



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HCCC NO 856 OF 2005

DANIEL MUNGAI KARANJA.....PLAINTIFF

VERSUS

**1. ATTORNEY-GENERAL
2. STANDARD CHARTERED BANK LTD.....DEFENDANTS**

RULING

1. The Plaintiff's suit herein is for damages for malicious prosecution, defamation and wrongful dismissal. The Defendants entered appearance and filed defence.
2. The 2nd Defendant has applied by **notice of motion dated 21st February 2011** for dismissal of the suit for want of prosecution under **Order 17, rule 2** of the **Civil Procedure Rules, 2010** (the **Rules**). The ground for the application is that since 19th March 2009 when the case came up for hearing and was stood over generally the Plaintiff has failed to set the suit down for hearing. There is a brief supporting affidavit sworn by the 2nd Defendant's advocate, one **Caroline Serem**, which repeats the grounds on the face of the application.
3. The Plaintiff has opposed the application by his **replying affidavit filed on 26th February 2014**. While acknowledging the delay of about two (2) years he has offered this explanation for it – that his previous advocate, **Mr Mburu Mbugua** of M/s Mburu Mbugua & Co., died in December 2008; that he was unable to raise the deposit for fees of KShs 100,000/00 demanded by the advocates he subsequently instructed, M/s D G Kimani & Co.; and that he subsequently instructed his present advocates, M/s Omwoyo Masese & Co., who came on record on 16th January 2014.
4. At the hearing of the application learned counsel for the 1st Defendant stated that he supported the application. I have considered the submissions of the learned counsels, including the cases cited.
5. I earlier mentioned the brevity of the supporting affidavit. The thrust of the application is rendered as follows at paragraph 5 of the supporting affidavit without more -

“That the Plaintiff has not bothered to take any step to fix the suit...for hearing since the matter last came up for hearing.... I verily believe that the Plaintiff is no longer interested in prosecution of this matter.”

6. Dismissal of an action unheard is a drastic power which the court will be reluctant to exercise if a fair trial of the action is still possible without undue further delay. There is no averment in the supporting

affidavit that fair trial will no longer be possible for whatever reason. A statement from the bar to that effect is not sufficient.

7. I note from the court record that the Plaintiff filed his list and bundle of documents way back on 7th September 2007. I also note that the Defendants have not filed any lists and bundles of documents.

8. I accept that delay in prosecuting the case may have been contributed to by the death of the Plaintiff's first advocate in December 2008, and the Plaintiff's lack of the wherewithal to meet the deposit demanded by his new advocates. It would not be just to dismiss the case at this stage, and I will refuse the application. It is hereby dismissed.

9. I will direct that the Plaintiff do take demonstrable steps within thirty (30) days of delivery of this ruling towards hearing of the case. These steps will include taking necessary pre-trial directions under **Order 11** of the Rules.

10. The Plaintiff will also pay the 2nd Defendant's costs of this application, hereby assessed at KShs 10,000/00. The same must be paid within fourteen (14) days of delivery of this ruling. In default of the 2nd Defendant may execute for the same.

11. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF OCTOBER 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER 2014