REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 47 OF 2009

BAIKUNYUA ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

THE STANDARD LIMITED.....1ST DEFENDANT

MOSES OCHOLA.....2ND DEFENDANT

RULING

1. In their Notice of Motion dated 1st April, 2014, the defendants (hereinafter the applicants) seek that the Plaintiffs suit be dismissed with costs for want of prosecution and that they be awarded costs of the application and the suit.

2. The application is expressed to be brought under *Order 51 Rule 1* and *Order 17 Rules 2(3)* of the *Civil Procedure Rules 2010* and *Section 1A, 1B* and *3A* of the *Civil Procedure Act*. It is premised on grounds that the Plaintiff and its advocates on record have failed to set down the suit for hearing for over four years; that the Plaintiff and or its advocates are not interested in prosecuting the suit; that the delay in prosecuting the suit is inordinate and inexcusable; that the suit's pendency was causing indefinite anxiety on the defendants and that they stand to suffer prejudice if it was not dismissed; and lastly that justice demands that litigants prosecute their cases expeditiously.

3. The application is supported by an affidavit sworn by *Ms Maureen W. Thuo,* an advocate in the firm of Guram & Company Advocates, the Advocates on record for the defendants. Besides reiterating the grounds anchoring the motion, learned counsel deposed that the Plaintiff filed its suit on 22nd April, 2009 praying for general, aggravated and exemplary damages for defamation and that since 13th May 2009 when the defendants statement of defence was filed, the Plaintiff has not taken any step towards prosecuting the suit; that failure to take any action towards progressing hearing of the suit for five years demonstrated the Plaintiff's lack of interest in the suit; that the delay is prejudicial to the defendants as it led to escalation of costs and adversely affected their chances of availing witnesses in support of their defence.

4. The application was prosecuted by way of written submissions. Those of the applicants were filed on 4th March, 2015 while those of the Plaintiff (respondent) were filed on 10th April, 2015.

5. I have carefully considered the application, the depositions made by the parties, their rival submissions and the court record. The court record confirms that the Plaintiff filed the suit on 2nd April, 2009 nearly seven years ago. In the suit, the plaintiff alleged that the defendants had maliciously and without any justification written, printed, published and distributed a memorandum which suggested *inter alia* that it

was impecunious; that it could no longer handle the business of distributorship of newspapers and magazines; that it could not be trusted to collect and remit money on behalf of any person and that it was indebted to the defendants; that the publication was calculated to injure its reputation and lower its esteem among right thinking members of the society.

6. It is also clear from the court record that as contended by the applicants, at the time the instant application was filed, the plaintiff had not taken a single step towards progressing the hearing of the suit. Subsequently however, the Plaintiff partially complied with pre-trial requirements by filing a list of witnesses on 3rd March, 2015 and a list of documents on 8th May 2015.

7. Under *Order 17 Rules 2 (1); 2* and *3* of the *Civil Procedure Rules*, if no application is made or step taken by either party for one year, any party may apply to the court for dismissal of the suit. It is now settled law that if such an application is made, the court has wide discretion in deciding whether to dismiss or sustain the suit with or without conditions taking into account several factors which includes the following; the nature of the case; whether the Plaintiff has offered a reasonable explanation for the delay in question; whether the delay was inordinate or excusable; whether the delay was likely to cause substantial prejudice to the defendant which cannot be adequately compensated by way of costs; what prejudice dismissal of the suit would occasion to the Plaintiff and the interests of Justice having regard to the facts and circumstances of the case under consideration. From the factors enumerated above, it is evident that each case must be considered on its own merit.

8. That said, I also wish to take cognizance of the test in applications of this nature that was laid out in ***Ivita V Kyumbu (1984) KLR 441*** by Chesoni J (as he then was) when he stated as follows;

> ***"The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court."***

9. In view of the foregoing, it is clear to me that what should be at the forefront of the court's mind in deciding how to exercise its discretion in an application such as the one before the court is whether there is a reasonable explanation for the delay and whether the delay complained about impedes the fair trial of the suit and if justice can still be done despite the delay whether prolonged or otherwise, the court should exercise its discretion in sustaining the suit and setting it down for hearing instead of dismissing it.

10. In this case, it is not disputed that the Plaintiff had not taken any action in the suit for about five years since the institution of the suit. The Plaintiff's explanation for this prolonged delay is that by the time the suit was filed, the Civil Procedure Rules then in force did not require compliance with pre-trial procedures of filing a list of witnesses or documents and completing pre-trial questionnaires; that compliance with pre-trial procedures is a joint duty to be discharged by all parties to the suit and that as both parties had not complied, the suit could not be fixed for hearing.

