REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 1238 of 2004

CHARTERHOUSE BANK LIMITED..... 1ST PLAINTIFF

SANJAY SHAH…….……...…2ND PLAINTIFF

VERSUS

NATION MEDIA GROUP…….....…….....……..1ST DEFENDANT

WANGETHI MWANGI…….....……..……..2ND DEFENDANT

RULING

By a Motion brought on Notice dated 8th March, 2012 expressed to be brought under the provisions of Order 17 Rule 2(1) and Order 51 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 and all enabling provisions of the law, the defendants herein seek orders that this suit be dismissed for want of prosecution. They also seek the costs of the application and the entire suit. The said application is based on the grounds that the plaintiffs have not taken any steps to prosecute the suit for a period of 6 years; that the defendants continue to suffer unnecessary anxiety due to the delay in prosecuting the suit; that the delay in prosecuting the suit greatly prejudices the Defendants in terms of witnesses and accuracy of testimony; and hence it is fair and just that the application be allowed.

The application is supported by an affidavit sworn by **Sekou Owino**, 1st defendant's legal officer on 8th March 2012. According to the deponent, the plaintiffs having obtained *ex parte* orders of injunction against the defendants on 23rd December 2003, the same came for *inter partes* hearing on 26th November 2004, but could not proceed and the matter was stood over generally with the said *ex parte* orders being extended till the hearing of the application or till further orders. The next time the application came up for hearing was 8 months later on 28th July 2005 when the same was taken out of the hearing list and the interim orders extended. Since then, the deponent contends, the plaintiffs have failed to take any step to prosecute either the application or the suit itself without any justifiable ground. According to the deponent the persistent delay is an abuse of the process of Court as the plaintiffs are not keen in prosecuting the suit while the defendants are apprehensive that the delay is likely to cause great prejudice to the defendants in

terms of availability of witnesses with the accuracy of testimony being impaired.

The application was opposed through an affidavit sworn by **Sanjay Shah**, the 2nd defendant on 25th May 2012. According to the deponent, he was the Managing Director of the 1st defendant before the appointment of the Central Bank of Kenya's statutory manager. He deposes that the defendants herein published falsehoods against the plaintiffs which publication caused extensive and unwarranted injury to the plaintiffs though the plaintiffs are willing to pursue an out of Court settlement. According to the deponent on 11th May 2006, the plaintiffs' advocates broached the issue of out of Court settlement vide a letter of the same date but the defendants never responded to the plaintiffs' overtures. Therefore, it is contended that the failure to fix the matter for hearing was occasioned by the already initiated negotiations. The deponent further avers that the injurious publications have been repeated subsequently. Following the filing of the current motion on 8th March 2012, the plaintiffs revived the said staled negotiations vide their letter dated 5th April 2012 setting out settlement proposals which were however rebuffed by the defendants vide their letter dated 11th April 2012. According to the plaintiffs the delay is excusable and it would be unfair to dismiss the suit since the plaintiffs are keen in prosecuting the suit and no prejudice will be suffered by the defendants if the motion is disallowed and the parties are directed to prepare and set the suit down for hearing.

The application was prosecuted by way of written submissions. Apart from reiterating the contents of the supporting affidavit, it is submitted on behalf of the defendants that since the cause of action herein arose in November 2004, nearly 8 years ago, the delay herein stands to prejudice the Defendants in terms of availability of witnesses and accuracy of testimony. The contention by the plaintiffs that the delay is excusable, according to the defendants, would set a dangerous precedent since under Order 17 of the Civil Procedure Rules a delay of one year suffices for the purposes of such application. Seven years, therefore, it is submitted can without fear of contradiction, be categorized as extravagant. With respect to attempted settlement, it is submitted that it is not enough to request a settlement of a matter and await such settlement indefinitely since it is the duty of the plaintiffs to prosecute the suit. A fair administration of justice, it is submitted, calls for the dismissal of the suit.

On their part, the plaintiffs submit that there is no contention that the defendants will be disabled from defending the suit. Nor is it contended that by loss of memory the 2nd defendant shall not be able to defend himself. It is therefore submitted that no disability has been shown that would prejudice the defendants' case. The dismissal of the suit, it is submitted, will confer benefit to the defendants while being adverse to the plaintiffs. Since the 1st plaintiff is under statutory management, it is submitted, time cannot run against it during that disability. It is contended that since the defendants never formally terminated the negotiations of settlement, the plaintiffs were never put on notice that the avenue of settlement was not to be pursued, hence the delay is excusable. The need to render substantial justice to the parties, it is submitted, dictates that the suit be allowed to proceed to trial instead of being dismissed moreso in light of the fact that the plaintiffs were greatly injured by the publication. In support of the submissions the plaintiffs rely on **Allen vs. Sir Alfred McAlpine & Sons Ltd [1968] 1 All ER 543 at 556** in which it was held that courts should temper logic with humanity and take into consideration the effect of dismissal on the plaintiff vis-à-vis the defendant. Citing **Ivita vs. Kyumbu [1984] KLR 441**, it is submitted that the Court should consider the issue of prejudice as well as the excuse for the delay. Support is also sought from **Ruth Wambui Gichuru vs. Crossways Car Hire Tours & Travel Ltd & Another [2007] eKLR** for the submission that the discretion to dismiss a suit should only be exercised when the Court is satisfied that it is not possible to have a fair trial of the issues in action.

