REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 215 of 1996

CHRISTOPHER PETER KINYUA MWAI ..... PLAINTIFF

VERSUS

LAWRENCE KARAI MWAI ..... 1ST DEFENDANT

I.P. EUSTACE WANJOHI ..... 2ND DEFENDANT

HON. ATTORNEY GENERAL ..... 3RD DEFENDANT

R U L I N G

By an application dated 3rd June 2008, the first Defendant has applied that this suit be dismissed with costs for want of prosecution. The application is expressed to be brought under Orders XVI rule 5 and L rule 1 of the civil procedure rules. The application is supported by the affidavit of Charles Wahome Gikonyo, Esq, learned counsel. In the main, it is deponed that this case was last listed for hearing on 9th November 2005 more than three years ago. That it is obvious that the Plaintiff has not been keen on prosecuting the suit and therefore it was meet and just that the same be dismissed with costs.

In his oral submissions in support of the application, Mr. Wahome stated that this was a 1996 case. That this was the second time that the 1st Defendant is making a similar application. The plaintiff has never been keen to prosecute the suit. The contention by the Plaintiff that there had been a directive that all matters involving the Attorney General be heard in Nairobi was not correct as the directive applied only to judicial Review applications.

The application was opposed. Stephen Mwirigi M"Inoti learned counsel swore a replying affidavit. He deponed that the case was last in court in 2005. However on 4th June 2006 he addressed a letter to the advocates for the defendant involving them to fix a hearing date. On 22nd August 2006 when his court clerk attended court for that purpose, she was told that the court diary was full. That on 9th July 2007, he again invited the 1st Defendant's counsel for the same purpose but he was again informed that he could not take a date since there was a directive that all cases where the Attorney General is a party should henceforth be heard in Nairobi. That when that directive was lifted, he visited the court Registry to check on the available hearing dates but was informed that no such dates were available this year. The Plaintiff maintained that he had not refused to take action in the matter but had been unable to fix the same for hearing due to circumstances beyond his control.

In his oral submissions in opposition to the application, Mr. Mwirigi, submitted that though the last time the case came up for hearing was on 9th November 2005, he had thereafter not gone to sleep. He had thrice tried to fix the case for hearing unsuccessfully.

I have carefully considered the application, the supporting as well as the replying affidavits, the respective oral submissions and the law. As I understand it the law on this issue is well settled. It is as follows:-

Public policy demands that the business of the courts should be conducted with expedition. Under Order

XVI rule 5 of the Civil Procedure Rules, the Defendant to an action may apply to set down the suit for hearing or apply for its dismissal if the plaintiff does not set it down for hearing within three months after the close of pleadings, the removal of the suit from the hearing list or the adjournment of the suit generally. Whether an application for dismissal of a suit for want of prosecution should be allowed or not is a matter for the discretion of the judge who must exercise it judicially. The court should, among other things consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was inexcusable. However, each case will turn on its own peculiar facts and circumstances. See generally E.T. months & Co. Ltd v/s Evans (1985) KLR 584.

The record shows that this is the second time that the 1st defendant has been compelled to file the instant application. The first time, the plaintiff got off quite easily. The Hon. Justice Juma in dismissing the 1st application remarked "..... I am satisfied that the delay in prosecuting this matter was not entirely the fault of the plaintiff ....." One would then have assumed that through that wake up call, the plaintiff would not again sit on his laurels but push for the early hearing of the suit expeditiously. This was however not to be. The plaintiff, it appears is not at all a good student who learns from past experience. When he escaped narrowly the dismissal of his suit for want of prosecution during the first application, he should have been on the look out for a similar application in future and take such steps as would prevent the necessity for the first defendant to file a similar application again.

The plaintiff concedes that the last time the case came up in court was on 9th November 2005 three or so years ago. What is the explanation for his inactivity? He claims to have attempted to fix the case three times albeit unsuccessfully. Where is the evidence? He has annexed two letters of invitation to fix hearing dates addressed to counsel for the 1st defendant. However those are mere letters and are not a step on record towards the prosecution of the case. Further I note that the said letters were written a year apart. The first one is dated 4th August 2006 and the other one is dated 9th July 2008. I do not think that a litigant who is anxious to finalise his case would take a whole year to take steps towards the prosecution of his case. I have no doubt in mind that the plaintiff has been indolent and I do not think that this court should be a party to his indolence. He cannot have a second bite of the same cherry!

The Plaintiff has also claimed that his failure to fix the case for hearing was because there was a directive that all cases where the Attorney-General is a party should be heard in Nairobi. This court is not aware of any such directive and who issued it. The Plaintiff has not even annexed a copy of the said directive in his replying affidavit. Further the plaintiff claims that he was informed of the said directive but does not say who informed him and whether he believed that such information to be correct. It appears that the applicant wishes to have this court to act on rumours and or hearsay evidence. A court of law does not act on that basis. What this court is aware of however is that such directive was issued by the honourable the Chief Justice but was only limited to judicial Review applications. This suit is not about judicial Review.

From 9th July 2007 to date the applicant has not taken any steps in the prosecution of the case. He however states that this year he visited the court registry to see the position regarding hearing dates but was informed that there were no hearing dates this year. Once again the plaintiff is deliberately being ambiguous. He does not say for instance, when he did this year visit the court precincts for that purpose. There is no letter inviting the opposite side for purposes of fixing a hearing date. He does not say who told him that there were no hearing dates for this year in the court diary. I am personally aware that the court diary has always been open and parties have been taking hearing dates throughout the year. Indeed the court diary for next year was only opened in mid October 2008. If the plaintiff was only vigilant, he would have avoided the necessity of this application.

To my mind a delay of three years without the plaintiff taking any concrete steps to prosecute his case is inordinate and inexcusable. It may render a fair trial impossible in the circumstances. Having carefully considered all the circumstances obtaining in this case, I am satisfied that the application is merited. Accordingly it is allowed with costs.

Dated and delivered at Nyeri this 20th day of November 2008

M. S. A. MAKHANDIA

JUDGE