



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 686 of 2004**

**STEPHEN OGAMBA .....PLAINTIFF**

**VERSUS**

**JIMMY ANGWENYI.....1<sup>ST</sup> DEFENDANT**

**NATION MEDIA GROUP LTD.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The instant suit was filed on June 25, 2004 claiming the following reliefs against the two defendants jointly and severally:-

(a) *General damages*

(b) *An injunction restraining the defendant from writing or publishing any matters, defamatory of the plaintiff.*

(c) *Costs of this suit.*

(d) *Interest on (a) and (c) above*

2. The cause of action is said to have arisen on April 6, 2004 when the 2<sup>nd</sup> defendant is said to have falsely and maliciously printed and published of and concerning the plaintiff some alleged defamatory words which the plaintiff said was responsible for or connected or linked to the attack upon the 1<sup>st</sup> defendant and further that the said plaintiff was an irresponsible unreasonable person who reverts to 'serious criminal activity as strategy in dealing with any imagined real or perceived dissent or opposition' to his management style of the cooperative society of which he was Chairman.

3. The summons to enter appearance together with copy of plaint was served upon the 2<sup>nd</sup> defendant who filed its defence on July 20, 2004. To date, the 1<sup>st</sup> defendant has never been served. In its defence, the 2<sup>nd</sup> defendant did not admit any part of the plaintiff's claim and in particular denied that any words that may have been published by the 2<sup>nd</sup> defendant, which was denied, referred or were understood to or capable of referring to the plaintiff. There was no reply to the 2<sup>nd</sup> defendants defence, thus bringing the pleadings to a close seven days after July 20, 2004.

4. On February 21, 2006, the 2<sup>nd</sup> defendant filed the instant application seeking to strike out the plaintiff's suit against the 2<sup>nd</sup> defendant for want of prosecution. They also prayed that the plaintiff do pay the costs of the application and of the suit. It was contended on the face of the application that since

the close of pleadings the plaintiff had failed to set down the suit for hearing and that the delay by the plaintiff to do what he should do without waiting to be prompted has been inordinate, inexcusable and/or an abuse of the process of the court. The 2<sup>nd</sup> defendant has thus concluded that the plaintiff has lost interest in his suit against the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant urged the court to find and to hold that it would serve the interests of justice better if the plaintiffs suit is dismissed for want of prosecution.

5. The application was also supported by the affidavit of Oscar Avedi, advocate who reiterated the averments as contained in the grounds on the face of the application and said more than 3 months since the close of pleadings the plaintiff has taken no action to set down the suit for hearing and therefore the suit should be dismissed for want of prosecution.

6. The application was opposed on the grounds that:?

1. *The application is premature, misconceived, frivolous, devoid of merit and incompetent.*
2. *The application has failed to disclose to this Honourable Court that the plaintiff and the 2<sup>nd</sup> defendant have been in negotiations with a view of settling this matter out of court.*
3. *The plaintiff has had severe difficulties in attempting to serve the 1<sup>st</sup> defendant who is an Honourable Member of Parliament.*
4. *The plaintiff is truly desirous of prosecuting this matter.*
5. *The plaintiff has a valid and reasonable cause of action against the 2<sup>nd</sup> defendant which can only be adjudicated fully after taking viva voce evidence.*

7. At the hearing of the application, Mr. Avedi appeared for the 2<sup>nd</sup> Defendant/Applicant while Mr. Mokaya appeared for the Plaintiff/Respondent. Mr. Avedi urged the court to find and to hold that the plaintiff's grounds in opposition to the 2<sup>nd</sup> defendant's application which are in the form of evidence should be discarded. On his part Mr. Mokaya argued that the plaintiff's delay to have this suit prosecuted does not prejudice the 2<sup>nd</sup> defendant in any way and that the 2<sup>nd</sup> defendant has not demonstrated that any such prejudice could arise or has arisen. Mr. Mokaya also contended that this application is premature for the reason that discovery has not been done. Further that dismissing the suit at this stage without giving the plaintiff an opportunity to be heard would be such a draconian step that this court, being a court of justice should not countenance it. He also contended that the plaintiff has reasonably explained the reason for the delay in not having this suit fixed for hearing, namely that it has been hard to effect service upon the 1<sup>st</sup> defendant. To support his arguments, Mr. Mokaya cited Nrb HCCC No. 29 of 2003 – NHIF –vs- Equity Building Society.