11. I must say that am not entirely satisfied with the explanation given by the Plaintiff in its explanation of the aforesaid delay in prosecuting the suit. True, the suit was instituted before the Civil Procedure Rules 2010 came into force bringing with them the requirement that parties should comply with pre-trial procedures before a suit was fixed for hearing but nothing prevented the Plaintiff from complying with the said procedures after the 2010 rules came into force and fixing the case for mention for directions. The prolonged delay of about 5 years in taking any step to progress the suit is in my view excessive and has not been sufficiently explained. In as much as both parties have a duty under the law to take action aimed at facilitating hearing of a suit, the Plaintiff having instituted the suit and dragged the defendant to court has a greater responsibility of ensuring that the suit is prosecuted without undue delay.

12. The defendants have contended that the Plaintiff is not interested in prosecuting the suit. But the Plaintiff has disputed this claim and countered that it is still interested in pursuing its case. It has urged

the court to give it a chance to do so. As noted earlier, the Plaintiff filed a list of its witnesses and a list of documents supporting its case after it was served with the instant application. This action by the Plaintiff though belated goes to support its contention that it is indeed still interested in prosecuting the suit.

13. Though the defendants have claimed that further delay in the prosecution of the suit will occasion them prejudice, they have not on their part complied with the provisions of *Order 11* of the *Civil Procedure Rules*. They have also not demonstrated that if the suit was not dismissed as prayed, they are likely to suffer any prejudice that cannot be sufficiently compensated by an award of costs or that the delay in prosecuting the suit has given rise to substantial risk to a fair trial. They would have done so by for instance demonstrating that its witnesses if any are no longer in the 1st defendant's employment or cannot be traced.

In this case, I am not persuaded that if the application is disallowed, the defendants are likely to suffer any prejudice that cannot be adequately ameliorated by an award of costs.

14. On the other hand, if the application was allowed, the Plaintiff will suffer grave prejudice as its suit will be dismissed without being heard on its merits. Dismissal of the suit will effectively drive the Plaintiff away from the seat of Judgment without being heard. The dictates of substantive justice which is one of the constitutional principles enunciated in *Article 159* of the constitution and is also enacted under *Section 1A* and *1B* of the *Civil Procedure Act*; the right to a fair and public hearing enshrined in *Article 50 (1)* of the Constitution requires that as far as possible, cases should be determined on their merits after hearing all the parties to a dispute. Consequently, I think that courts should lean more towards sustaining rather than dismissing suits unless there was evidence that sustaining the suit would occasion a miscarriage of justice. There is no such evidence in this case. It should always be remembered that justice is a double edged sword. It cuts both ways. The court must do justice to both the Plaintiff and the defendant or any other party in a suit.

15. It is however not lost on me that one of the principles that govern the exercise of judicial authority under *Article 159* of the Constitution is that justice shall not be delayed. Taking all factors into account particularly the nature of the respondent’s claim and the fact that it has demonstrated, though belatedly an interest in prosecuting the suit, it is my finding that this is one of the cases in which the court is called upon to balance the scales of justice in a way that takes care of the competing interests of both the plaintiff and the defendants.

16. The only way of doing so to my mind is not to slam the door of justice against the plaintiff’s face but to sustain the suit on conditions which will facilitate the expeditious disposal of the suit in order to eliminate any further unnecessary delay. In the circumstances and purely in the interest of administering substantive justice, I decline to order dismissal of the plaintiff’s suit as prayed in the application dated 1st April 2014. The application is accordingly dismissed. The suit is thus sustained on terms that I will state shortly.

17. As the Plaintiff has already filed a list of its witnesses and documents, the defendants are directed to file a list of its witnesses and the documents they intend to rely on in support of their defence if any within the next 21 days. Thereafter, both parties shall file a statement of agreed issues within 30 days failing which each party may file its own issues within 10 days immediately after the expiration of the 30 days assigned for filing of agreed issues. The Plaintiff shall thereafter fix the suit for mention for directions after expiration of the time lines set above and in any case not later than 120 days from today's date in default of which the suit shall stand dismissed with costs to the defendants.

18. Given that the applicants were entitled to move the court for dismissal of the suit in view of the delay in prosecuting the same, the order that best commends itself to me on costs is that the plaintiff shall bear the costs of the application.

19. Lastly, I wish to apologize to the parties for the unintended delay in the delivery of this ruling. The delay was caused by misplacement of the file as a result of an inadvertent failure to diarize the ruling date in the court diary.

C. W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 7th day of September, 2016

In the presence of:-

Mr. Kipnyekwei holding brief for Mr. Kigamwa for the plaintiff

Miss Naomi Chonde – Court clerk

No appearance for the defendant