REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 32 OF 2012

THOMAS WAHOME NJUGUNA...............PLAINTIFF/RESPONDENT

VERSUS

ERIC OBINA...1ST DEFENDANT/APPLICANT

MUTUMA MATHIU...............................2ND DEFENDANT/APPLICANT

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

RULING

1. This ruling seeks to determine a Notice of Motion dated 2nd November, 2017 brought under the provisions of Order 17 Rule 2(3), Order 51 Rule 1 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act, seeking orders that the Plaintiff's suit against the Defendants be dismissed for want of prosecution and the costs of the application and the suit be awarded to the Defendants/Applicants.

2. The Application is supported by the Affidavit of **ZEHRABANU JANMOHAMED** and its based on the grounds that the Plaintiff filed the suit on 31st January, 2012 together with an application for an ex parte injunction orders dated 30th January, 2012 which application came up for hearing on 10th February, 2012 and the court dismissed the prayer for ex parte injunction and ordered that the same be set down for hearing inter partes on 27th March, 2012. Since then, the Applicant depones that the Plaintiff has never taken any step in prosecuting the suit and it has been more than 5 years since the matter was last in court. The Applicant avers that the Plaintiff has shown no interest in the suit and the delay has prejudiced them in that, the Defendants employees leave from time to time and witnesses tend to forget with time. That to date the Plaintiff has failed to serve summons and therefore seeks the suit to be dismissed in the interest of justice.

3. The Plaintiff opposed the application and filed a Replying Affidavit dated 20th February, 2018 sworn by **CHARLES M. ONGOTO**, his Advocate, who depones that the suit has been pending due to circumstances beyond his control as the particular Advocate working on the file misplaced the same and for a long time failed to report and all along he thought that the file was actively being prosecuted. He further depones that as soon as he received the instant application, he contacted the Plaintiff who stated that he is very much interested in pursuing the matter. He therefore depones that it's only fair that the suit be heard on priority as the Applicants will suffer no prejudice if the suit is immediately set down for hearing but the Plaintiff will suffer greatly if condemned unheard.

4. The application was canvassed by way of written submissions. The Applicant filed submissions dated 6th April, 2018 and indentified three issues for determination being; whether there has been inordinate delay in prosecuting the suit; whether the inordinate delay is excusable and whether the defendant will suffer substantial prejudice as a result of the delay if the suit was to be allowed to trial.

5. On whether there has been delay, the Applicants submitted that the delay is inordinate and relied on the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** where it was held that**,** *"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. Caution is, however, advised for courts not to take the word ''inordinate'' in its dictionary meaning, but to apply it in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.***"**

6. On whether the delay is excusable, the Applicant submits that since the Plaintiffs Advocate came on record, for a period of three years he has not done anything meaningful to set the suit in motion. That the Advocate who had misplaced the file did not swear an affidavit to confirm the allegation. It was also submitted that the Plaintiff didn't even swear an affidavit to confirm his willingness to prosecute the matter. Furthermore, the applicant submitted that it is the Plaintiffs duty to ensure that there is continuous progression of the suits filed on his behalf. Among other authorities, the Applicant relied on the case of **Pyrethrum Board of Kenya v Samuel K. Kihiu & 3 others** [**2014**] **eKLR where it was held that,** *"The applicant had a duty and was duty bound to follow up on its advocates to ensure that the*

suit is listed down for hearing as well as to find out the status of his case."

7. The Applicant further relied on the decision in **John Ongeri Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** where it was held that:

"Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent".

8. On whether the Applicant would suffer substantial prejudice, it was the Applicants submission that they have suffered great prejudice as a result of the pendency of the instant suit owing to the Plaintiff's inaction and should the suit be allowed to proceed, they would continue to suffer prejudice as the alleged cause of action arose 6 years ago and witnesses would have died, memories faded and documents untraceable. The Applicant referred to the case of **Moses Otsyula v Children of God Relief Institute [2015] eKLR** where it was held that, *"It is also trite that every year that passes prejudices the fair trial as witnesses may have died, documents mislaid, lost, destroyed and the memory tends to fade(see Dickson J in Nilan v Pater (1969) EA Page 341."*

