



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO 96 OF 2016**

**NAHASHON NGIGE NYAGAH.....PLAINTIFF**

**VERSUS**

**ABDULLAHI AHMEDNASIR MAALIM.....1<sup>ST</sup>DEFENDANT**

**CYPRIAN ADAMA NYAKUNDI.....2<sup>ND</sup> DEFENDANT**

**AL- NUR MEDIA AFRICA LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants' Notice of Motion application dated 15<sup>th</sup> March 2019 and filed on 19<sup>th</sup> March 2019 sought the dismissal of the Plaintiffs' suit for want of prosecution and the award of costs of the said application and the entire suit. It was supported by the Affidavits of the 1<sup>st</sup> Defendant on his own behalf and on behalf of the 3<sup>rd</sup> Defendant herein in his capacity as its director. The same were sworn on 15<sup>th</sup> March 2019 and 20<sup>th</sup> June 2019.

2. They contended that the Plaintiff's Notice of Motion application filed on 1<sup>st</sup> March 2016 seeking injunctive orders against them was dismissed by Thuranira Jaden J on 27<sup>th</sup> April 2017 and that since then, the Plaintiff had not taken any step to prosecute the suit herein.

3. It was their contention that a year and ten (10) months had passed demonstrating that the Plaintiff was not interested in prosecuting the case herein. They further asserted that the fact that he had preferred an appeal against the Ruling of the said learned judge did not impede him from fixing a hearing date of the matter herein. They averred that it was only fair and just that their application be allowed and the suit dismissed for want of prosecution.

4. The 2<sup>nd</sup> Defendant swore his Replying Affidavit in support of the present application on 13<sup>th</sup> May 2019. The same was filed on even date. He reiterated the 1<sup>st</sup> and 3<sup>rd</sup> Defendants' averments.

5. In opposition to the said application, the Plaintiff swore his Replying Affidavit on 10<sup>th</sup> May 2019. The same was filed on 13<sup>th</sup> May 2019. It was his assertion that his Appeal against the decision of Thuranira Jaden J at the Court of Appeal was scheduled for hearing on 2<sup>nd</sup> July 2019 and that the issue of whether or not an injunction should be issued was a core dispute at the said court.

6. He averred that he filed all the documents and witness statements together with the Plaintiff and consequently, there would be no prejudice in awaiting the decision of the Court of Appeal.

7. The Defendants relied on Order Rule 17 Rules 2 and 3 of the Civil Procedure Rules, 2010 that provides that in any suit where an application had not been made or step taken by either party in one year, the court could issue a notice to show cause why the suit should not be dismissed and any party could apply for the dismissal of the case respectively.

8. In support of their application, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants relied on several cases amongst them the cases of **Anthony Kaburi Kario vs Ragati Tea Factory Company Limited & 10 Others [2014] eKLR** and **John Mwangi Muhia & 2 Others vs Director of Public Prosecution & 5 Others [2019] eKLR** where the common thread was that a suit will be dismissed for want of prosecution where there had been inordinate and inexcusable delay which had prejudiced or was likely to prejudice a defendant. They were emphatic that justice should not be delayed as was stipulated in Article 159(2) of the Constitution of Kenya, 2010 as had been held in the case of **Kestem Company Limited vs Ndala Shop Limited & 2 Others [2018] eKLR**.

9. On his part, the 2<sup>nd</sup> Defendant relied on several cases amongst them **Governors Balloon Safaris Limited vs Skyship Company Limited & Another [2013] eKLR** and **Fran Investments Limited vs G4S Security Services Limited [2015] eKLR** where the suits therein had been dismissed for want of prosecution.

10. On the other hand, the Plaintiff placed reliance on the cases of **Charles Macharia Maina vs Jane Wanjiku Ndungu [2018] eKLR** and **Shadrack Kinyua Mbogo & Another vs Benson Mbogo Gachau & Another [2014] eKLR** where the courts therein held that courts should be slow to dismiss suits for want of prosecution unless it could be shown that there was inordinate delay that prejudiced the defendant.

11. Notably, Order 17 Rule 2 of the Civil Procedure Rules stipulates that:-

**1. 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.**

**2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**

**3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

12. In view of the fact that a case belongs to a plaintiff, it is his responsibility to progress the same to ensure that the same is concluded expeditiously as is contemplated in Section 1A, 1B and 3A of the Civil Procedure Rules and Article 159 (2) (b) of the Constitution of Kenya. He cannot move at the pace of a defendant. The onus is on him to take steps to progress his matter. Indeed, the Sword of Damocles cannot hang over a defendant's head indefinitely. Litigation must come to an end and expeditiously as stipulated in Article 159(2)(b) of the Constitution of Kenya.

13. While this court agreed with the Defendants that a suit may be dismissed for want of prosecution, it is not a matter of course. It is a matter of discretion to be exercised judiciously by a court. A suit will not be dismissed for want of prosecution unless there had been delay which was inordinate, inexcusable and if it had caused and/or was likely to cause prejudice to a defendant. If any of the three (3) ingredients was absent, then it had to restrain itself from dismissing a suit and proceed to sustain the suit.

14. This court noted that there had been delay of about a year and ten (10) months prior to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants filing their present application. It was the view of this court that dismissal of injunctive orders at an interlocutory stage did not stop the Plaintiff from proceeding with the hearing of the main suit for the reason that he had also sought substantive injunctive orders in his suit. The reason that he advanced for not having fixed the matter for hearing was not good and/or sufficient. As he did not adduce any evidence at the time this court was reserving its Ruling herein that there were any orders from the Court of Appeal staying the proceedings in the High Court, this court took the considered view that the hearing herein could still have proceeded to its logical conclusion as had been contended by the Defendants herein.

15. Be that as it may, although there was a delay as contemplated under Order 17 Rule 2 of the Civil procedure Rules, the period of his inaction could not be said to have been so inordinate as to have caused prejudice to the Defendants. This court was thus not persuaded that it should dismiss his suit for want of prosecution. The Defendants did not demonstrate what prejudice they had suffered in the last year and ten (10) months. If they did, they did not demonstrate the same. In the absence of the element of prejudice, this court was called upon to exercise restraint in dismissing the suit herein. Justice demanded that the Plaintiff be given an opportunity to prosecute his case.

## **DISPOSITION**

16. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants' Notice of Motion application dated 15<sup>th</sup> March 2019 and filed on 19<sup>th</sup> March 2019 was not merited and the same is hereby dismissed. The costs of the application will be in the cause.

17. However, to avoid causing the Defendants suffering any prejudice and to progress this matter further, the Plaintiff is hereby directed to fix the same for Pre-Trial Directions within one hundred and twenty (120) days from the date of this Ruling failing which his suit will stand as automatically dismissed with costs to the Defendants herein. Either party is at liberty to apply.

18. It is so ordered.

**DATED and DELIVERED at NAIROBI this 11<sup>th</sup> day of May 2020**

**J. KAMAU**

**JUDGE**