



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 329 OF 2008

SALIM SULTAN MOLOO PLAINTIFF

V E R S U S

1. OSCAR FOUNDATION

2. THE NATION MEDIA GROUP LTD

3. PARTAP SINGH GILL

4. DEVINDER KUMAR SONI DEFENDANTS

RULING

1. A Notice of Motion dated 28th March 2013 is brought by the 2nd Defendant. That Defendant seeks an order of dismissal of the Plaintiff's suit for want of prosecution. In the affidavit in support of that application the learned Counsel for the 2nd Defendant stated that the matter was last before Court on 28th April 2010. That it had been three (3) years since the matter was last in Court. That the Plaintiff's delay in prosecuting this suit was inordinate and it was therefore in the interest of justice that this suit be dismissed. He deponed that the Plaintiff's delay and his lack of interest in prosecuting the suit amounted to an abuse of the Court process.
2. The Plaintiff opposed the application in his replying affidavit the Plaintiff referred to pending applications which according to the Plaintiff were an impediment to the prosecution of this suit. One such application is dated 20th November 2008. To date that application has not been prosecuted to conclusion. By it the Plaintiff sought an injunction to restrain the Defendants from printing what the Plaintiff termed as defamatory articles. That application was first heard ex parte under Certificate of Urgency when the Court granted the Plaintiff an interim injunction for a period of fourteen (14) days. To date it has never been heard inter partes and there are no adequate explanations that the Plaintiff has offered why that is so.
3. The Plaintiff instead of pursuing the conclusion of that application pursued another application where he sought to join the 3rd and 4th Defendants as parties in this case. The 3rd and 4th Defendants after they were joined in this case filed their Defence on 21st July 2009.
4. Following the filing of those Defences the Plaintiff filed a Chamber Summons dated 20th August 2009 seeking that the Court would order the 3rd and 4th Defendants to give further and better particulars of their Defence. The Plaintiff did also file an application on the same date seeking for

further and better particulars from the 1st Defendant.

5. The record of this file shows that the Plaintiff last wrote a letter dated 15th March 2010 to the Deputy Registrar of this Court by which he invited the Defendants to attend Court for the purpose of fixing a hearing date for those two applications of 20th August 2009. When the party's representatives met in the registry they fixed for hearing of those applications for 28th April 2010. When the parties appeared before the Court on 28th April 2010 they informed the Court that they desired to dispose the preliminary objection first which had been filed by the 1st Defendant. That is the last record of this matter being before Court.
6. The Plaintiff's learned Counsel in his written submissions set out the seriousness of the Plaintiff's case. He stated as follows-

“The 2nd Defendant without justification or any authority of a Court order published a large advertisement calling the Plaintiff a fraudster, a money launder, a tax evader, an economic criminal, a corrupt individual, a bank fraudster, a member or leader of syndicate formed to sink the Kenya hospitality industry and destroy local investments, an unscrupulous trader and a person out to reap off local and foreign investors. The advert called for the Plaintiff's bank accounts at Habib Bank Zurich and Guardian Bank be investigated. The advert included the Plaintiff a passport size photograph as the Defendants were keen to ensure that those who know the Plaintiff by face only would now know his full names and those who only know the name, Salim Sultan Moloo, would be able to put a face to that name. This is the foundation of the suit.”

7. If indeed the case for the Plaintiff is of such serious consequence as stated by his learned Counsel one would not understand why the Plaintiff since 20th April 2010 went to sleep on this case. That seriousness should have spurred the Plaintiff to proceed with his case.
8. The cases that deal with the dismissal of suits for want of prosecution are worthy to consider in this ruling. In the case of **Ivita –Vs- Kyumbu HCC 340 of 1971-Nairobi** at page 449 held 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 and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time.”

Mukisa Biscuit Manufacturing Co. –Vs- Westend Distributors [1969]EA 696 where at page 701 it was said-

“It is the duty of the Plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty by saying that the Defendant consented to the position.”

Paxton –Vs- Allsop [1971]3 ALL ER 370-

“If he (ie the Plaintiff) is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his own fault.”

9. In my view the Plaintiff's inactivity in this case has undoubtedly caused injustice and probably prejudice to the Defendants whom he dragged to this Court. Such delay goes against the overriding objective of the Civil Procedure Act. That objective is found in Section 1A(1). It provides as follows-

“The overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes

governed by the Act.”

The Plaintiff has acted contrary to the overriding objective of the Civil Procedure Act. He has failed to act expeditiously in the resolution of the dispute between him and the Defendants. The delay is inexcusable. Litigation ought in this case to come to an end. It is for that reason that I will grant the prayers sought by the 2nd Defendant and in addition in exercise of the inherent power of this Court I will proceed to dismiss the suit as against all the Defendants for want of prosecution.

10. The orders of the Court are that-

- a. **The Plaintiff's suit as against all the Defendants is hereby dismissed for want of prosecution.**
- b. **The costs of the suit and of the Notice of Motion dated 28th March 2013 are awarded to the 2nd Defendant as against the Plaintiff.**

Dated and delivered at Mombasa this 20th day of September, 2013.

MARY KASANGO

JUDGE