8. In reply, Mr. Avedi argued that the plaintiff should have put his grounds of opposition to the application in a Replying affidavit in order to put forward evidence to support such allegations that there have been negotiations towards a settlement between the plaintiff and the 2<sup>nd</sup> defendant. Mr. Avedi also said that since the summons expired more than four years ago, the plaintiffs assertion that he is still interested in serving the 1<sup>st</sup> defendant before taking any further action in the matter cannot hold water and that in any event, the plaintiff has not produced any evidence to prove that he has applied to serve the said 1<sup>st</sup> defendant with substituted service. Mr. Avedi contended further that such inordinate delay would greatly prejudice the 2<sup>nd</sup> defendant/applicant.

9. The above are the pleadings and the submissions. The question that now arises is whether in light of the provisions of Order 16 Rule 5 of the Civil Procedure Rules, the plaintiffs suit should be dismissed. The relevant rule provides thus:?

*“5. If, within three months after ?*

*(a) close of pleadings*

*(b) (Deleted by LN 36/00)*

(c) *The removal of the suit from the hearing list or*

(d) *The adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal”*

10. After carefully considering the law, I am satisfied that the 2<sup>nd</sup> defendant/applicant’s application has merit. It is not disputed that since the filing of the 2<sup>nd</sup> defendant’s defence on July 20, 2004, the defendant has not taken any other step in this case towards setting the suit down for hearing. It does not matter that the 1<sup>st</sup> defendant has not been served. It is not the duty of the 2<sup>nd</sup> defendant to ensure that the 1<sup>st</sup> defendant is served with summons. The situation has been made worse by the fact that the plaintiff has never applied to serve the 1<sup>st</sup> defendant by way of substituted service. I think that the reasoning of the plaintiff on this point is fallacious because the 2<sup>nd</sup> defendant cannot be expected to wait for eternity while the plaintiff also waits and/or attempts to effect service upon the 1<sup>st</sup> defendant.

11. It is also my view that completion of discovery is not a condition precedent to the making of an application such as the present one. The 2<sup>nd</sup> defendant did what the plaintiff required it to do by answering to the allegations against it and it is the duty of the plaintiff to expedite the course of justice by ensuring that (i) discovery is completed and (ii) the suit is set down for hearing without undue delay. The court is surprised that even after being served with the instant application way back in February 2006, the plaintiff has not filed an application before this court seeking to serve the 1<sup>st</sup> defendant by substituted service. Such conduct on the part of the plaintiff is a sign of extreme indolence. As a court of equity, this court does not aid the indolent but the vigilant. The plaintiff has not been vigilant over this matter and for this reason, the 2<sup>nd</sup> defendant’s application must succeed.

12. I have also considered the authority cited to me by counsel for the plaintiff/respondent. In that case, and as the grounds raised in opposition to the application showed, the plaintiff was always ready to prosecute the case. The court also found that the delay had not prejudiced the defendant in any way and that no such prejudice had been shown and that the suit had once been fixed for hearing on July 6, 2004. The court also found that the delay was not inordinate. In the instant case, the plaintiff has simply gone to sleep, both before and after the filing of the instant application. Further, the 2<sup>nd</sup> defendant herein has shown that the delay in having this suit fixed for hearing is prejudiced to it because it is not even known when the plaintiff is likely, if at all, to serve the 1<sup>st</sup> defendant so that he can jumpstart the prosecution process herein. The 2<sup>nd</sup> defendant cannot wait indefinitely for a man who has slept and continues to sleep on his rights. In the case of *Ivita –vs- Kyumbu* [1984] KLR 441 referred to by Emukule J in his considered opinion in the *NHIF –vs- Equity Building Society* case (supra), Emukule J referred to the words of Chesoni J in dealing with Rule 5 of Order 16. The words have lent a hand to me in considering this application:-

*“Part one. The Plaintiff should within three months from the date the pleadings are closed, or the suit is either removed from the hearing list or adjourned generally set it down for hearing.*

*Part two. The Plaintiff having failed to set down the suit for hearing, the Defendant may either set it down for hearing or apply to the court for the suit to be dismissed.”*

13. In the instant case, the plaintiff had more than three months to do something after the pleadings closed regarding the 2<sup>nd</sup> defendant’s case. If the 2<sup>nd</sup> defendant chose to, he could have gone ahead to set down the suit for hearing after expiry of the three months, from close of pleadings, but the 2<sup>nd</sup> defendant was under no obligation to do so. It was a discretion the 2<sup>nd</sup> defendant could exercise if it wished, but the primary duty of setting down the suit for hearing remained with the plaintiff.

