REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL CASE NO. 873 OF 2005

FRANCIS KIGO NJENGA..…….APPELLANT

VERSUS

THE ROYAL MEDIA SERVICES AND

ANOTHER……..……..RESPONDENT

RULING

On 13th July 2005, by a plaint dated the same day, the plaintiff herein Francis Kigo Njenga filed this suit against the Defendants Royal Media Services Ltd and Oliver Seki claiming for damages arising from alleged defamatory statements by way of publication and or broadcast by the 1st Defendant Media House and in particular, radio broadcast, which broadcast had the effect of painting the plaintiff as a corrupt, dishonest, thief, lacking moral integrity among others.

The 1st Defendant did enter an appearance on 26th July 2005 and filed its statement of defence on 8/8/2005 denying the whole claim by the plaintiff against it, whereas the second Defendant entered an appearance on 26/7/2005 and filed defence on 16th August 2005 equally denying the claim.

The plaintiff filed reply to defence on 19th August 2005.

On 17th August 2005, the plaintiff filed an amended plaint.

On 22nd July 2009 the plaintiff filed notice of withdrawal of suit against the 2nd Defendant under order XXIV Rule 1 & 2 of the Civil Procedure Rules.

On 20th August 2009 the Defendant Royal Media Services Ltd lodged an application seeking to strike out the amended plaint and dismissal of the suit on the ground that the amended plaint did not set out in verbatim the words complained of to be defamatory as required under Order VI Rule 6A of the Civil Procedure Rule. The said application was by a ruling delivered on 20/1/2010 by Hon. Justice K.H. Rawal dismissed, with the plaintiff being granted leave to further amend the ammended plaint, which further amended plaint was filed on 27/1/2010.

The matter was later listed before the Deputy Registrar on 10/10/13 but the parties never appeared hence the file was returned to the Registry.

On 4th March 2014 the Defendants filed a Notice of Motion dated 3rd February 2014 seeking to have this suit dismissed for want of prosecution, with costs on the grounds that the plaintiff had not taken any steps to have the suit prosecuted for over 4 years and that the last step taken was the filing of the further ammended plaint on 26th January 2010; that the plaintiff had clearly lost interest in the matter; that the plaintiff had breached his duty under Section 1A and 1B of the Civil Procedure Act of ensuing Inter alia, expeditious disposal of the case is achieved; and that the defendant continues to suffer prejudice in view of the case hanging over its head and there is real risk that the evidence will the prejudiced due to the age of the matter.

The application is supported by the affidavit of Gacheru Nganga Advocate sworn on 3rd February 2014 reiterating the grounds and avering that the plaintiff has not attempted to do pre-trials under Order 11 of the Civil Procedure rules and that the 2nd Defendant against whom the suit was withdrawn was central to the claim/story allegedly defamatory of the plaintiff and who could have been an essential witness for the defendant hence, more prejudice to the Defendant.

The application was opposed by the plaintiff whose advocate Mr. Maina Njuguna swore and filed a replying affidavit on 16th October 2014, attaching several annextures and deposing at length, setting out 27 paragraphs of reasons why the matter has not been set down for hearing as alleged by the defendant and giving a chronology of events and actions taken by the plaintiff in a bid to have the matter heard.

The court record shows, indeed, that action has been taken on a yearly basis to have the matter set down for hearing and as earlier indicated, pre-trial directions were even given by Hon. Hatari Waweru J, hence, it is not accurate for the Defendant to allege that the matter has never been ready for hearing.

The plaintiff advocate has been an active participant to these proceedings but on 17/11/20014 when this application came up for hearing, he made no appearance and having been present on 16/10/2014 when the date was taken by consent for the hearing of the application, and there being no reason given for their non attendance, I granted the Defendant's advocates leave to proceed.

On 16/10/2014 the Defence had sought leave to file a supplementary affidavit which leave was granted to enable them file within 14 days but they did not file any as at 17/11/2014.

The defendants counsel Mr. Gacheru submitted in support of the application, relying wholly on the grounds on the face of the application as well as the supporting affidavit. He denied the allegations by the plaintiff's counsel that the court file ever went missing charging that no complaint was ever raised with the court over any missing file hence, no explanation had been given for the failure to set down the suit for hearing for the alleged 4 years.

<u>The applicable Law:</u>

Order 17 rule 2 (1) of the Civil Procedure Rules provides that:-

"in any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit".

Sub rule 3 provides that:-

"**Any party to the suit may apply for dismissal of the suit if cause is not shown to the court why the suit should not be dismissed. (as provided in sub rule (1)**

In this matter none of the parties to the application relied on or filed any authorities.

There are, however, several cases whose common thread is that it is the duty of the plaintiff's to get on with the case.

Further, that Public policy demands that the business of the courts should be conducted with expedition. In **Governors Ballion Safaris Ltd Vs Skyship Company Ltd & Country Council of Transmara (2013) Eklr,** where Justice Mabeya cited **Dickson J in Nilani Vs Patel (1969) EZ P. 341** held that:

"it is only too trite to say that, as in every Civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of the claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of court towards that end as soon as it is convenient by either applying for its dismissal or setting down the suit for hearing. Delay in these cases is much to be deplored. It is the duty of the plaintiff's adviser to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died, documents have been mislaid, lost, destroyed and the memory tends to fade".

