



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 134 OF 2011

LEONARD GETHOI KAMWETI.....PLAINTIFF

-VERSUS-

SOLOMON KITUNGU.....1ST DEFENDANT

JAINDI KISERO.....2ND DEFENDANT

NATION MEDIA GROUP LIMITED.....3RD DEFENDANT

RULING

1. The matter herein was filed in the year 2011. On the 11th day of October, 2019, the court on its own motion moved the parties with a Notice to show cause why the same should not be dismissed for want of prosecution.
2. On the said date counsel for the respective parties sought time to file affidavits in response to the notice to show cause.
3. The Plaintiff filed an affidavit through his advocate, Mr. Gregory Makambo on the 25th October, 2019 in which he has deponed that the matter was last in court on the 14th May, 2018, for mention, when it was stood over to the 30th day of May, 2018 but on the said date it was not listed.
4. That counsel personally went to the registry to find out why the matter was not listed but the file could not be traced and the registry staff asked for time to trace it.
5. He avers that he has subsequently written (3) letters requesting for the matter to be listed, but the registry has declined to receive the said letters without having the physical file. He deponed that the inaction in the matter from the 30th May, 2018 was caused by the misplacement of the court file. He stated that despite being ordered to file and serve statements and documents within 14 days from 14th May 2018, the 2nd and 3rd Defendants have never filed the same. He contends that the Plaintiff is still interested in pursuing the matter and has urged the court not to dismiss the same.
6. The 1st Defendant filed a replying affidavit through his advocate, Kiragu Kimani on the 21st November 2019, in which he has deponed that, the matter was certified ready for hearing on the 6th day of April, 2016 but since then the Plaintiff has not made attempts to fix it for hearing.
7. He avers that the allegations of missing court file by counsel for the Plaintiff have not been substantiated in that, he has not presented any evidence to the court in form of a letter to the Deputy Registrar informing them that the file was missing and requesting for it to be traced. Similarly, he contends that counsel for the Plaintiff has not provided any evidence to prove that his court clerk has been making follow-ups at the registry to trace the file.
8. Counsel further depones that the 2nd and 3rd Defendants have on previous court attendances indicated to the court that they do not wish to file witness statement or documents contrary to the assertion by counsel for the Plaintiff that they have failed to do so.
9. He concluded by stating that the pendency of the suit is prejudicial to the 1st Defendant and has urged the court to dismiss the suit.
10. The 2nd and 3rd Defendants filed their affidavit on the 14th day November, 2019 sworn by Zehrabanu Janmohammed on even date. She avers that the matter was filed on the 12th day of April 2011 and it is with respect to an alleged cause of action that occurred on diverse dates in April 2010. That thereafter, it was fixed for pre-trial directions on diverse dates between the years 2011 and 2016 and was ultimately certified ready for hearing on the 6th day of April, 2016.

11. That the matter was scheduled for mention on the 30th day of May, 2018 but on the said date, it was not listed and thereafter the Plaintiff has failed to take any positive action in the matter to set the suit in motion.

12. On the allegations that the court file has been missing, she averred that the letters that were purportedly written to the Deputy Registrar have not been stamped by the registry as having been duly filed. That the averment in the Plaintiff's counsel's affidavit of the registry declining to receive the letters is a contradiction since the letter dated 4th day of October, 2019 was written after the court had already issued a Notice to show cause on the 2nd October, 2019 hence the court file in any event was available after that date.

13. That the pendency of the suit is prejudicial to the 2nd and 3rd Defendants on the basis that the alleged cause of action accrued over 9 years ago and the said liability is still pending on the 3rd Defendant's accounts. She has, thus urged the court to dismiss the suit.

14. The court has considered the affidavits aforesaid. The Notice to show cause was issued under **Order 17 Rule 2 (1)** of the Civil Procedure Rules which provides:-

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 finds fit to obtain expeditious hearing of the suit.

15. The principles to be applied in a case such as the one before the court, are set out in the case of **Allen vs Sir Alfred Mc Alphine & Sons Limited [1968]** where Salmon L.J stated as follows:-

i. There has to be inordinate delay. It is not possible to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary from case to case but it should not be too difficult to recognize inordinate delay when it occurs.

ii. That this inordinate delay is inexcusable. As a rule, until a credible excuse is made the natural inference would be that it is inexcusable.

iii. The defendants are likely to be seriously prejudiced by the delay. This may be prejudicial at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the larger the delay, the greater likelihood of serious prejudice at the trial".

16. The above principles have been followed in Kenya in the case of **Ivita vs Kyumba KLR 441** where the court held inter alia:-

"The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiffs excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court".

17. The power of the court to dismiss a suit for want of prosecution is discretionary but the same should be exercised judiciously. This was the holding in the case of **Moses Muriira Maingi & 2 Others vs Mwangi Kamuru & Another – Nyeri Civil Appeal No. 151 of 2010** and also in the case of **ET Monks & Co. Ltd vs Evans [1985] KLR 584** wherein Kneller J, as he then was, held inter alia:-

"Whether an application for dismissal of the suit for want of prosecution should be allowed or not is a matter for the discretion of the Judge, who must exercise it judiciously. The court shall among other things consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was inexcusable. However, each case will turn on its own facts and circumstances".

18. The reason given by the Plaintiff for failure to prosecute the matter for over an year is that the court file was missing. He has annexed letters to the affidavit in support which his counsel wrote to the Deputy Registrar requesting for her/his assistance in tracing the file.

19. The court notes that none of the letters is stamped with the registry stamp. In his explanation the deponent states that the registry could not stamp the letters without the file and in the circumstances, it is not possible for this court to ascertain for sure whether the court file was indeed missing.

20. On the other hand, the Defendants depones that the pendency of the matter is prejudicial to them but no serious prejudice has been alluded to, by any of them.

21. The court notes that the matter was last in court on 14th May, 2018 and it was listed for Notice to show cause on the 11th October, 2019, a period of one and a half year. I find that the delay is not inordinate and do give the Plaintiff the benefit of doubt. But due to the age of the matter, I hereby order that the same be prosecuted within a period of six (6) months failure to which it shall stand dismissed. Costs of Kshs 8,000/= are awarded to each Defendant payable within 21 days from today.

22. It is so ordered.

Dated, signed and delivered at NAIROBI this 5th day of December, 2019

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendants