REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 32 OF 2016

MICHAEL NYONGESA MAKOKHA…....…PLAINTIFF/RESPONDENT

VERSUS

STANDARD GROUP LIMITED……...….1ST DEFENDANT/APPLICANT

NATION MEDIA GROUP LIMITED……..2ND DEFENDANT

ERIC AHOLI

CHARLES APPLETON

BRIAN DESOUZA

ANIS PRINGLE

JOSEPHAT MWAURA

JACOB GATHECHA

JOSEPH KARIUKI

BENSON NDUNG'U

JOHN NDUNYU t/a KPMG KENYA……....…..3RD DEFENDANT

RULING

1. The 1st defendant has filed a Notice of Motion dated 23rd January, 2019 and the same stands supported by the grounds set out on the face thereof together with the affidavit sworn by *Robert Thiong'o Gachaga*. The 1st defendant seeks to have the suit against itself dismissed for want of prosecution.

2. On his part, *Robert Thiong'o Gachaga* deponed that the suit was filed on 8th February, 2016 and that thereafter, the plaintiff/respondent obtained a default judgment against the 1st defendant/applicant on 25th April, 2016.

3. The deponent further averred that subsequently, the 1st defendant/applicant sought to have the default judgment set aside and its application was allowed by consent of the parties on 30th January, 2017; that since then, the plaintiff/respondent has taken no steps to prosecute his case. That the 1st defendant has

suffered and continues to suffer unnecessary anxiety as a result of the pendency of the suit in court.

4. There has been no retort from the plaintiff/respondent.

5. *Mr. Thiong'o* counsel for the 1st defendant/applicant in his oral arguments chose to rely on the averments raised in the Motion and supporting affidavit. *Mr. Owiti* who held brief for *Mr. Fraser* advocate for the 3rd defendant reinforced the submissions made by his counterpart that the plaintiff's/respondent's suit should be dismissed for want of prosecution. The respective advocates for the plaintiff/respondent and 2nd defendant were absent from court during oral arguments.

6. In the premises, I have considered the grounds as articulated in the Motion and affidavit in support thereof. I will begin by making reference to *Order 17, Rule 2 (1)* of the Civil Procedure Rules stipulating that:

> ***"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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."***

Rule 2 (3) cited by the 1st defendant/applicant further expresses the following:

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

7. That said, the germane principles surrounding dismissal of a suit for want of prosecution have been encapsulated in various judicial authorities. I shall take the principles as set out in *Mwangi S. Kimenyi v Attorney General & another [2014] eKLR.*

8. In answering the first principle on whether or not there has been inordinate delay in the prosecution of the suit, I turn to the record which discloses that the suit was last in court substantively on 30th January, 2017 as correctly stated by the 1st defendant/applicant. On the said date, the parties recorded a consent to the effect that the 1st defendant's then application seeking to have the interlocutory judgment set aside be allowed conditionally. The consent was resultantly adopted as an order of the court.

9. It would appear that the matter was thereafter fixed for formal proof on 19th September, 2017 and 3rd April, 2018 which I find strange considering the fact that the interlocutory judgment was set aside pursuant to the abovementioned consent. Be that as it may, it is evident that the matter has not actively been in court for over two (2) years now. What then amounts to inordinate delay? The case of *Mwangi S. Kimenyi* (supra) brings perspective into the term in this sense:

> ***"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable...Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases."***

10. In the instant case, the matter was last in court sometime in 2017 as earlier stated. No explanation for the inaction has been brought forward, neither has the plaintiff/respondent challenged the application seeking to dismiss his suit. To my mind, this is evidence of inordinate delay.

11. In close reference to the above is the principle on whether the delay is intentional and hence inexcusable. Once again, I reiterate that the plaintiff/respondent has not made an effort to explain the delay in the suit despite there being evidence of service of the application upon him through his advocates. Nonetheless, I have taken note that the firm of *Ataka Kimori & Okoth,* advocates on record for

the plaintiff/respondent, filed an application to cease acting in the matter on 21st March, 2018 for the reason that they have not received instructions from their client. There is no indication that the said application was heard and determined. Needless to say, I find that no excuse has been given for the dormancy of over two (2) years.

12. The third principle concerns whether or not the delay is an abuse of the court process. The overriding objectives under the Civil Procedure Act dictate that parties should strive to dispose of their respective suits expeditiously. In the present instance, the suit has been inactive and without reason, thereby inhibiting the overriding objectives. It matters not that the suit was filed fairly recently; parties are responsible for assisting the court in expediting their matters and where this is not done, an abuse of the court process is deemed to have arisen.

13. The 1st defendant/applicant is expected to demonstrate the prejudice it stands to suffer. In this respect, I turn to the court's analysis in *Mwangi S. Kimenyi* (supra) that:

> ***"…the Defendant must show he suffered some additional prejudice which is substantial and results to 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant. It must also be shown that the delay has worsened the Defendant's position in the suit. It will not, therefore, be sufficient to just make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out herein above."***

14. Likewise, the court in *Ivita v Kyumbu [1984] KLR 441* had the following to say:

> ***"(the defendant) must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution."***

15. The deponent in the supporting affidavit to the Motion stated that the pendency of the suit has occasioned the 1st defendant/applicant unnecessary anxiety and the fear of increased costs. In view of the analysis given hereinabove, it is my honest view that the 1st defendant/applicant has not shown the manner in which it has been prejudiced in the process. In any case, there is nothing to indicate that the 1st defendant/applicant provoked the plaintiff/respondent to prosecute the suit on previous occasions. In the circumstances, I am not convinced that prejudice has befallen the 1st defendant/applicant.

16. On the flip side, I am expected to consider whether the plaintiff stands to suffer prejudice. In *Ivita* (supra) as referenced by the court in *Mwangi S. Kimenyi* (supra) the judge wisely held the following:

> ***"Thus, even if 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."***

17. Drawing from the above, the consideration of a plaintiff by the court is triggered by the reason afforded. In the present instance, the plaintiff/respondent has given me no such reason or explanation for his delay and thus, I have no basis on which to find that he stands to be prejudiced.

18. I cannot pen off without emphatically stating that the interest of justice forms the crux of every decision by the courts. However, I must add that this ought to be weighed hand in hand with the rights and obligations of the respective parties. I appreciate that the suit touches on a defamatory claim relating to a matter of public interest; however, this does not diminish the fact that parties are obligated to proactively pursue their cases so as to curb the backlog of cases. In my view, the plaintiff/respondent does not give the impression that he is keen on prosecuting his case and it would be unfair for the defendants herein to be dragged with no end in sight.

19. In the end, the Motion is found to have merit. Consequently, the suit against the defendants is hereby dismissed with costs to the defendants. In addition, the 1st defendant/applicant shall have the costs of the

application.

Dated, signed and delivered at **NAIROBI** this 7th day of March, 2019.

L. NJUGUNA

JUDGE

In the presence of:

……. for the Plaintiff/Respondent

……. for the 1st Defendant/Applicant

……. for the 2nd Defendant

……. for the 3rd Defendant