Further, in **AGIP (Kenya) Ltd Vs Highlands Tyres Ltd (2001) KLR 630** Visram J (as he then was) pronounced thus on the issue of inordinate delay.

"Delay is a matter to be decided on the circumstances of each case. <u>Where a reason for the delay is offered</u>, the court should be lenient and allow the plaintiff an opportunity to have his case determined on merit".

In **Utalii Transport Co Ltd & 3 Others Vs NIC Bank Ltd & Another NRB HCC 32/2010.** The court noted that whereas dismissal of suit for want of prosecution is a matter for the discretion of the court, a Court of Law should always avoid acting intuitively on such applications or hastily dismiss a suit for want of prosecution, but rather, it should make further enquiries into the matter under the guidance of the now defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is a draconian act, for it drives the plaintiff away from the judgment seat.

The court set out the 7 recognized principles of law which should govern the exercise of the discretion as:-

1. Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case.
2. Whether the delay is intentional, contumelious and, therefore, inexcusable.
3. Whether the delay is an abuse of the court process.
4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant.
5. What prejudice will the dismissal occasion to the plaintiff.
6. Whether the plaintiff has offered a reasonable explanation for the delays and
7. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court.

What the above established principles espouse is that the court in exercising its discretion when faced with an application of this nature, must ask itself whether there has in effect been inordinate delay which has not been explained and therefore inexcusable. In **Anthony Kaburi Kano & 2 Others Vs Ragah Tea Factory Co. Ltd & 10 Others (2014) eKLR** Hon F. Gikonyo J opined, and I quite agree with him that,

"there is no precise measure of what amounts to inordinate delay, as what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; but that care should be taken not to apply the word "inordinate" in its dictionary meaning; but rather in the sense of excessive as compared to normality.

Further, that inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads to an inescapable conclusion that it is inordinate and therefore, inexcusable".

Applying the above tests to this suit, albeit the court proceedings. Indicate that the last time the matter

came up for hearing after the ruling dismissing the defendant's application to strike suit was on 10/10/2013 when none of the parties attended court before the Deputy Registrar, which date followed the said ruling, on 20/1/2010 the other part of the pleadings and as annexed to the Respondent's replying affidavit clearly show that the suit herein has been active, with the plaintiff making efforts from time to time, to set it down for hearing such as on 1/11/2010, 24/10/2011, 1st February 2012, noting that the further amended plaint was filed on 27/1/2010. All the above dates refer to letters inviting the Defendant's advocates to avail themselves for the purpose of fixing a suitable hearing date.

In my view, the fact that the said invitation letters were served upon the Defendants counsel and copied to the Deputy Registrar of the High Court although the said copies are not on the court file lends credence to the averment and assertion by the plaintiff that most probably, the court file was not available for fixing of the appropriate dates. Therefore, whereas there has been delay in prosecuting this suit which has been pending in court since 2005, the said delay though inordinate, has been explained and excusable in the circumstances. This court is indeed conscious of the overriding objectives espoused in Section 1A and 1B of the Civil Procedure Act that oblige not only the court but the parties and their advocates to assist the court in achieving the said overriding objectives among others, ensuring expeditious, proportionate just and cost effective resolution of disputes.

In addition, Article 159 (2) of the Constitution is clear that courts should be inclined to serving substantive justice while determining disputes and render justice without delay, a balance that recognizes that justice entails justice to all parties to a dispute.

From the available evidence as deposed by counsel for the plaintiff, the plaintiff has not in my view, acted contrary to the said statutory and Constitutional desire and or infringed upon the legitimate expectation of the Defendant to have the dispute resolved timeously.

Furthermore, in this case, the Defendant has not demonstrated what prejudice it has suffered.

Taking into account the fact that the plaintiff has shown interest in prosecuting his suit against the Defendant to a determinable conclusion, and bearing in mind the plaintiff's right to be heard and to be heard fairly as stipulated in Article 50 (1) of the Constitution, and this Court's duty to facilitate access to justice for all parties irrespective of status to enable the parties ventilate their grievances in a full trial, I decline to dismiss the plaintiff's suit for want of prosecution.

I direct that the plaintiff takes all the necessary steps to comply with all the pre-trial requirements within 30 days from the date hereof and this being a 2005 case, I further direct that the plaintiff secures a hearing date in the registry on priority basis within 60 days from the date of pretrial directions.

I order that each party bears their own costs of this application.

Dated, Signed and Delivered at Nairobi this 4th day of March, 2015.

R.E. ABURILI

JUDGE

4/3/15

Coram: Aburili J

CC: Kavata

Mr. Gacheru for Defendant/Applicant

Mr. Masavu holding brief for Maina for the plaintiff.

Court: This ruling was to be delivered yesterday 3/3/2013.

However, I was engaged on official duty at JTI and informed parties to attend today.

Ruling read and pronounced in open court as scheduled.

R.E. ABURILI

JUDGE

4/3/2015