of the several occasions, the last one being on 8th October, 2012, when the Plaintiff purported to invite the Applicants to the court registry for the purpose of fixing a suitable hearing date, the Plaintiff always failed to attend. The Applicants further deponed that this being a defamation suit, it required to be prosecuted promptly when memories related to the complained of words are fresh in the witnesses minds.

In his replying affidavit however, sworn by the counsel, the Plaintiff denied the above grounds upon which this application is based. Mr. S Kimondo Mubea Advocate, swore that when they invited the Defendants to the court registry to fix a hearing date, a representative from his firm attended and that that information came to him from his clerk whom he had no reason not to believe. He stated further that the clerk always told him that the court file could not be traced. That the last time the clerk visited court was 8th October, 2012 and that on the said date the clerk was told that the diary for 2012 was full and closed. That in the year 2013 the same clerk forgot to obtain a suitable hearing date because he forgot to seek one until the 2013 diary was also full and closed sometimes in May, 2013.

Mr. S Kimondo Mubea further deponed that although in the year 2013, it was the Plaintiff's counsel who was at fault, the court should not penalize the Plaintiff in dismissing the suit for the mistake committed by his advocate.

Mr. Kimondo also stated that he has filed all the witness statements and when the Defendants do likewise the likelihood of fast progress will be achieved. He accordingly prayed that the suit be saved on the basis that the Plaintiff is keen to have it disposed of as soon as possible.

I have carefully considered the application. It cannot be denied that there has been inordinate delay in bringing this suit to a hearing. It is clear to the court that the Advocates of the Plaintiff have not put in sufficient effort to dispose of this case. That much they have admitted in the replying affidavit and have purported to hide behind the principle that protects parties from the indolence and negligence of their advocates. What, therefore, remains to be resolved is whether the indolence of the firm of Kimondo Mubea & Co. Advocates should be excused in this particular case.

The court has agonized over the matter. The principle referred to above cannot be over stretched. It cannot be used as a shield against inexcusable laziness and in proper cases, it can be distinguished and be overridden. In this case, however, the defendants claim that they always went to court on invitation to fix

a suitable hearing date and could not see the Plaintiff's representative. Why did they not take a suitable hearing date and serve a hearing notice upon the Plaintiff? After all, the principle under which such hearing dates are taken, also authorized the opposite party to take an ex parte date and issue a hearing notice! That, the Defendants herein failed, to do.

For the above reasons, the court is of the view that justice will be served by dismissing this application with costs of the same however, being paid by the Plaintiff's counsel to the Defendants, in view of the deficient conduct of the Plaintiff's counsel office. Orders accordingly.

Dated and delivered at Nairobi this 27th day of March, 2014.

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D A ONYANCHA

JUDGE