



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 27 OF 2016

TABITHA MUKAMI KAMAU.....1ST PLAINTIFF

TROJAN NOMINEES LIMITED..... 2ND PLAINTIFF

-VERSUS-

NATION MEDIA GROUP LIMITED.....1ST DEFENDANT

ENOCK SIKOLIA..... 2ND DEFENDANT

KENYA AGRICULTURAL & LIVESTOCK

RESEARCH ORGANIZATION..... 3RD DEFENDANT

TITUS LANYASUNA..... 4TH DEFENDANT

RULING

The 1st and 2nd Defendant's filed an application dated 28th January, 2020 seeking for the following orders;

- 1. THAT the Plaintiff's suit against the first and second Defendants be dismissed for want of prosecution.**
- 2. THAT the costs of this application and suit herein be awarded to the First and Second Defendants.**

The Application is supported by the affidavit of Sekou Owino, Head of Legal at the Nation Media Group Limited sworn on 28th January, 2020. The application is premised on the grounds that the Plaintiffs have failed to take any action to prosecute the matter since 4th October, 2018. That in the interest of justice the application be allowed as the four (4) year delay in prosecuting the suit is prejudicial to the Defendants' case especially on witnesses accounts due to memory loss. These grounds are reiterated in the Supporting Affidavit where the Defendants maintain that the Plaintiffs have lost interest in the suit as evidenced in their failure to serve the amended plaint on any of the parties.

In opposition, the Plaintiffs filed a Replying affidavit of Tabitha Mukami Kamau sworn on the 2nd March 2020 in which they averred that the suit was instituted on 2nd February, 2016 via Plaint and an application seeking inter-alia orders of injunction against the 1st and 2nd defendants from publishing defamatory material, exemplary and/or punitive damages, General damages for libel and the costs of the suit. The Plaintiffs have admitted that indeed there was delay in prosecuting the suit, this they have attributed to loss of contact between their advocates and themselves between 2018-2019 hence no instruction was issued to their counsel. They have however reiterated their desire to prosecute this matter to its logical conclusion considering that the cause of action relates to their reputation.

ANALYSIS AND DETERMINATION:

The only issue for determination before this court is whether the Plaintiffs' suit should be dismissed for want of prosecution. Order 17 Rule 2(1), which governs dismissal of suits for want of prosecution, provides as follows:

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

Further Order 17 Rule 2(3) states thus:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”

In **Argan Wekesa Okumu vs Dima College Limited & 2 others [2015] eKLR** the court considered the principles for dismissal of a suit for want of prosecution and stated as follows:-

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of Ivita –vs-Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

In the present case, a period of 1 year 3 months had elapsed between the time the application for filing an amended plaint was allowed and the filing of the present application. Order 17 Rule 2 provides that a matter should have been pending for 12 months before the court, either on its own motion or on the application of a party, makes an order for its dismissal for want of prosecution. The plaintiffs have admitted that there was indeed delay in filing and serving the amended plaint however they submitted that the delay was excusable as they lost contact with their advocates on record.

From the foregoing, it is obvious that delay in this matter has been established. When such delay is established, unless it is well explained, it becomes inexcusable. This was discussed in **Agip (Kenya) Limited-v-Highlands Tyres Limited [2001] KLR 630**, Visram J. (as he then was) stated of inordinate delay as follows: -

"Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay."

The Plaintiffs have given an explanation for the delay, I find that the interests of justice lie in allowing the Plaintiffs to prosecute their claim which they say they are desirous of prosecuting. I agree with Azangalala J. (as he then was) in **Naftali Opondo Onyango vs National Bank of Kenya Ltd [2005] eKLR**, where the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows:-

“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.”

The suit has been pending for some time now. There is no prejudice to the first and 2nd defendants. The 1st defendant is a limited liability company which exists perpetually and cannot allege loss of memory. What is complained of is a News bulletin whose content has been reproduced in the plaint. The 1st and 2nd respondents must have saved the information in this library and can be retrieved whenever it is required.

Accordingly, I decline to allow the application for dismissal of the suit, The application dated 28th January 2020 is hereby dismissed with no orders as to costs. The Plaintiffs to expeditiously move to file and serve the amended plaint and fix the matter for hearing within 60 days hereof.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF JULY 2021

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S. CHITEMBWE

JUDGE