



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO585 OF 2009

ISAIAH KUBAI..... 1ST PLAINTIFF
JOSEPH OLE TIPAPE.....2ND PLAINTIFF
DAVID KINYUA.MBAGGIA.....3RD PLAINTIFFS

VERSUS

MUNIR ABUBAKAR MASOUD.....DEFENDANT

RULING

The Defendant has applied by **Notice of Motion dated 28th May 2014** for dismissal of the Plaintiffs' suit for want of prosecution. The application is brought under Section 3A of the **Civil Procedure Act (the Act)**, **Order 17, rule (3)** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010 (the Rules)**. By **sub-rule 3 of Rule 2** (as read with **sub-rule 1**), 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.

The grounds for the application are that the Plaintiffs have not taken any material steps to prosecute their claim for over four years, which clearly shows they have no interest in the case. It is the Defendant's case in this application that it is in the interest of justice that the suit is dismissed for want of prosecution. These grounds are buttressed by the supporting affidavit sworn by the Defendant's advocate, **Alfred Nyabena**.

There is a replying affidavit sworn on 10th November 2014 by the 1st Plaintiff, Isaiiah Kubai. Grounds of opposition to the application emerging from that replying affidavit include –

- (i) That there are investigations ongoing in the Criminal Investigations Department following the Defendant's false report in that office against the Plaintiffs.
- (ii) That they now await a report on the investigations, which will constitute part of their evidence.
- (iii) That further, he was appointed to the Salaries and Remuneration Commission which has taken up most of his time.

(iv) That in any case they are now ready and willing to prosecute the claim evidenced by their filing of witness statements.

(v) That the suit is a matter of public interest as it involves a nationwide union of bank employees thus it ought to be ventilated in court.

(vi) That the application as filed is fatally defective as the supporting affidavit is sworn by an Advocate even though it is prohibited by statute.

The application was canvassed by way of oral submissions.

The 1st Plaintiff apart from stating that he was appointed commissioner in the Salaries and Remuneration Commission and awaiting of evidence from the CID (for a claim actually lodged by the Defendant) he does not give any cogent reason why the Plaintiffs have allowed the suit to hang over the Defendant's head for a period of four years seven months.

The witness statements have now been exhibited in the replying affidavit.

Beyond stating that the continued pendency of the case is not in the interests of justice, the Defendant does not say anymore. He does not state whether he will be prejudiced or not. Further, it has not been averred that because of the passage of time a fair trial of the action will no longer be possible. It has not been alleged that witnesses or documents will no longer be available at the trial.

From the material now before the court, a fair trial of this suit is still possible without any further undue delay. It is therefore just that the Plaintiffs be accorded a last opportunity to prosecute his case.

It is in this spirit that the application must be dismissed. The Plaintiffs are directed to take discernable steps within the next 30 days after delivery of this ruling in order to move his case towards hearing. To this end, a date for taking pre-trial directions ought to be taken as soon as possible. (within the said 30 days).

The defendant would not have brought the application had the plaintiff acted diligently. The Plaintiff's shall bear the costs of the present application which shall be paid to the Defendant within fourteen (14) days of delivery of this ruling. Those will be the orders of the court.

Dated and delivered at Nairobi this 4th Day of March, 2015.

A.MBOGHOLI MSAGHA

JUDGE