



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 376 OF 2008

AMBROSE OTIENO WEDAPLAINTIFF

V E R S U S

1. THE NAIROBI STAR PUBLICATIONS LTD

2. PAULINE ODHIAMBO.....DEFENDANTS

R U L I N G

1. The Plaintiff filed this case on 19th August 2008. It is a claim in defamation. The Defendants entered appearance on 25th September 2008 and filed defence on 13th October 2008. On 21st October 2008 the Plaintiff filed a reply to the defence.

2. On 19th January 2009 the Plaintiff filed his list of documents. It was not accompanied by a bundle of the documents. One of the documents listed is a “certified copy of proceedings for 16th October 2007 in Criminal Case No. 7649 of 2007, Kibera, Republic – vs – Ambrose Otieno Weda o& Others.”

3. On 5th February 2009 the Plaintiff filed his statement of issues.

4. On 16th February 2009 the Defendants applied to amend their defence. Their application was allowed on 24th March 2009 and they filed their amended statement of defence on 31st March 2009.

5. On 1st October 2009 the Defendants applied for consolidation of this present case with Nairobi **HCCC No 571 of 2008**, Nairobi **HCCC No 63 of 2009** and Nairobi **HCCC No 395 of 2009**. All four suits were said to be closely related “(involving) the same parties, arising from the same criminal proceedings and all being for damages for alleged defamation...(and raising) the same or similar questions of law or fact”. The Plaintiff opposed this application for consolidation by replying affidavit filed on 26th November 2009.

6. The application for consolidation was partially allowed by a ruling delivered on 29th January 2010. Consolidation of **HCCC Nos. 376 of 2008, 571 of 2009 and 395 of 2009** was ordered. **HCCC No. 63 of 2009** was ordered to be tried separately.

7. Then on 17th September 2012 the Defendants applied by a **notice of motion dated 9th September 2013** for dismissal of the Plaintiff’s suit for want of prosecution under **Order 17, rule 2(1) & (3) of the Civil Procedure Rules (the Rules)**. That application is the subject of this ruling.

8. The grounds for the application appearing on the face thereof include –

- (i) That there has been inordinate delay in prosecuting the suit, that delay being “more than two (2) years since the suit was last fixed for hearing”.
- (ii) That it is fair and just that the suit be dismissed

9. There is a supporting affidavit sworn by one **William Pike**, the managing director of the 1st Defendant. He has deponed, *inter alia*, that it is more than (2) years since the suit was last fixed for hearing; that there is no justifiable ground for the delay; and that the delay is causing the Defendants great prejudice “as there is a high likelihood that the accuracy of testimony would be impaired as the witnesses may not concisely recall material facts” due to the passage of time.

10. The Plaintiff has opposed the application by his **replying affidavit filed on 29th January 2014**. He has deponed as follows, *inter alia* -

- (i) That he invited the Defendants’ advocates by letter dated 24th January 2012 to fix the case for hearing.
- (ii) That the registry declined to give a date for hearing because both parties had not complied with **Order 11** of the new Civil Procedure Rules.
- (iii) That he then set to prepare his bundle of documents but discovered that he did not have certified typed proceedings and ruling in the Kibera criminal case, which case is the basis of, and which proceedings and ruling form the main evidence in, his claim. He opines that the documents could have been lost when he changed his advocates.
- (iv) That he then “immediately” visited **Kibera Law Courts**, but the court file could not be traced as it had been taken to storage.
- (v) That it was not until the beginning of December 2013 that he was able to get a copy of the proceedings.
- (vi) That the delay in prosecuting his case therefore has been occasioned by the loss of his copy of the typed proceedings and ruling and subsequent difficulty in getting replacement copies.
- (vii) That any rate the court diary for this year is already full and closed.

10. I have considered the submissions of the learned counsel for the Defendants and those of the Plaintiff (who is an advocate of this court acting in person), including the cases cited. I have also perused the court record as is apparent from the history of the litigation that I have set out above.

11. Delay in prosecuting the case has been since 29th October 2010 when the Deputy Registrar gave his ruling on the consolidation of suits application.

12. As already seen, this case was consolidated with two others, HCCC No 571 of 2009 and HCCC 395 of 2009. The issue that comes to mind on account of this consolidation is whether an application that seeks to dismiss one suit from among three consolidated suits for want of prosecution is proper. But the issue was not raised. Nor is the court aware if there are similar applications for dismissal in the other two suits where the Plaintiff herein is also plaintiff. Surely the consolidated cases must be prosecuted together or be dismissed together for want of prosecution? It is not an idle point!

13. be that as it may, the Plaintiff has sworn that he invited the Defendants to take a hearing date at

the registry in January 2012 but that no date could be given because of non-compliance by both sides with pre-trial requirements of the new Rules. That is plausible. He has explained the further delay in preparation of the suit for trial by the fact of loss of the typed proceedings and ruling in the criminal case upon which his suit is based, and the further delay in securing copies. That is also plausible.

14. The Defendants have pleaded prejudice to the extent that the witnesses' memories might be impaired by the passage of time by the time they testify at trial. But I note that the claim is based upon a published publication in relation to court proceedings and ruling. All those are documents which will be available to witnesses at trial. I am thus satisfied that a fair trial of the action will still be possible.

15. The court must always endeavor to determine issues between parties upon a proper trial of the action. However, the court will not hesitate to dismiss an action for want of prosecution where a fair trial will no longer be possible because of the delay. But where no injustice will be occasioned to the defendant, the court's inclination should be to preserve the suit rather than to dismiss it unheard. In the present case I am satisfied that there will be no prejudice to the Defendants.

16. In the event, I will refuse the Defendant's application, but upon the following conditions –

(a) The Plaintiff must within sixty (60) days of today take demonstrable steps towards prosecution of the case. In default there will be liberty to apply.

(b) The Plaintiff shall pay the Defendant's costs of this application hereby assessed at KShs 10,000/00, within fourteen (14) days of delivery of this ruling. In default the Defendants may execute for the same.

17. Those shall be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF FEBRUARY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 3RD DAY OF MARCH 2014