



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 75 of 2008

GEORGE SHANE OKOTH p/a

G.S. OKOTH & COMPANY, ADVOCATES PLAINTIFF

VERSUS

NYAKUNDI NYAMBOGA 1ST DEFENDANT

THE STANDARD LIMITED 2ND DEFENDANT

RULING

1. On 28th May 2012 the defendant filed a notice of motion under **Order 51 Rule 1, Order 17 Rule 2 (3)** of the **Civil Procedure Rules, 2010** and **Section 3A** of the **Civil Procedure Act** seeking dismissal of the plaintiff's suit as against the defendants for want of prosecution.
2. The above application was supported by an affidavit sworn by M. Billing an advocate of the defendants averring that the plaintiff presented this suit in court on 11th July 2008 claiming amongst other reliefs judgment on damages for libel. That upon instructions his firm entered a memorandum of appearance and filed defence on 1st and 13th of August 2008 respectively. That on 17th September 2008 the plaintiffs' advocate filed reply to 1st and 2nd defendants' defence and on 29th September 2008 plaintiffs filed a list of documentary exhibits dated 23rd October 2008.
3. He further averred that on being served with the said list of documentary exhibits his firm wrote a letter dated 24th October 2008 requesting to be supplied with copies of documents listed and having not received any reply his firm wrote several reminders and since then the plaintiff has not taken any steps in the matter for 4 years and as defendants they cannot be kept in indefinite abeyance,.
4. He therefore prayed that the delay by the plaintiff's to have this suit heard and determined should not be tolerated and it is in the interest of justice for litigation to be conducted expeditiously.
5. The plaintiff/respondent on his part filed a replying affidavit dated 5th October 2012 averring that the purported delay has been occasioned by the defendants/applicants' counsel's failure to comply with the provisions of **Order X Rule 11A** of the **Civil Procedure Rules** which in turn has prevented him from taking a hearing date.
6. When the matter came up for inter parties hearing on 10th December 2012 counsel for the defendants/applicants Miss Fatuma submitted that the applicants' firm wrote to the respondent's firm on 24th October 2008 asking for a list of documents and thereafter sent reminders upto July 2010 and that since then the plaintiff/respondent has taken no steps to prosecute the case.

7. She further submitted in reference to paragraph 14 of the plaintiff's/Respondent's replying affidavit that the allegation that the plaintiff/

Respondent were waiting for the defendants/applicants to comply with the Civil Procedure Rules has no merit. Counsel contended that the respondent have not demonstrated how the applicants/defendants have caused the delay.

8. The application was opposed by Mr. Abisai for the plaintiff/respondent who submitted that on 6th November 2009 they invited the applicants for purposes of taking a suitable hearing date and were advised by the registry that date could not be taken due to noncompliance by the applicants.

9. He further averred that in July 2010 they received statement of agreed issues for their signature and sent them back to applicants counsel for their signature vide letter dated 5th November 2010. That in this case it is the applicants who have contributed to the delay and that in the circumstances and pursuant to the provisions of **Order 17 Rule 2 (2)** this court ought to make such orders for the expeditious disposal of the suit.

He urged court not to dismiss suit as sufficient cause has been shown.

10. I have considered the above arguments by the respondent's counsel. **Order X Rule 11A** of the old Civil Procedure Rules provides:-

“Notwithstanding anything contained in Rule 11, within one month

after the pleadings are closed in a suit in the High Court, every party shall make discovery by filing and serving on the opposite party a list of the documents relating to any matter in question in the suit which are or have been in his possession or power.”

Sub section (2) of Order 11A states:

“Any party on whom a list of documents is served under sub rule (1) may give notice to the party making discovery requiring the verification on affidavit of the list of documents and the affidavit shall be filed and served within 14 days of the request.”

Sub section (3) of Order 11A further provides:

“On the default of a party to comply with sub rule (2), application may be made to the court for the fixing of a time limit within which the party must comply with sub rule (1).”

11. On perusal of the file the plaintiff/respondent wrote a letter dated 5th November 2010 asking the defendants/applicants to comply with **Order X Rule 11A**. After that there was no other activity in this suit until the defendants/applicants filed this application for dismissal of suit for want of prosecution.

12. After considering the above provisions of **Order 11A Sub rule (3)** I fail to comprehend why the plaintiff/respondent delayed in ensuring that the suit herein was fixed for hearing. They should have followed the provisions of **Order 11A (3)** once they realized the defendants/applicants were not complying with the above order, in order for the court to fix a time limit within which the Defendants/

Applicants were to comply with **Order X Rule 11A Sub rule 1**. However, no evidence of such action has been shown.

13. I therefore agree with counsel for the applicants that the Plaintiff/Respondent has not demonstrated to this court why it has taken him more than a year to comply with the relevant provisions of the Civil Procedure Rules. The plaintiff has truly been indolent.

14. I therefore allow the notice of motion dated 28th May 2012 and dismiss the plaintiff's suit as against the Defendants/Applicants. Each party to bear their own costs.

Dated and delivered at Kisii this 07th day of February, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Abisai for the Plaintiff/Respondent

Miss Fatuma for M. Billing for the Defendants/Applicants

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.