14. Emukule J in the *NHIF* case (above) also required to Chesoni J’s (as he then was) summary of finding in the *NHIF vs Equity Building Society Ltd.* in which the learned Judge had said,

*“The authorities I have considered here show that the law and principle upon which courts go are clear. The test was enunciated by Lord Denning MR in ALLEN V SIR ALFRED Mc ALDINE and SONS LTD. [1968] ALL ER 543 at page 547, and it was repeated by Edward Davies LJ in PAXTON VS ALLSOPP [1971] 3 ALLER 370 at page 378 who put it as follows:-*

*“If I may be acquitted of immodesty by quoting some words of mine used in AUSTIN SECURITIES LTD. VS NORTHGATE & ENGINEERING STORES LTD. [1969]2 ALLER 753; where having set out the familiar tests to be applied in such cases, said:*

*“But the questions are, as it were posed enroute to the final question which overrides everything else and was enunciated by Lord Denning MR in ALLEN VS SIR ALFRED MC ALPINE & SONS LTD. in these words:-*

*“the principle on which we go is clear, when the delay is prolonged and inexcusable and is such as to do grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straight away ---- “. So, the overriding consideration always is whether or not justice can be done despite the delay. Thus Lord Denning MR referred later in his judgment in that case to “delay --- so great as to amount to a denial of justice.”*

15. Applying the above test and principle to this case, I find and hold that the plaintiff’s delay herein is *“so great as to amount to a denial of justice”*. The plaintiff has not controverted the 2<sup>nd</sup> defendant’s contention that the summons against the 1<sup>st</sup> defendant expired more than four years ago. The plaintiff did not produce evidence to show that the summons were renewed, nor has he produced evidence to show that he applied for leave of this honourable court to serve the 1<sup>st</sup> defendant through substituted service. I find therefore that for the 2<sup>nd</sup> defendant to be expected to wait for an eventuality that is so remote as to be impossible, would cause great prejudice to the said 2<sup>nd</sup> defendant. Indeed justice will not be seen to be done to the 2<sup>nd</sup> defendant. No reasonable excuse has been given by the plaintiff for the delay which this honourable court finds to be prolonged and inexcusable. The plaintiff’s conduct thus amounts to delayed justice which translates itself into denied justice.

16. Mr. Mokaya argued that if the court went ahead to dismiss the plaintiff’s suit at this stage, it would be draconian. In the Allen –vs- Sir Alfred Mc Alpine (above from which Emukule J quoted extensively in his ruling in the NHIF –vs- Equity Building Society Ltd. (above) Denning MR said the following at pages 546 and 547 of the judgment:-

*“The delay of justice is a denial of justice --- to no one will we deny or delay right or justice”. All through the years men (and women) have protested at the law’s delay and counted it as a grievous wrong, hard to bear; Shakespear ranks it among the whips and scorns of time (Hamlet, Act 3 SC 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, C.I). To put right this wrong, we will in this court do all in our power to enforce expedition and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit. It is the only effective sanction that they contain.”*

17. The delay in the instant case is not only inordinate, but it is likely to go on for a long time to come since the summons which could be served upon the 1<sup>st</sup> defendant have long expired. The plaintiff is to blame for this predicament and no matter how draconian the action of dismissing his suit may seem, the plaintiff himself has to take the blame.

18. In the result, I find and hold that the plaintiff is guilty of long and inexcusable delay. The 2<sup>nd</sup> defendant is entitled to a speedy and expeditious disposal of the case against him. There is no chance that this suit will be prosecuted if its prosecution is dependent upon the 1<sup>st</sup> defendant being served with summons to enter appearance. I therefore allow the 2<sup>nd</sup> defendant’s application dated February 20, 2008 and hereby strike out the plaintiff’s suit for want of prosecution. Costs of the application and of the suit

shall be paid to the 2<sup>nd</sup> defendant.

Orders accordingly.

Dated and delivered at Nairobi this 18<sup>th</sup> day of July 2008.

**R.N. SITATI**

**JUDGE**

**Delivered in the presence of:-**