REPUBLIC OF KENYA

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

Civil Case 845 of 2004

HON.JOHN JOSEPH KAMOTHO……..……..DEFENDANT

VERSUS

NATION NEWSPAPERS & ANOTHER…….DEFENDANT

RULING

The Plaint herein is dated 2nd August, 2004 and filed the same date. The defence is dated 15th September 2004 and was filed on 16th September, 2004. The action was taken in the matter until the defendant applicant moved to court and filed a notice of motion under Order XVI rule 5(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking to have the suit be dismissed for want of prosecution and that costs be borne by the plaintiff. The major grounds are:-

(1) That pleadings closed in September, 2004.

(2) Parties exchanged correspondence on agreed issues dated 3rd August, 2005 and it is over one year since that was done but the plaintiff has not taken steps to put measures in place to prosecute the suit to its logical conclusion.

(3) They maintain that the plaintiff has lost interest in the matter and this conduct is prejudicing the defence.

(4) The action is a defermation suit and the defendant's witnesses are in danger of leaving the employment.

(5) That costs continue exaclating.

(6) Allegations that the defence failed to respond to the agreed issues sent to them is no excuse as they should have moved to file their own issues and set the suit down for hearing.

(7) They maintain that the case law cited by them supports their stand that the delay is in ordinate.

In response to that application and submissions counsel for the plaintiff countered that argument on the basis of grounds set out in the replying affidavit and oral sub missions in court and the major grounds are:-

(1) That they wrote to the defence counsel on 14th June 2005 forwarding the statement of agreed issues for approval but the same were never returned to them to enable them file the same in Court.

(2) That pleadings have not been closed as discovery of documents is yet to be finalized and none of the parties herein have filed their separate statements of agreed issues at all.

(3) That the plaintiff is ready and willing to prosecute this suit and has already prepared his list of documents and authorities but has been unable to fix the matter because of the pending application subject of this ruling.

(4) That if the suit is not heard the plaintiff is apprehensive that the defendants will continue publishing injurious articles about the plaintiff unless they are restrained by an order of this court.

(5) They maintain that the application does not measure up to the requirements of order 16 and so the same should be struck out.

(6) That paragraphs 3 of the supporting affidavit does not have the annexture and so the same should be struck out and once struck out there is no basis for the application as there will not be cause for allowing the application.

(7) They also add that the defendant had an option to process the suit for disposal before applying to have the suit dismissed.

(8) The court is urged to allow the suit to proceed to full determination rather than terminating it prematurely.

In response to the Plaintiffs Counsel submissions, Counsel for the applicant maintained that want of form in the supporting affidavit is no ground for rejecting the application. Even if ignored paragraph 5 of the replying affidavit confirms that correspondences on agreed issues were exchanged. But they have not stated what steps they took there after to process the suit for hearing and disposal.

(2) That allegation of the defendant having an election to process the suit for hearing first before moving to have it struck out does not hold as it is the duty of the plaintiff to fix the suit for hearing and determination and cannot be heard to shift that burden on to the defence on that account, they still maintain that the suit is ripe for striking out. Order XVI rule 5(a) Civil Procedure Rules under which the application is brought is clear as under what circumstances a suit may be dismissed for want of prosecution. The right to relief or dismissal of a suit for want of prosecution arises if within three months after the close of the pleadings or 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.

It has been contended that more than three months elapsed after the close of the pleadings without the plaintiff setting the suit down for hearing hence the application for dismissal. The Respondent has countered *inter alia* that the pleadings had not closed as formalities of discovery and agreed issues had not been finalized. This therefore necessitates this court to turn to the rules to determine as to when pleadings are deemed to be closed. Order VI rule 11 which is the relevant rule states:-

"*The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counter claim or if neither is served fourteen days after service of the defence, not withstanding that any order or request for particulars has been made but not complied with*"

There is no requirement under the foregoing rule that processes such as agreed issues or discovery have to be gone into before pleadings can be treated as being closed.

There is no reply to defence herein and so pleadings are to be deemed to have been closed 14 days from the date of service upon the plaintiff of that defence. The defence was filed on 16th September. Since no reply to the defence was filed, order VI rule 10 comes into operation where by there is deemed to be a joinder of issues it reads: "*10(1) if there is no reply to a defence, there is a joinder of issue on that defence, order VIII rule 1(2) provides "where a defendant, has been served with a summons to appear,*

he shall unless, some other or further order be made by the court, file his defence within fifteen days after he has entered an appearance in the suit and serve it on the plaintiff within 7 days from the date of filing the same"

Applying the foregoing rule to the facts herein and since there is no complaint that the defence was not filed as required by law seven days from 16.9.2004 ends on 23.9.04. 14 days counted from 23.9.2004 would go up to 7.10.04.. Allowing weekends and public holidays would give the plaintiff upto or/and 11.10.2004 as the date for the close of the pleadings. It therefore follows that even at the time the defence forwarded issues to the plaintiff vide their letter dated 14th June 2005 which letter is annexed as D001 to paragraph 5 of the replying affidavit, pleadings had already closed. It is therefore no excuse that they were waiting for a response to that letter.