9. The Plaintiff filed his submissions dated 9th April, 2018 and regretted that there was a communication breakdown within the Advocate's office. It was deponed that the Plaintiff is committed to have the case heard on merits and prays that the defendant's application be dismissed with no orders as to costs. The Plaintiff further submitted that it will be unfair for the Defendants to have the case dismissed as the circumstances are beyond anyone's control. The Applicant relied on the case of **AGIP (KENYA) LTD. VS. HIGHLANDS TYRES LIMITED (2001) KLR 630,** where Visram J. (as he then was) stated: *"**Delay is a matter to be decided on the circumstances of each case where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit".***

10. I have considered the arguments from both parties as well as the Affidavits on record. The principles upon which a suit may be dismissed for want of prosecution are well settled in a decision by this court in the case of **Utalii Transport Company Limited & 3 Others V NIC Bank Ltd & Another Nbi HCCC No 32 of 2010 [2014] Eklr** where the court noted that; *whereas dismissal of suit for want of prosecution is a matter for the discretion of the court, a court of law should always avoid acting intuitively on such application or hastily dismiss a suit for want of prosecution, but rather, it should make further enquiries into the matter under the guidance of the now defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act, for it drives the plaintiff away from the judgment-seat.*

11. The recognized principles of law which should govern the exercise of the discretion are:

(a) ***Whether there has been inordinate delay on the part of the Plaintiff in prosecuting the case;***

(b) ***Whether the delay is intentional, contumelious and, therefore, inexcusable;***

(c) ***Whether the delay is an abuse of the court process;***

(d) ***Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;***

(e) ***What prejudice will the dismissal occasion to the plaintiff?***

(f) ***Whether the plaintiff has offered a reasonable explanation for the delay;***

(g) ***Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?***

12. The explanation given by the Plaintiff for the delay is that the Advocate who was dealing with the matter misplaced the file and went silent. It is the Applicant's case that since the Advocate took up the matter he has never set the suit in motion. A perusal of the file will reveal that there was an application filed in January 2012 which is pending hearing and it's the Applicant's submission that the same has never been set down for hearing. The Advocate for the Plaintiff took up the matter in the year 2015 and other than filing a Notice of Appointment, did nothing else to dispose off the application or even set down the suit for hearing.

13. Inordinate delay varies depending on the circumstances of each case. Since this suit was filed, nothing much has happened for a period of almost 6 years. The last time the matter was in court was on 10th February 2012 when the court delivered a ruling and declined to issue an interim injunction sought by the plaintiff. Since then, it is now over 6 years and the Plaintiff has never set down the application dated 30/1/2012 for hearing inter partes. Further, the Plaintiff has never served the Applicants with summons to enter appearance. It is clear from the foregoing that the Plaintiff is not desirous in prosecuting the suit and the delay has been long.

14. It is my finding that six years is such a long period and no good reason has been given for the delay. The explanation that the file had been misplaced by the Advocate dealing and that the Plaintiff's Advocate came to learn of it when the instant application was served is not good enough. As submitted by the Applicant and well held in the case of **Moses Otsyula V Children of God Relief Institute [2015] eKLR** *"It is also trite that every year that passes prejudices the fair trial as witnesses may have died, documents mislaid, lost, destroyed and the memory tends to fade(see Dickson J in Nilan v Pater (1969) EA Page 341."* I too resonate with the argument that the Applicant being a company can have its employees leave employment and therefore the difficulty in tracing them as well as documents could get lost with time.

15. The fact that the Plaintiff has neither served the summons to enter appearance nor set the application for injunctive orders for hearing cast doubt on the Plaintiffs willingness to pursue the matter and the delay in doing so is inordinate. The conduct of the Plaintiff in this matter cannot be said to be one of a party desirous in prosecuting his suit.

16. The upshot of the above is that the court finds that there has been inordinate delay which has not been sufficiently explained. The end result is that the suit is hereby dismissed. The costs of both the application and the suit are awarded to the Defendants/Applicants.

Dated, Signed and Delivered at Nairobi this 7th *Day* of June, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

……………………………. For the Applicant

…………………………..For the Respondent