

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO. 102 OF 2010

HON. JUSTICE NYAMU.....PLAINTIFF

VERSUS

NAIROBI STAR PUBLICATIONS.....DEFENDANT

RULING

1. The Defendant has filed a Notice of Motion dated 9th June, 2014 essentially seeking that this suit be dismissed for want of prosecution. The application is expressed to be brought under Order 17 Rule 2(3), Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act.
2. The motion is based on the grounds stated on the body of the application and the supporting affidavit of William Pike sworn on 9th June, 2014. He averred the Plaintiff has since 20th March, 2012 when the parties met at the registry to take a hearing date never for any justifiable reason taken any steps in setting the matter down for hearing. He stated that the slack approach with which the matter has been attended to by the Plaintiff is likely to cause great prejudice to the Defendant in terms of availability of witnesses since a substantial period has lapsed. He added that there is a high likelihood that the accuracy of testimonies would be impaired as the witness may not concisely recall material facts considering that the subject matter of the suit are articles written on or about five (5) years ago on the 26th February 2009 and 3rd April, 2009.
3. The application is not opposed. In his submissions, Learned Counsel for the Defendant, Mr. Imende reiterated the depositions in the supporting affidavit which I have considered.
4. The test applied by courts in an application for dismissal for want of prosecution is whether or not the delay in setting down the suit for hearing is inordinate and inexcusable. (See: *Ivita v. Kyumbu [1984] KLR 441*). It is noteworthy that although the Plaintiff has failed to explain the delay in prosecuting this case, both parties have not complied with the provisions of Order 11 of the Civil Procedure Rules, 2010. I in the circumstances decline to dismiss the appeal and make an order that the parties do set down this matter for hearing within the next sixty days from the date of this ruling failure to which this suit stands dismissed.

Dated, Signed and Delivered in open court this 6th day of February, 2015.

J. K. SERGON

JUDGE

In the presence of:

N/A for the Plaintiff

N/A for the Defendant