REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 29 OF 2003

MAINA KIHARA ……..…….....….....PLAINTIFF

VERSUS

WAWERU NJOROGE

CATHERINE KASAVULI

MERCY OBURU

BEN AGINA

TERVIL AKOKO

ALEX CHAMWADA

EZEKIEL MUTUA

BARAZA LIMITED ……...……..…… DEFENDANTS

R U L I N G

By a plaint dated 14th January 2003, the plaintiff herein Maina Kihara sued the 8 defendants herein claiming for general damages, exemplary damages, punitive damages, costs of the suit, interest and any other relief that the court may deem fit and just to grant for libel. The suit was lodged on 15th January 2003.

The defendants Nos. 1, 2, 3, 4, 6 who were all journalists working for the 8th defendant's television station namely, Kenya Television Network entered appearance on 3rd February 2003 and filed their joint defence dated 18th February 2003 on the same date.

There is no evidence on record to show that the 5th and 7th defendants were served with summons to enter appearance.

The suit herein was thereafter fixed for hearing vide mention dates taken on 7th November 2003, 24th February 2004, 10th August 2004, 1st February 2005 and 12th July 2005. On the latter date, the hearing date taken was for 7th March 2006. On all those occasions when the matter was fixed for hearing, there is no record of what transpired.

On 30th August 2006, vide a notice of motion dated 29th August 22006, the firm of Mohammed Muigai Advocates for the 1, 2, 3, 4, 6 and 8th defendants filed an application by way of notice of motion under the old order 16 Rule 5 (c) of the Civil Procedure Act seeking to dismiss the plaintiff's suit for want of prosecution with costs. Under the old rules, a party only needed to prove that three months had lapsed since the matter was taken out of the hearing list to seek an order of dismissal of the suit which was pending.

The application came up for hearing on 22nd November 2006 before Hon. Justice Mutungi and by consent of both counsels for the parties, the said application was withdrawn with no orders as to costs.

Thereafter on 14th February 2007 the plaintiff set down the suit for hearing for 13th and 14th June 2007 but again, no record exists as to what transpired on the said hearing dates.

The matter was later re-fixed for hearing for 17th and 18th March 2009 and 17th December 2009. On the former date, nothing transpired whereas on the latter date, the matter came before Hon. Aroni Ali who stood it over generally as she was scheduled to go on transfer to Kisumu and could not begin hearing new matters.

Ever since 17th December 2009, the plaintiff has not taken any steps to set down the suit for hearing. It is this inaction for a period of over 4½ years that provoked the application by the defendants herein dated 31st March 2014 and filed in court on 8th April 2014 supported by the affidavit of David Muthee Michuki advocate sworn on 31st March 2014.

The application is brought under the provisions of Order 17 Rule 2 (3) and Order 51 rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

It seeks for dismissal of the plaintiff's suit for want of prosecution and costs of the suit and of the application. It is premised on the grounds that it is more than 4 years when the matter herein was last in court, the plaintiff has lost interest in the suit and that it is in the interest of justice that the application be allowed.

The affidavit in support of the application as sworn by David Muthee Michuki depones that the matter was last in court on 17th December 2009 when it was adjourned generally and that since the plaintiff has not taken any steps to set down the suit for hearing, the delay is inordinate and prejudicial to the defendants who have been eager to have the matter out of their way.

By an affidavit of service of Peter Ongiri sworn on 13th October 2014, the plaintiff's advocates were duly served with the application herein which was slated for hearing on 14th October 2014. No replying affidavit or grounds of opposition were filed by the plaintiff to resist the application seeking to dismiss his suit for want of prosecution.

Neither did his advocates who were duly served with the hearing notice attend court on 14th October 2014 to show cause why the suit cannot be dismissed as prayed.

I therefore allowed Mr. Kimathi holding brief for Mr. Michuki advocate and Mr. Nyandieka, as well as Miss Kemunto holding brief for Mr. Bosire advocate for the 1st and 8th respondents respectively to argue the application. Mr Kimathi's submissions reiterated the contents of the application and supporting affidavit urging this court to dismiss the application with costs.

The other advocates adopted Mr. Kimathi's submissions.

The issue before me is whether to grant the orders sought with costs as prayed.

Order 17 rule 2 (3) of the Civil Procedure Act provides that a party may apply for dismissal of the suit for want of prosecution if no steps have been taken to prosecute the same for a period of one year. Under Subrule 2 (1), the court is empowered, where no application has been made or step taken by either party for one year, to give notice in writing to the parties to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction the court may dismiss the suit.

In this case, the court did not act *suo moto* Under Sub rule 2 (1). The defendants who appeared to the summonses issued have moved the court to dismiss the suit.

The power of the court to dismiss the suit under Order 17 must be exercised on the basis that it is in the best interest of justice regard being has as to whether the court is satisfied that the party instituting the suit has lost interest in it or whether the delay in prosecuting it has been inordinate or unreasonable or inexcusable and is likely to cause serious prejudice to the defendant on account of that delay. This is the principle espoused in the case of **INTERS – VS – KYUMBA [1984] KLR 441** in which the court held that:-

"The test applied by the courts in application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. This, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be served to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."

As shown from the elaborate history of this suit stated in this ruling, it is clear that it is over 4 years since the matter last came up for hearing and stood over generally. The plaintiff has not appeared in court despite notice issued, to defend his position or give reasons or excuse why no steps or action has been taken to have the suit heard and determined.

Article 159 of the Constitution places a duty to the courts to serve the interests of substantive justice, while rendering the said justice by determining disputes expeditiously and without undue delay.

In this suit, this is the second time the defendants herein are seeking to have the suit dismissed on the same grounds. The plaintiff appears unmoved. I can only conclude that he has lost interest in the matter herein but is using the court of law to archive pleadings against the defendants forever. This court shall not permit or condone such conduct of suits pending before it without action or sound reasons for inaction. Litigation must come to an end. If parties chose to use the courts to ventilate their grievances, then they must, of necessity and with expedition, actively move the court to determine such disputes, to avoid clogging the courts with dormant litigation.

I am conscious of the fact that the act of dismissing a party's suit is a draconian act which should be exercised cautiously as it drives the plaintiff away from the judgment and therefore, the justice seat, but I must balance out that justice is for both parties to the suit.

The defendants too deserve justice because they have been dragged to court and the yolk of litigation is hanging on their neck for the last 11 years when the suit herein was first initiated against them by the plaintiff. The record does not demonstrate seriousness on the part of the plaintiff to prosecute his suit. He has slept on his rights of getting expeditious substantive justice, while the pendency of this suit no doubt prejudices the defendants as well, as they, too have legitimate expectation that the dispute should be resolved expeditiously.

As no vigilance has been displayed by the plaintiff, and as equity aids the vigilant and not the indolent, and as delay defeats equity, to fail to grant to the defendants herein the orders sought would be a lavish exercise of discretion which this court is not prepared to engage in.

In the premise, I am satisfied that the applicants/defendants have satisfied the court that they are entitled to the prayers sought in their application dated 31st March 2014 and I accordingly allow the application and order the plaintiff's suit filed in court on 15th January 2003 as against all the defendants who entered appearance and filed defence dismissed with costs and award them costs of this application.

Dated, signed and delivered at Nairobi this 18th Day of November, 2014.

R.E. ABURILI

JUDGE