



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 152 OF 2010**

**WAMBUGU GITONGA**

**T/A MAKHECHA & GITONGA ADVOCATES.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JAMES OCHIENG' ODUOL T/A OCHIENG', ONYANGO,**

**KIBET & OHAGA ADVOCATES.....DEFENDANT/APPLICANT**

**RULING**

1. The Defendant/Applicant has brought the Notice of Motion dated 26<sup>th</sup> March, 2019 which is supported by the grounds set out on its face and the facts deponed in the affidavit sworn by the Defendant/Applicant. The order being sought in the Motion is for dismissal of the Plaintiff's/Respondent's suit for want of prosecution.
2. The Respondent opposed the motion and relied on the replying affidavit of Wambugu Gitonga.
3. The brief background of this matter is that the Respondent filed a suit against the Applicant vide the plaint dated 12<sup>th</sup> March, 2010 seeking for both general and exemplary damages for the defamatory words allegedly published by the Applicant concerning the Respondent on various dates. The offensive words are set out in paragraphs 5, 6, 7 and 8 of the plaint. The Defendant filed a defence to deny the Plaintiff's claim.
4. When the motion came up for interpartes hearing, learned counsels appearing in this matter made oral submissions. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have further considered the rival oral submissions.
5. It is the submission of Mr. Limo, learned advocate for the Defendant/Applicant that this suit was last in court for mention on 13.2.2018 to confirm compliance with the pre-trial directions and since then the Plaintiff has not taken any step to have it set down for hearing.
6. It was also pointed out that the delay for more than a year is inordinate, inexcusable and an abuse of the court process. The learned advocate further pointed out that the Plaintiff has explained what caused the delay in the period between the year 2013 and 2017 but he has failed to explain the delay between the year 2018 and 2019 and for the above reason, this court was beseeched to dismiss the suit for want of prosecution.
7. Miss Gesare, learned advocate who appeared for the Plaintiff/Respondent opposed the motion by relying on the replying affidavit of Wambugu Gitonga. It is averred that the Plaintiff's advocate wrote several letters to the Deputy Registrar of this court requesting for the matter to be listed for hearing but that could not be granted because the suit had not been certified as ready for hearing by the court.
8. The Plaintiff also stated that he is ready and willing to prosecute the matter. Plaintiff further averred that his advocate misfiled his file in their office thus failing to take a hearing date at the registry. The Plaintiff argued that the failure to list the matter for hearing within a reasonable time was purely an oversight and honest mistake on the part of his advocates which mistake should not be visited upon him.
9. The principles to be considered in determining an application for the dismissal of an action for want of prosecution were restated by this court in the case of *Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others [2014] eKLR* thus:

***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 this case, the Plaintiff has beseeched this court to spare his suit because the delay to prosecute the matter was due to the mistake of his erstwhile advocate and by the fact that it took time for the court to certify the suit as ready for hearing.

11. The Defendant is of the submission that the Plaintiff has offered no plausible explanation to explain the delay. Upon weighing the competing arguments, I am convinced that the Plaintiff has given a good account for his failure to prosecute this suit. The record also vindicates the Plaintiff as the party who has always been keen to pursue his case. This is proved by the myriad of correspondences he attached to his replying affidavit indicating the follow ups he made to have the suit ready for hearing.

12. This court notes that the Defendant has raised genuine concerns over the considerable delay in prosecuting this suit. However having considered the explanation given by the Plaintiff, I am convinced that the delay though long is excusable.

13. In the circumstances of this case, a fair order to make is to sustain the suit but direct the Plaintiff to have it listed for hearing within a given time line.

14. In the end, the motion dated 20<sup>th</sup> March 2019 is dismissed with costs abiding the outcome of the suit. The Plaintiff's suit should be listed for hearing and prosecuted within a period of 120 days failure to which the suit shall stand automatically dismissed.

**Dated, signed and delivered at Nairobi this 5<sup>th</sup> day of July, 2019.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant