



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 459 OF 2011**

**VIJAY DAHYALAL SADLANI.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**HAREN KUMAR DAMJI SADLANI.....1<sup>ST</sup> DEFENDANT**

**THE STANDARD LIMITED.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**THE STANDARD GROUP LIMITED.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants/applicants have taken out the Notice of Motion dated 13<sup>th</sup> July, 2018. The same is supported by the grounds set out on the face of the motion and the facts deponed in the affidavit sworn by *Millicent Ng'etich*. The 2<sup>nd</sup> and 3<sup>rd</sup> applicants are seeking for the dismissal of the plaintiff's/ respondent's suit against them for want of prosecution.
2. The plaintiff/respondent filed the replying sworn by *Odhiambo Marcellus Titus Adala* together with Grounds of Opposition.
3. This court directed the parties to file written submissions on the Motion. The 2<sup>nd</sup> and 3<sup>rd</sup> applicants' submissions were filed on 28<sup>th</sup> January, 2019 whereas those by the respondent were filed on 7<sup>th</sup> March, 2019.
4. The brief background of the case is that the respondent filed an action against the defendants herein on 21<sup>st</sup> October, 2009 seeking damages for wrongful arrest, malicious prosecution and unlawful detention, in addition to damages for defamation.
5. The respondent pleaded that as a result of malicious utterances by the 1<sup>st</sup> defendant, he was arrested, charged and prosecuted alongside other persons not before court for the offence of demanding money/properties with menaces contrary to Section 302 of the Penal Code.
6. The respondent also pleaded that the charges were later withdrawn by the 1<sup>st</sup> defendant, who later on caused to be published with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/applicant's defamatory material against him, hence the suit.
7. I have carefully considered grounds stated on the face of the motion and the facts deponed in the supporting affidavit. I have also taken into account the Grounds of as well as the rival submissions.
8. The grounds and or principles to be considered in applications for dismissal of suits for want of prosecution are stated under *Order 17, Rule 2 (1) and (3) of the Civil Procedure Rules*.
9. The guiding principles in such an application were discussed in **Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others [2014] eKLR** inter alia as follows:

**i. Whether there has been inordinate delay in the prosecution of the suit by the plaintiff;**

**ii. Whether the delay is intentional and thus inexcusable;**

**iii. Whether the plaintiff has offered a reasonable explanation for the delay;**

**iv. Whether the delay is an abuse of the court process;**

**v. Whether the delay prejudices the defendant(s);**

**vi. The prejudice that will be visited upon the plaintiff; and**

**vii. Whether justice can still be done notwithstanding the delay.**

10. In addressing the first principle, I make reference to the applicants' submission that the suit was last in court on 16<sup>th</sup> May, 2017 and that since then, the respondent has taken no steps to prosecute his suit.

11. The respondent on his part opposed the above submissions by contending that the suit came up for hearing on various occasions thereafter.

12. I have examined the court record. The record shows that on 15<sup>th</sup> May, 2017, the parties appeared before the deputy registrar where the respondent's and applicants' respective counsels sought for leave of the court to put in additional pre-trial documents. The matter was therefore stood over to 5<sup>th</sup> June, 2017.

13. The record also shows that thereafter, two other hearing dates were taken by the respondent's counsel ex parte but there was no court attendance on the said dates. Eventually, the matter went dormant until 20<sup>th</sup> June, 2018 when the suit came up before the deputy registrar but neither of the parties were present, despite the scheduled date being issued to the respondent ex parte. Since then, the suit came up in court once more but there was no attendance on the part of the parties.

14. In the premises, I take the view that the parties last appeared before court on 15<sup>th</sup> May, 2017. It is now close to two (2) years since then and no progress has been achieved in the matter. This, to my mind, amounts to inordinate delay.

15. Let me determine the second and third principles contemporaneously. The applicants basically submitted that the respondent has offered no reasonable explanation for failing to prosecute his suit for over (1) year; whereas the respondent argued that he experienced difficulties in getting his witnesses to record their statements since they have since relocated to various foreign countries.

16. Having considered the positions stated hereinabove, it is apparent that the challenges faced by the respondent were not brought to the attention of this court until now.

17. I have noted that the respondent's advocates took reasonable steps to obtain hearing dates in the matter ex parte sometime between late 2017 and mid-2018, they have given no explanation for their failure to attend court on the given dates.

18. The respondent as well indicated that he experienced health complications as a result of the unavailability of his witnesses but has not availed any medical evidence to support his assertions.

19. It is my humble view that the explanations given by the respondent are neither supported nor do they adequately explain the reason for the prolonged delay in prosecuting the matter.

20. This brings me to the fourth principle on whether or not the delay is an abuse of the court process. The onus of prosecuting a suit ultimately falls on the plaintiff.

21. The respondent in this instance was expected to have taken every reasonable step to prosecute his case. I must reiterate that dates were sought and obtained in the matter, this amounted to nothing in the absence of physical attendance. A failure to expedite the prosecution of his case, in my opinion, gives rise to an abuse of the court process since it impedes the overriding objective under the Civil Procedure Act.

22. It was upon the plaintiff's advocates to ensure the court attendances as and when required and in failing to do so, he let the respondent down. It would therefore be unjust to have the plaintiff suffer solely for the inadvertence of his counsels.

23. As regards the subject of prejudice, the applicants in their submissions did not address the subject of prejudice, though it is indicated in the supporting affidavit that they stand to suffer the risk of unavailability of witnesses and additional costs.

24. In the case of *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR it was held inter alia as follows:

**“...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."**

25. From the averments of the applicants, it is clear that they made generalized assertions on the prejudice they would suffer in the continued pendency of this case.

26. This is a claim for damages for wrongful imprisonment, malicious prosecution and defamation. In my humble view, the plaintiff stands to lose his chance to prosecute his case in a fair trial should his case be dismissed, and largely due to the failure by his advocates to attend court on the scheduled hearing dates.

27. I am convinced that from the circumstances of this case that justice can still be done notwithstanding the delay. A similar position was taken in *Mwangi S. Kimenyi* (supra) as hereunder:

**"I admit that a party should always take steps to progress his case to logical conclusion...But courts of law are courts of justice to all the parties. And as I stated earlier, dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay..."**

28. In the end a fair order is to have the Motion dated 13.7.2018 dismissed. However, the plaintiff/respondent is directed to prosecute his suit within 90 days from today, in default their suit shall stand dismissed.

29. Costs of the motion to abide the outcome of the suit.

**Dated, signed and delivered at NAIROBI this 2<sup>nd</sup> day of May, 2019.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff/Respondent

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants

..... for the 4<sup>th</sup> Defendant