



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL SUIT NO. 328 OF 2007

JOSEPHAT AKOYO MABIALA.....PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES.....1ST DEFENDANT
SAULO WANAMBISI BUSOLO.....2ND DEFENDANT

RULING

The Notice of Motion dated 2nd November, 2010 but filed on 16th December 2010 is premised under Sec. 1A and 1B of Civil Procedure Act and Order 17 Rule 2 (3), Order 51 Rule 1 of Civil Procedure Rules, 2010.

It seeks the dismissal of the suit for want of prosecution.

The application was heard ex-parte because of the non representation from the Plaintiff despite the due service on the Advocate on record. However, the replying affidavit has been sworn by the Plaintiff.

It was urged that the burden to prove that all necessary steps have been taken rests on the Plaintiff. The replying affidavit simply states that there has been negotiation for an out of court settlement and that the sum is still to be agreed.

I have gone through the pleadings of the matter which is a defamation case.

Under Order 17 Rule 2 of Civil Procedure Rule, 2010, the Court has discretion to dismiss the suit, which discretion is wide and unfettered. However, no court shall exercise this discretion capriciously. It has to be a carefully considered judicious discretion.

It is also a trite law that the court has to look at interest of both parties before it proceeds to shut the doors of justice on a party.

I have carefully considered the application and do frown upon the non-action by the Plaintiff and on the absence of representation even on the date of hearing of this application. I also note that despite the leave

to file a further affidavit to the Applicant after filing of replying affidavit by the Plaintiff, none is filed by the Defendant/Applicant.

In the peculiar circumstances of this case, I shall give this last opportunity to the Plaintiff to put his house in order and direct that the pre-trial requirements as per Order 3 of Civil Procedure Rules be finalized by both parties within 45 days hereof.

I dismiss the application but give the costs thereof to the Defendant/Applicant.

Dated, signed and delivered at Nairobi this 23rd day of **June, 2011**

K. H. RAWAL

JUDGE

23.06.2011