



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 18 OF 2013

PASTOR SIMION PETER ONDIEKI.....1ST PLAINTIFF/RESPONDENT

THE BILL OF RIGHTS.....2ND PLAINTIFF/RESPONDENT

-VERSUS-

MEDIA ROYAL STATION EGESA (EKERAMBAUTI).....DEFENDANT/APPLICANT

RULING

1. This suit was filed by the plaintiff(s) Pastor Simioni Peter Ondieki and an interested party described as “The Bill of Rights” on the 9th September 2013. In nature, it is a suit based on alleged defamation of the plaintiff(s) by the defendant in a broadcast aired by one of the defendant’s media stations.

The plaintiff(s) seek general damages against the defendant for allegedly disseminating false and malicious information against him on or about the 19th June 2013.

The defendant denied the claim vide its statement of defence dated 24th September 2013 and contended that if any information was aired against the plaintiff(s), then it was done in good faith without malice, without intention to injure the character of the plaintiff(s) and in public interest.

2. A reply to the defence was filed by the plaintiff(s) on 30th September 2013, but the defendant subsequently filed a notice of motion dated 18th October 2013, seeking orders to strike out the plaint and have the suit dismissed.

The defendant also sought an order to have the plaintiff(s) deposit security of costs in the sum of Kshs. 100,000/=. However, and in reaction to the defendant’s application aforementioned, the plaintiff filed a notice of motion dated 26th November 2013, seeking to strike out the defendant’s notice of motion dated 18th October 2013.

3. The court, on the 7th July 2014, ordered that the two applications by the defendant and plaintiff(s) respectively be heard together. A hearing date to that effect was fixed for 22nd September 2015, when the plaintiff(s) failed to turn up. Thereafter, the matter stalled for more than one year without any party taking steps to have the pending applications heard and determined. Neither the plaintiff nor the defendant made any effort to even have the suit fixed for hearing in order to circumvent the applications.

4. Instead, on the 13th January 2017, the defendant filed the present application dated 10th January 2017

for dismissal of the plaintiff's suit for want of prosecution on the basis of the grounds contained in the appropriate notice of motion and fortified by the averment in a supporting affidavit dated 10th January 2017, deposed by the defendant's counsel, **Karanja Munyori**.

The plaintiff(s) had not filed any response to the application by the time it came up for hearing firstly, on the 20th February 2017 and secondly, on 27th March 2017. This is per the court record.

5. Learned counsel, **Mr. Ndungu**, appeared for the defendant on the hearing dates. The plaintiff(s) appeared in person on the 20th February 2017 but not on 27th March 2017. He expressed his intention to proceed with the defendant's notice of motion dated 18th October 2013, for which a response had been filed. He was not ready to proceed with the present application which was then stood over to 27th March 2017 on which date it proceeded in his absence with the defendant's counsel arguments in support thereof.

6. After due consideration of the application in the light of the supporting grounds and the history of the matter as indicated hereinabove, it is the opinion of this court that a party to a suit must be given reasonable and adequate opportunity to present his case without being encumbered by procedural technicalities which under our constitution ought not be accorded undue regard (**Article 159 (2) (d) of Constitution**).

Under Rule 2(3) of Order 17 of the Civil Procedure Rules, any party to a suit may apply for its dismissal if no application has been made or step taken by either party to have it heard.

7. In this case, necessary steps were taken by both parties to complete the pleadings and prepare ground for hearing. However, the process was interrupted by the defendant's application dated 18th October 2013, which was followed by the plaintiff(s)' application dated 26th November 2013.

Those two applications in effect caused the delay in hearing the suit for it could not start and proceed without the applications being disposed of.

After the applications were listed for hearing and adjourned on the 29th September 2015, none of the parties made any attempt to take a fresh hearing date and this persisted for a period of more than one year.

8. The defendant eventually moved the court on the 13th January 2017, by the filing of the present application while ignoring the fact that there were two previous applications pending hearing and determination.

The defendant in as much as the plaintiff was under obligation to fix the two applications or even the suit for hearing and final determination. Both parties failed in that regard.

It would therefore be unfair and imprudent if this court were to allow the present application even if it appears not to be opposed by the plaintiff(s).

9. Accordingly, the application dated 10th January 2017, is dismissed and each party shall bear their own costs.

Either of them is at liberty to fix the two pending applications or the suit for hearing and serve the other party with the necessary notice.

[Read and signed this 4th day of April 2017].

J. R. KARANJAH

JUDGE

In the presence of

Mr. Godia holding brief for Mr. Karanja for defendant/applicant

Plaintiff/Respondent - Absent

Mohe CC