



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL SUIT NO. 152 OF 2013**

**RICHARD KERICH ..... PLAINTIFF**

**VERSUS**

**FRANCIS ATWOLI ..... 1<sup>ST</sup> DEFENDANT**

**CENTRAL ORGANISATION OF TRADE UNIONS**

**(KENYA) ..... 2<sup>ND</sup> DEFENDANT**

**PEOPLE MEDIA GROUP LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

The Notice of Motion dated 6<sup>th</sup> June 2017 and filed on 8<sup>th</sup> June 2017 seeks dismissal of the suit against the 3<sup>rd</sup> defendant for want of prosecution. The application is brought under Order 51 Rule 1 and Order 17 Rule 2(b) of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. It is premised on the grounds that the plaintiff herein has failed to prosecute the suit since close of pleadings on 13<sup>th</sup> August 2013. According to the applicant, this long delay is an indication of the plaintiff's lack of interest in the suit and continues to cause the applicant indefinite anxiety and risk of losing its witnesses. The applicant pleads that the suit ought to be dismissed for the interests of justice to be served. The application is supported by the Affidavit of Rose N. Munyasi sworn on 6<sup>th</sup> June 2017.

The respondent/plaintiff opposed the application through the Replying Affidavit of Richard Kerich, the plaintiff herein, sworn on 26<sup>th</sup> July 2017. He admits that there has been some delay in prosecuting the suit but attributes the delay to his prosecution in a criminal matter before the Anti-Corruption Court in Nairobi. He deposes that following institution of these charges, he was suspended from duty which greatly inhibited him. He beseeches the court to grant him an opportunity to prosecute the suit, adding that all the documents in support of his case had been filed. The plaintiff undertakes to proceed with the suit expeditiously to prove his claim against the defendants. He states that the delay has not been inordinate or of such nature as to seriously prejudice the defendants. Furthermore, any prejudice suffered can be compensated by way of reasonable costs.

The applicant dismisses the respondent's reasons for the delay as an excuse which does not provide a convincing explanation to show there was no opportunity for prosecuting the civil matter. It further points out that it defeats reason for the plaintiff/respondent to plead financial strain as a reason for his inability to prosecute the matter and at the same time suggest compensation to the applicant. The applicant relies on the decisions of the court in **Moses Mwangi Kimari v Shammi Kanjiraapparambil Thomas & 2 Others (2014) eKLR** and **Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Another (2014) eKLR**.

The plaintiff/respondent's explanation for the delay is that he was charged in Nairobi Anti-Corruption Case No. 18 of 2013 *Republic v Richard Langat Kerich* which needed his attendance. He submitted that following the institution of charges against him, he was placed on suspension from duty at half pay. As a result, he was constrained financially and was unable to focus on other matters. Relying on the decisions of the court in **Skyview Properties Ltd. & Another v Kennedy Amos Njoroge & 3 Others (2017) eKLR** and **Mwangi S. Kimenyi v Attorney General & Another**, the plaintiff urges the court to decline the application and in its stead issue directions on hearing of the matter.

Rule 2(1) of Order 17 of the Civil Procedure Rules gives direction when a suit is not prosecuted in the following terms:

**(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.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.

It is a well-settled principle that before a court resorts to dismissing a suit for want of prosecution, it ought to be satisfied that the delay is inordinate and inexcusable. As stated by the Court of Appeal in **Salkas Construction Limited v Kenya Petroleum Refineries Limited Civil Appeal No. 250 of 2003 (2004) eKLR**:

*‘ The principle that pervades these decisions is that the court has to be satisfied that the inordinate delay is excusable and if so satisfied, then the court has to consider whether justice can still be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable, then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution.’*

Such was also the position in **Naftali Onyango vs. National Bank of Kenya [2005] eKLR**, where the court reiterated the burden of proof that a defendant seeking for dismissal of suit for want of prosecution must meet. The court cited with approval the decision of Salmon L.J. in **Allan v. Sir Alfred MC Alphine and Sons Ltd [1968] 1 ALL ER 543** as follows: -

