



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 609 OF 2009

PHINEHAS NYAGAH.....PLAINTIFF

VERSUS

ISAAC ONGIRI.....1ST DEFENDANT

RADIO AFRICA LTD.....2ND DEFENDANT

RULING

1. The subject of this ruling is the motion dated 8th May 2013 in which the 1st and Defendants herein are praying for the suit to be dismissed for want of prosecution with costs. The motion is supported by an affidavit of **William Pike** sworn on 8th May 2013. When served with the motion, the Plaintiff filed a replying affidavit, he swore to oppose the motion.
2. The main ground argued by the defendant is that the plaintiff has failed to prosecute the matter for two years since the matter was last in court for no apparent reason at all. It is the argument of the defendants that the continued pendency of the suit has caused unnecessary anxiety on the defendant and the delay prejudices him as far as the accuracy of the testimony of the witnesses is concerned.
3. On the part of the plaintiff, he urged this court not to dismiss the suit because he has a good excuse. He deponed that his advocates sought leave to amended the plaint and substitute the 2nd defendant with Nairobi Star publication Limited which application was dismissed yet the application was very crucial. He argued further that defendants are yet to comply with Order 11 of the Civil Procedure Rules hence contributing to the delay. He deponed that since the coming of the Civil Procedure Rules 2010, his advocates could not set the matter down for hearing until parties had fully complied with the rules which has not been the case.
4. A cursory look at the provisions of order 17 rule 2(1) and (3) of the Civil Procedure rules will show that the defendant is at liberty to apply for the dismissal of a suit within one year, no application has been made or step taken by either party including where after the close pleadings or removal of the suit from the hearing list or the adjournment of the suit generally, the plaintiff has not set down the suit for hearing.
5. In this matter, the record shows that the suit commenced on 6th November 2009. The parties filed their requisite documents and vide an application dated 7th October 2010, the plaintiff made an application seeking leave to amend the plaint. The application was dismissed for non attendance on 8th November 2010 and ever since there was no further action. It is not in dispute that this suit was last in court on 8th November 2010. The record shows that the matter was mentioned in court before **Mwera J.**

on 15th October 2010 when the plaintiff sought to amend the plaint. The court directed that the application be served on the defendants and on 8th November 2010, the matter came before **Dulu J.** who dismissed the application to amend the plaint due to non attendance of the plaintiff.

6. It is clear is that more than 4 years 11 months have lapsed since plaintiff prosecuted the suit. In deciding the matter in favour of an applicant, the court must be satisfied that the prolonged delay has not been justified by the respondent. In other words, sufficient reasons must be given. I have considered the grounds argued in favour of the motion. I have also considered the reasons advanced by the plaintiff to justify the delay. The plaintiff has argued that the reason he failed to prosecute the suit, firstly, is because his application dated 7th October 2010 which he considered vital as it sought to enjoin the correct defendant to the suit was dismissed and secondly that the defendant is yet to comply with Order 11 of the Civil Procedure Rules. In my view, failure by the defendants to comply with Order 11 cannot be a deterrent for the plaintiff is failure to prosecute his suit. Moreover, following the dismissal of the application, the plaintiff should have taken the necessary steps to avert anguish on the part of the defendant including seeking reinstatement of the application. Failing to take any action in a matter for a period of 4 years 11 months is inordinate delay and the reasons given are not convincing. The plaintiff has been indolent and equity only assists the vigilant. In **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2014] eKLR**, the Court of appeal held thus:

"...the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime the 1st defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent."

7. In the end I dismiss the suit and direct that the defendants be paid costs of the suit and the motion.

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

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendants