



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 571 OF 2006

JIMMY WANJIGI.....PLAINTIFF/APPLICANT

- V E R S U S -

WILFRED KIBORO.....1ST DEFENDANT/RESPONDENT

DAVID MUGONYI.....2ND DEFENDANT/RESPONDENT

WANGETHI MWANGI.....3RD DEFENDANT/RESPONDENT

NATION MEDIA GROUP.....4TH DEFENDANT/RESPONDENT

JOSEPH ODINDO.....5TH DEFENDANT/RESPONDENT

RULING

- 1) The defendants herein took out the motion dated 12th April 2018 in which they sought for this suit to be dismissed for want of prosecution pursuant to the provisions of Order 17 rule 2(3) of the Civil Procedure Rules. The motion is supported by the affidavit of Sekou Owino.
- 2) When served, the plaintiff filed the affidavit of Nicholas Reuben Nyamai to oppose the application.
- 3) When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.
- 4) I have considered the grounds set out on the face of the motion and the facts deponed in the affidavit filed in support and against the motion. I have further considered the rival written submissions.
- 5) It is the submission of the defendants that the plaintiff filed this suit more than twelve (12) years ago and has never deemed it fit to take out and serve the summons to enter appearance. The defendants pointed out that the delay to comply with the law and procedure is inordinate and inexcusable.
- 6) They further argued that the continued pendency of this suit is prejudicial to the defendants in that many witnesses will have left their employment hence it will be difficult to secure witnesses to testify in support of the defendant's defence. It was also argued that the witnesses may suffer from loss of memory of the facts of the case and this in itself is detrimental the defendants. It is for the above reason that this court was urged to dismiss this suit for want of prosecution.
- 7) In opposing the application, the plaintiff stated that he is willing to prosecute this suit. The plaintiff further argued that he was not in a position to take out summons to enter appearance nor prosecute this suit because the original court file could not be traced at the court registry.
- 8) The plaintiff beseeched this court to give him time to obtain and serve the summons to enter appearance.

9) The plaintiff's advocate also deponed in the replying affidavit that he has had difficult times to meet the client to obtain instructions to prosecute the case hence the delay. The plaintiff further argued that the delay to prosecute the suit was not inordinate and that the delay is not prejudicial.

10) Having considered the rival submissions and the material placed before this court, it is apparent that this suit was filed on 31st May 2006, about 12 years 6 months ago.

11) It is also apparent from the record that it took the initiative of the defendants to file an application for the reconstruction of a new court file when the original file went missing in the year 2009. The defendants successfully obtained orders to have this file reconstructed on 22.9.2016 vide the motion dated 11th July 2016.

12) The plaintiffs' advocate has deponed in the replying affidavit that his firm made numerous attempts to have the summons issued but that was not done because the court file went missing.

13) The plaintiff merely wrote one letter dated 5th April 2018 complaining of the missing court file yet it is apparent from the defendants' submissions the file went missing as early as 2009.

14) In the letter was tailor made to be used as a shield against the defendants' motion. One would expect the plaintiff to have written several letters and make numerous visits to the registry over the missing file. It is also clear in my mind that despite the information in respect of the missing file being within the plaintiff's knowledge, the plaintiff and his advocates took no steps to have the file reconstructed.

15) The plaintiff's advocate has deponed that at some point he lost contact with his client hence causing a further delay in prosecuting the matter.

16) A delay of more than 12 years to prosecute the case cannot be said to be excusable. In my view, the delay is inordinate and not excusable. Such a delay will obviously prejudice the defendant. Witnesses may not be easy to come by and even if some are found, their memories may fade thus impacting negatively on the defendants' right to a fair trial of the suit.

17) Under Order 17 rule 2 of the Civil Procedure Rules, a party is entitled to have a suit dismissed for want of prosecution in the event that no steps have been taken by either party for more than one year.

18) The defendants have also argued that no summons to enter appearance have been applied nor issued. The plaintiff admits this assertion but he now seeks to justify it on the basis that the court file could not be traced.

19) I have already stated that this reason appears plausible but the plaintiff has failed to present tangible evidence showing the steps he took to have the missing file reconstructed save for the single letter written on 5.4.2018.

20) Under Order 5 rule 1(5) the Civil Procedure Rules it is clear that every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay and in any event not more than 30 days from the date of filing suit. It is admitted by the plaintiff that he did not comply with the provisions of Order 5 rule 1(2) and (5) of the Civil Procedure Rules.

21) It would appear from the provisions of Order 5 rule 1(5) of the Civil Procedure Rules that the Rules do not envisage a scenario where a plaint is filed without summons. In fact, the aforesaid sub rule expressly directs the plaintiff or his advocate to prepare the summons which the plaintiff and his advocate did not do. Without summons, the suit cannot stand.

22) In the circumstances this court is entitled to *ex debito justitiae* to strike out the suit for being incompetent for want of summons.

23) In the end, I find the defendants' motion dated 12.4.2018 meritorious. Consequently, this suit is ordered struck and dismissed with costs being awarded to the defendants.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants