REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 210 OF 2010

KAMLESH MANSUKHLAL DAMJI PATTNI …..… PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED …….. DEFENDANT

R U L I N G

The plaintiff/Respondent herein Kamlesh Mansukhlal Damji Pattni filed suit on 16th April 2010 against the Defendants, Nation Media Group Limited seeking for general damages, exemplary damages and punitive damages as well as a permanent injunction to restrain the defendants, its agents, servants in any manner from printing or further printing, publishing or in any other manner howsoever uttering any words defamatory of the plaintiff. He also prayed for costs of the suit on a higher scale and any other relief this Honourable Court may deem fit to grant. The plaint as filed in court is not dated. It is filed by M/s Kalore & Company Advocates.

In the said plaint, the plaintiff alleges that the defendant defamed him by publishing in the Daily Nation Newspaper the words "Pattni in legal tussle with Laico Owners" and that "a company associated with businessman Kamlesh Pattni is embroiled in a legal tussle with the owners of Laico Regency" knowing the said words to be false and defamatory of the plaintiff.

He took out summons to enter appearance on the same date of filing suit and on 23/4/2010 effected service of the said summons to enter appearance upon the defendant at Nation Cenre, 4th floor as per the affidavit sworn by Nzuki Musyoki sworn on 7th May 2010 and filed in court on 10th May 2010.

On 10th May 2010, the plaintiff did request for interlocutory judgment to be entered upon the defendant's failure to enter appearance and filing defence within the stipulated period.

On 10th May 2010 ostensibly before interlocutory judgment requested by the plaintiff could be entered, the defendant filed memorandum of appearance dated 7th May 2010 through the firm of Iseme, Kamau & Co Advocates. On 17th May 2010, the defendant filed a detailed statement of defence denying the claim for damages and pleading that the alleged defamatory works were not in fact, defamatory of the plaintiff but factual.

On 16th January 2012, vide an application dated 10th January 2012, the defendants applied to have the plaintiff's suit dismissed for want of prosecution as no steps had been taken to set it down for hearing since 16th April 2010.

The said application was served upon the plaintiff's advocate who swore a replying affidavit opposing the application on 28th February 2012 and filed in court on 29th February 2012 when the said application came up for hearing Hon. Justice Joyce Khaminwa on 29th February 2012, both counsels appeared and it was intimated to the court that in view of paragraph 6 of the replying that parties were negotiating with a view to settling the matter out of court, the plaintiff's counsel had sought views from the defence counsel on the same to facilitate the settlement of the case.

The defendant therefore sought leave of court and was granted leave to withdraw the application with unquantified costs to the plaintiff to be settled within 21 days from the date thereof.

From thence, no other action has been taken by the plaintiff to set down the suit for hearing and consequently, on 12th March 2014, the defendant filed another application dated 3rd March 2014 to have the plainitff's suit dismissed for want of prosecution with costs to the defendant.

The application by way of Notice of Motion is brought pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and other enabling laws. It is supported by the sworn affidavit of Martin Munyu filed on 12th March 2014 and sworn on 3rd March, 2014. The deponent is an advocate practicing in the firm of the defendant's advocates on record.

The application was fixed for hearing on 23rd September 2014 and by an affidavit of Vihaki Armstone Sworn on 3rd April 2014, the plaintiff's counsels on record were duly served with the Notice of Motion for hearing on 23rd September 2014. The acknowledgement of service on 20th March 2014 at 1.30 pm was noted.

The plaintiff's advocates, despite being served with the hearing notice for the application to dismiss their client's suit for want of prosecution did not file any replying affidavit and neither did they appear in court on 23rd September 2014 so the defendant's counsel was allowed to proceed with the hearing of the application unopposed upon hearing the defendants' counsel in support of the application for dismissal of the plaintiff's suit for want of prosecution. The issue is whether to grant the orders as prayed with costs to the defendant.

Order 17 Rule 2 of the Civil Procedure Rules provides that where 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 the court may dismiss the suit under Order 17 rule 2(3), a party may also apply for dismissal of the suit for want of prosecution if no steps have been taken to prosecute the same for a period of one year.

From the onset, it is important to appreciate that the court's discretion to dismiss the suit under Order 17 must be exercised on the basis that it is in the best interest of justice regard being had as to whether the court is satisfied that the party instituting the suit has lost interest in it, or whether the delay in prosecuting it has been inordinate or unreasonable or inexcusable and is likely to cause serious prejudice to the defendant on account of delay. I am enjoined to adopt the holding in ***INTERVS KYUMBA [1984] KLR 441*** in which the court held that "the test applied by the courts in application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.

The history of the litigation in this suit which was instituted in 2010 shows that the plaintiff was very active and keen to obtain judgment on the clock. Later, the defendant took over the vigilance and sought to have the suit dismissed on the clock. It did not work for both parties as each party's attempts were met with the necessary vigilance and defence. However, from 29th February 2012 when the defendant's first application to dismiss the plaintiff's suit for want of prosecution was withdrawn on account that the parties were negotiating with a view to reaching a settlement, no action has been taken by the plaintiff to

either have the suit set down for hearing or settle it all together. This prompted the defendant to file Notice of Motion dated 3rd March 2014 exactly two years and two days from 29th February 2012.

The plaintiff's advocates were served but have not appeared to defend their position or give reasons or excuse why they have not taken steps to have the suit heard and determined. I hasten to add that the courts of law shall not be used to archive pleadings forever. Litigation must come to an end. If parties chose to use the courts to ventilate their grievances, they must of necessity and with necessary expedition have their suits heard and determined, without clogging the court with dormant litigation.

In this case, the delay in prosecuting the suit has not been offered by the plaintiff who chose not to appear and or show cause why his suit should not be dismissed for want of prosecution. I am aware that the act of dismissing a party's suit is a draconian act which should be exercised cautiously as it drives the plaintiff away from the judgment seat, contrary to the Constitutional principles enshrined in Article 159 of the Constitution that courts should be inclined towards serving the interest of substantive justice, while rendering the said justice by determining disputes without undue delay.

That is the balance I apply here, recognizing that justice entails justice to all parties to a dispute. Either way, therefore, depending on which party is occasioning delay, unreasonable delay occasions injustice to the other party to a dispute.

In my view the plaintiff has slept on his rights. He must bear the responsibility. On the other hand, he has delayed justice for the defendant by causing the suit to hang on the defendant's head undetermined. That infringes on the defendant's legitimate expectation that the dispute should be resolved expeditiously. In the premise, this court is of the view that the plaintiff has not shown any vigilance or interest in prosecuting his suit. Equity aids the vigilant and not the indolent. He is not here to seek the court to give him a second bite of the cherry. To fail to grant the defendant's application will be a lavish exercise of discretion which this court is not prepared to engage in.

Accordingly, I allow the defendant/applicant's application by way of Notice of Motion dated 3rd March 2014 and dismiss the plaintiff/respondent's suit herein filed on 16th April 2010 with costs to the applicant/defendant.

Dated, signed and delivered at Nairobi this 14th day of October, 2014.

R.E. ABURILI

JUDGE