*“The defendant must show:*

*i. That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely 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 out the natural inference would be that it is inexcusable.*

*iii. That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between themselves and the plaintiff or between each of other or between themselves and*

*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 longer the delay the greater the likelihood of prejudice at trial.”*

This court is also enjoined under **Article 159** of the Constitution to among others ensure that justice is not delayed and that justice is done to all irrespective of status. This duty is also aligned with the duty of the court to uphold the overriding objective under **sections 1A, 1B and 3A** of the Civil Procedure Act.

It is not disputed that there has been delay in prosecuting this suit. This fact has not been denied by the plaintiff/respondent. The record shows that the Plaintiff instituting the subject suit was filed on 30<sup>th</sup> April 2013. The Statements of Defence were filed on 4<sup>th</sup> June 2013 and 24<sup>th</sup> June 2013 by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and 3<sup>rd</sup> defendant respectively. The plaintiff filed the Replies to the Defence on 24<sup>th</sup> July 2013 and 15<sup>th</sup> August 2013. According to the applicant, the matter remained dormant till the applicant filed a Notice of Change of Advocates on 20<sup>th</sup> March 2017 which was served on 24<sup>th</sup> March 2017. Thereafter, there was no action on the part of the plaintiff until the applicant filed the instant application.

Whether a delay is inordinate and inexcusable is determined by the circumstances of each case. It is the duty of the plaintiff being the party who moved the court in the first instance, to set the suit down for hearing. The explanation afforded here is that the plaintiff was involved in a criminal case where he was facing charges. A copy of the charge sheet stamped 5<sup>th</sup> May 2013 was attached in support of this claim. The plaintiff also stated in submissions that he was eventually acquitted of the charges on 3<sup>rd</sup> October 2017. I find his explanation unconvincing to explain the inordinate delay. That said, it is also observable that the plaintiff had retained an advocate, and pleadings in this matter had closed. All that was needed was for the plaintiff’s advocate to take pre-trial directions and set the suit down for hearing, which did not require his personal attendance. Thereafter, it would have been open to the plaintiff to appeal to this court for its indulgence to attend to the anti-corruption matter. It is not possible that the plaintiff was attending to court all this time.

Having so found, the final question for determination is whether the interests of justice would be served despite the inordinate delay. Dismissal of a suit is a discretionary power of the court that ought to be exercised judiciously considering all the circumstances of a case. In determining this question, this court is required to take into consideration the effect of dismissing the suit on both parties. In the instant case, there has been a delay of about three years, nine months.

Interests of justice demand that delay in a matter ought not be the sole consideration in determining the suit. Indeed, the Constitution under Article 48 on access to justice and Article 50 (1) on the right to fair hearing demands the court’s consideration of other factors before resorting to the otherwise draconian exercise of dismissing the suit. The prejudice suffered by the applicants/defendants is the prolonged anxiety and *the risk* of losing witnesses. In essence, were the case to be set down for hearing forthwith, the witnesses would be available to give evidence. On the other hand, if the case were to be dismissed, the prejudice to be suffered by the respondent/plaintiff is being turned away from the judgment seat of justice unheard. Pitted against each other, it is this court’s view that prejudice caused by complete denial of audience before court of a party who is willing to prosecute their matter outweighs the anxiety suffered by a litigant due to delay in

prosecuting the same. Any prejudice that the applicant may suffer can be compensated by way of costs.

For this sole reason, I am persuaded that the suit should be sustained for hearing for the interests of justice. In the end, this application fails. In the premise, I direct that the plaintiff moves to set down this suit for taking of pre-trial directions within 30 days from the date of this ruling.

The plaintiff/respondent shall however, bear the costs of the applicant. Orders accordingly.

*Dated, signed and delivered at Nairobi this 13<sup>th</sup> Day of June, 2018.*

**A. MBOGHOLI MSAGHA**

**JUDGE**