



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL SUIT NO. 1881 OF 2001**

**AHMED SHEIKH ADAN.....PLAINTIFF**

**VERSUS**

**WANGETHI MWANGI.....1<sup>ST</sup> DEFENDANT**

**NATION NEWSPAPER LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

This is a very old case having been filed in November, 2001. It has remained in the list of pending cases since then, although the record shows that it is part heard and for some reason has never moved beyond the plaintiff's testimony.

Considering the length of time it has remained pending, the defendants filed an application by way of Notice of Motion dated 11<sup>th</sup> and filed on 22<sup>nd</sup> May, 2017 for the suit to be dismissed for want of prosecution. The application is based on Sections 1A, 1B and 3A of the Civil Procedure Act, Order 17 Rule 2 (1) and (3) and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

The defendants have observed in the grounds that appear on the face of the application that, the publication complained of by the plaintiff was published on 3<sup>rd</sup> January, 2001 which is over 16 years ago and the last time the matter was in court was April, 2012 which is almost 5 years ago. Since then, no step has been taken to prosecute the case.

There is an observation that the plaintiff invited the defendants to take a hearing date in November, 2013 but since then no steps have been taken to prosecute the matter. The delay is prejudicial to the defendants in that, due to the passage of time, their witnesses may not be available and if they are available, their recollection of events may not be accurate. On those grounds the defendants plead the suit should be dismissed.

The plaintiff has filed a replying affidavit in which he depones, he had some misunderstanding with his previous advocate which forced him to engage a new firm of advocates who prepared Notice of Change but could not trace the file in the registry. His request in writing to the Deputy Registrar did not elicit a reply and going by the said correspondence, it is clear he is still interested in pursuing the suit and therefore should not be dismissed for want of prosecution.

The orders sought are discretionary although it is clear the court has power to dismiss the suit for want of prosecution under Order 17 Rule 2. There are no restrictions or limits on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

I have to consider whether or not such discretion is to avoid injustice or hardship that may result from accident, inadvertence or excusable mistake. Further, the said discretion should be exercised judicially and in a selective and discriminatory manner, not arbitrarily – **See Maina Vs. Mugiria [1983] e KLR.**

I have considered the pleadings on record and the averments in the affidavits relating to this application.

The cause of action is premised on a publication made in the Daily Nation, a newspaper owned by the 2<sup>nd</sup> defendant and where the 1<sup>st</sup> defendant was the Chief Editor. Whereas it is true that the prosecution of this case and the delay appears inordinate, the nature of evidence to be advanced relates to printed matter whose preservation goes beyond human memory.

The risk of it disappearing is therefore minimised by that fact. In fact, copies of that publication are part of the record before the court. I also note that the matter is part heard and the plaintiff gave evidence to some extent before another judge who is no longer in this station. That is also a demonstration that he is still interested in this suit.

I am inclined to find in favour of the plaintiff and dismiss the defendant's application, which I hereby do. Considering the age of this suit, I direct that the plaintiff shall endeavour to complete the prosecution of this suit within 6 months from the date of this ruling, failure of which the suit shall be dismissed with costs to the defendants. The costs of this application shall be in the cause. Orders accordingly.

*Dated, signed and delivered at Nairobi this 19<sup>th</sup> Day of July, 2017.*

**A. MBOGHOLI MSAGHA**

**JUDGE**