



**Nation Media Group Limited & another v Kariuko & another (Civil Suit 14 of 2020) [2023] KEHC 705 (KLR) (Civ) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 705 (KLR)

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

**CIVIL**

**CIVIL SUIT 14 OF 2020**

**JN MULWA, J**

**FEBRUARY 9, 2023**

**BETWEEN**

**NATION MEDIA GROUP LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**STANDARD GROUP LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**TITUS GATITU KARIUKO ..... 1<sup>ST</sup> DEFENDANT**

**JOHNSON NYAGA KIBIRA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. For determination is the 2<sup>nd</sup> defendant's application dated March 1, 2022. It is brought under provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 17 Rule 2(3) and order 51 Rule 1 of the *Rules* 2010. The applicant seeks an order of the dismissal of the suit for want of prosecution with costs.
2. The application is grounded on reasons stated at its face and a supporting affidavit sworn on the March 1, 2022 by Kevin Wakwaya, an advocate practicing in the firm of Rachier & Amollo Advocates who have the conduct of the suit on behalf of the 2<sup>nd</sup> defendant. In opposing the application, the 1<sup>st</sup> plaintiff Johnstone Nyaga Kibira swore the replying affidavit on the 31<sup>st</sup> of May 2022.
3. I have considered the averments in the affidavits for and in opposition as well as the oral arguments by Counsel before me on the 19<sup>th</sup> of July 2022.
4. The suit was filed by a plaint dated 31<sup>st</sup> January 2020 on the 17<sup>th</sup> of February 2020; and by averments by the Applicant that the last action taken by the plaintiffs was on the 27<sup>th</sup> of February 2020 which is more than two years since (as at date of the application). It is the Applicants' submission that by dint



of Order 17 Rule 2(5) of the Civil Procedure Rules, the suit stood dismissed by operation of the law, citing lack of interest in the suit.

5. The Respondents by their replying affidavit blame the advent of Covid- 19 pandemic in early 2020 and another case in the ELC Court from which this defamation case arose that they depone slowed them down. In the premises, they state that they are serious about the progression and hearing of the suit and have thus urged the court to dismiss the application and allow the case to be heard on merit.
6. Order 17 Rule 2 of the Civil Procedure Rules provides for dismissal of a suit where no action has been taken by either party for one year but upon a notice to show cause being issued and served to the parties. It is common knowledge that the Covid -19 pandemic slowed down court processes but that did not bar any of the parties from taking advantage of the online and virtual court processes for those who were willing to embrace technology. It is evident that the plaintiffs lost interest in their case from February 2020, and were woken up from their slumber when they were served with the present application and by their replying affidavit, no plausible reasons whatsoever have been advanced to persuade the court to deny the Applicants the prayers sought.
7. In the old age decision in Ivita v Kyumbu (1984) KLR 441, the test as to whether or not to dismiss a suit for want of prosecution were laid down; "...Whether the delay is prolonged and inexcusable, and if it is, can justice be done despite the delay.....thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time".
8. In addition, there is a long line of authorities over time buttressing the principles governing applications for dismissal of suits for want of prosecution, among them; Ceven Limited v Erastas Gichubi & 4 others (2021) eKLR; Josphat Oginda Sasia v Wycliffe Wambile Kiiya (2022) eKLR; Rose Makokha Mteta v Osevia Development Company Limited (2022) eKLR.
9. The bottom line is whether the court finds that the delay though long and inordinate can be explained and even if not, if justice would be met by not dismissing the suit. Reliance is also placed in the case Mwangi S Kimenyi v A G & another, Misc Civil Suit No 720 of 2009, wherein the court restated the test as follows.
  - i. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties.....lest justice should be placed too far away from the parties.
  - ii. Invariably, what should matter to the court is to serve substantive justice through judicious exercises of discretion which is to be guided by the following; (i) whether the delay has been intentional and contumelious; (2) whether the delay or conduct of the Plaintiff amounts to an abuse of the court process;
  - iii. Whether the delay is inordinate and inexcusable;
  - iv. Whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of the issues in action or causes or likely to cause serious prejudice to the Defendants;



- v. What prejudice will the dismissed case cause to the plaintiff? By this test, the court is not assisting the indolent, but rather it is serving the interest of justice; substantive justice on behalf of all the parties”
10. In totality, upon interrogation of the reasons for the two years’ delay, I find that the delay was inordinate and not excusable, but a dismissal of the suit would not be in the interest of serving substantive justice to all the parties as well captured in the above case – *Mwangi S Kimenyi (supra)*; and would not be in line with the objectives stated under sections 1A, 1B, 3A and Order 51 Rule 1 of the [Civil Procedure Rules](#). I am also minded that it is draconian to dismiss a suit when there are avenues open to the court to sustain the suit to avoid grave injustice and prejudice to the Plaintiff.
- As ably stated in the above case, what matters to the court is to serve substantive justice, by exercise of judicial discretion. In the context of this suit, and the reasons advanced by the Respondent, among them Covid – 19 Pandemic though not entirely to blame for the inordinate delay, I shall exercise my discretion in favour of the Respondents.
11. I shall not allow the application by the Defendants, but as the indolence was caused by the Plaintiffs, I shall penalize them for the prejudice so far caused; and issue directions that if not complied with, the suit shall stand dismissed.
12. Consequently, the application dated March 1, 2022 is compromised as hereunder: -
- a. The Plaintiffs shall take steps to fix the suit for pre-trial conference/directions before the Deputy Registrar of this court within 45 days of this ruling.
  - b. Upon such directions being issued, the suit shall be mentioned before a Judge for taking hearing dates for the suit within 45 days thereafter.
  - c. The plaintiffs jointly and or severally shall pay throw away costs of the suit inclusive of costs of this application to the 2<sup>nd</sup> defendant/applicant within 45 days of this ruling assessed at Kshs 20,000/-.
  - d. In default of any of the above orders by the Plaintiffs, the suit shall stand dismissed.
- Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY 2022.**

**J. N. MULWA**

**JUDGE**