Having been presented with the foregoing scenario the question is whether this court can exercise its discretion in favour of the applicant or not. Both parties have urged the court to be guided by case law on the subject. In the case of **CROWN BERGER KENYA LTD VERSUS TUNDAI TRANSPORTERS LTD MILIMANI COMMERCIAL COURT HCCC NO. 1917/00 Mwera J** when upholding an application for dismissal for want of prosecution held that "*completing discovery and drawing up issues is not pegged to taking hearing dates. There is actually no explanation advanced as to why this was not done*." In the case of **SAGOO VERSUS BHARIJ [1990] KLR 459** where there was an application for the dismissal of the plaintiffs suit for want of prosecution under the provisions of order 16 rule 5 (a) of the Civil Procedure Rules. In this same case the plaintiff had failed to take out summons for directions and to set down the suit for hearing or to file grounds of objection to the application for dismissal. He instead drew the courts attention to the Court of Appeal's decision in **EVANDUS AND SHREDEDUR VERSUS S.S. KOKHI** which held that such applications could be filed by a defendant. The defendant them submitted that the Court should exercise its inherent jurisdiction and dismiss the suit for want of prosecution incompliance with order 16 rule 5 (a).

After the argument Mbito J. as he then was made the following holding:-

(1) The decision of the Court to Appeal in **EVADUS VERSUS SOKHI,** binds this Court to find that the defendant is not entitled to proceed under rule 5(a) of Order 16.

(2) It is not the practice of the Courts to exercise the drastic power of dismissing, a suit unless satisfied that there has been Intentional, inordinate or in excusable delay on the part of the plaintiff and that there is a risk that the delay would inhibit a fair trial or that would cause prejudice to the defendants.

(3) In the present case, it was common ground that the suit had only recently been filed, no specific order had been willfully disobeyed nor had it been shown that prejudice had occurred or was likely to occur. It would therefore not be justified to dismiss.

Further reference was made, to a ruling by Wasame Ag. J. as he then (was now J.) in the case of **MARK OMOLLO AGENG AND 2 OTHERS VERSUS THE ATTORNEY GENERAL AND FOUR OTHERS KISUMU HCCC NO. 326 OF 1995.** At page 2 of the said ruling the learned judge made observations to the effect that the "*onus to set down the suit for hearing is on the plaintiff or his advocate …… the issue is to prosecute the suit in order for the court to determine the controversy between the parties. The defendant cannot assume that responsibility, therefore the plaintiff must take steps to show that he was desirous of conducting the matter and not to take steps a window dressing as under dressing without showing the urge to finalize the dispute. Further that "in order for a plaintiff to resist an application for dismissal he/she must have evidence that he has taken all that was humanly possible or that the defendant has impaired or restricted the conclusion of the matter"*. At page 3 of the ruling quoting his own ruling in the case of **BENARD OCHOLLA NGONI AND -OTHERS VERSUS MATHAYO NDO AND 2 OTHERS HCCC NO.270/2001** observed that "*the Plaintiff ought to show sufficient and/or credible excise if they want to resist an application for dismissal of their suit by the defendant and or court. It is my opinion that the plaintiff must avail genuine reasons to enable the court to exercise its discretion in their favour. It is the duty of the plaintiff and his advocate to bring the suit for trial and they cannot shift that primary burden to the defendant by saying the plaintiff has no lesser*

burden. Usually the burden is on their shoulders and failure to discharge that onus would be detrimental to their case"

All the three quoted cases are High Court decisions and therefore not binding on this court. This court is entitled to revisit the provisions of the law concerned and arrive at its own decision. The application is brought under Order XVI rule 5(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. This court does not understand why the Court of Appeal ruled in the case of **EVADUS AND SCREDEDUR VERSUS S.S. SOKHI CA.A. NO. 17 OF 1984** that a defendant cannot avail himself of the provisions of Order XVI rule 5(a) Civil Procedure Rules. The facts given in the case of SAGOO V. BHARS are scanty. This court has therefore no alternative but fall back on to its own interpretation and the other two decisions by Warsame J. and Mwera J. that it is a relief available to the defendant as the command is directed at the defendant. This court is satisfied that the application is properly laid. All that the court has to look for is whether the defendant has brought himself within the principles governing the striking out of the suit for want of prosecution. The stand of the defendant is that the principles have been met, while the stand of the plaintiff is that they have reasonable excuse namely that it is the defence who refused to return the proposed agreed issues either approved or not approved. As per the finding in the crown **BERGER KENYA LTD** case (supra) and the reading of Order XVI rule (5) Civil Procedure Rules it is clear that there is no requirement that issues be agreed and discovery done before a suit is set down for hearing. The plaintiff would have set down the suit for hearing or moved fast enough for discovery and then file its own issues. Even after the application was filed the replying affidavit does not have the proposed own issues, neither does it have a list of documents for discovery to show that if the court exercises its discretion in their favour and allow them leave to process the suit for hearing they are going to move fast to have the same heard and disposed off speedily.

As per the observations in the cases cited the burden is on the plaintiff to ensure that he moves the court to have their suit heard and disposed off speedily. The scenario displayed herein that the plaintiff wants to move the disposal of the suit at own pace to the detriment of the defence. The case being one of defamation as observed by justice Warsame in the cited case of **MARK OMOLLLO AGENG (SURPA)** at page 5, the matter being a defamation action every year that passes prejudice of the fair trial, witnesses may die, disappear and shift to unknown locations. The cause of action here in a rose on 5.7.2004 and pleadings closed 2005 two years down the line there is no sign of readying the suit for hearing. This is a proper case where the courts discretion to sustain the suit can be declined. The defence application dated 27.2.2007 has merit. The same is allowed as prayed with costs. The defence will also have costs of the suit dismissed for want of prosecution.

DATED, READ AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER, 2007.

R. NAMBUYE

JUDGE