I have now considered the application, the affidavits both in support of and opposition to the application, the submissions made as well as the authorities cited.

It is the duty of the plaintiff to take the necessary steps to ensure that the matter is fixed for hearing. The defendant's primary aim is to have the suit dismissed and therefore the defendant cannot be faulted for choosing the route of terminating the suit rather than sustaining it. In Pirbhai Lalji & Sons Ltd Vs. Hassanali Devji [1969] EA 439 Russel, J emphasised that although the defendant had the right to set down the suit for trial it was not incumbent on him to do so as it might only have involved him in further and unnecessary costs. He was entitled to sit back and in due course make an application for dismissal of the suit for want of prosecution. Again in the case of Sheikh vs. Gupta and Others [1969] EA 140Trevelyan, J citing other decisions on the subject stated as follows:

"The purpose of rule 6 of Order 16 is to provide the court with administrative machinery whereby

to disencumber itself of case records in which parties appear to have lost interest…In this matter the claim is now eight years, less four months, old and the plaintiff, so far as the court is concerned, has done nothing for more than three years to say the least. There is a prima facie negligence on the part of the lawyers or inexcusable delay on the part of the plaintiff or both, on his own say so. In deciding whether or not to dismiss a suit under rule 6 a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship, and that there has been no flagrant and culpable inactivity on the part of the plaintiff…In the instant case there has been both culpable and flagrant inactivity on the part of the plaintiff in respect of his smallish claim and he cannot bring himself within the set of circumstances as stated...<u>There is no reason why the defendant should not sit back and await remedies and rights coming to him by operation of law. It is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition. The plaintiff should not derive any advantage from the fact that the defendant did not apply earlier</u>. (Underlining mine)

In the case of **<u>Et Monks & Company Ltd vs. Evans [1985] KLR 584</u> Kneller, J** citing several decisions stated as follows:

"The defendant(s) to an action may apply to set down a suit for hearing or apply for its dismissal if the plaintiff(s) do not set it down for hearing within three months after the close of the pleadings or removal of the suit from the hearing list or the adjournment of the suit generally. This is under Order 16 rule 5. The English RSC, Order 25, rule 1(14) is nearly the same but the defendant there may move if the plaintiff does not take out a summons for directions. This really provides that the defendant(s) cannot apply for dismissal of the suit until three months have passed from the close of the pleadings or (each time) it is removed from the hearing list or adjourned generally. The alternative is for the defendant(s) to have it set down for hearing (or do nothing). It does not imply that if the plaintiff does nothing about having it set down for hearing within 3 months or any time it will be dismissed for want of prosecution. It depends on many factors…It is the duty of the plaintiff's adviser to get on with the case and no advantage may be derived from the defendant's inaction. Unless he has waived or acquiesced in it…The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable? Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances…If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates. Should the trial proceed despite a prolonged delay the plaintiffs may not succeed because it cannot after such a long time establish liability and then it has no remedy against anyone else. If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself…The court may consider the matter of limitation and whether or not the plaintiff might probably succeed in the action for negligence against its lawyers and might prefer to be slow in deciding to dismiss for want of prosecution, but looking at the matter as a whole may order the application be dismissed and award the defendants the costs of the suit and of the application…<u>It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position. A plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy</u>…If the court is satisfied that there will be prejudice to the defendant as a result of a delay of ten years if the case proceeds and it would be impossible to have a fair trial the suit dismissed for want of prosecution since the principle witness for the defence was dead and 3 others had left Kenya and their whereabouts were unknown".

In the present case, the suit was filed on 12th November 2004 in respect of a cause of action which allegedly arose on 5th November 2004. That is more than seven years ago. Together with the plaint was

an application for injunction expressed to be brought under certificate of urgency. On 12th November 2004, the Court appreciating the seriousness of the matter granted *ex parte* orders of injunction and fixed the application for *inter partes* hearing on 26th November 2004 on which day the matter was stood over generally with interim orders being extended by consent. No action seems to have been taken in the matter until 30th March 2005, 4 months later, when the application was fixed for hearing on 28th July 2005, nearly 4 months thereafter. Come 28th July 2005 and the matter was again taken out *sine die* with the orders being extended. That was the last time a step was taken in the matter until the present application was filed on 8th March 2012, more than seven years after the suit was filed and nearly seven years after the last Court appearance. In **Et Monks Case** (Supra), the Court took the view, which view I associate myself with, that a plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy. A delay of more than 7 years to prosecute a suit for defamation, which suit is required to be brought within one year of the date of the cause of action is, *prima facie*, inordinate. The drafters of the legislation must have been aware of the currents underpinning defamatory matters for them to have provided a special limitation period for such causes of action. Therefore for the plaintiffs to get themselves out of the quagmire they placed themselves when they allowed their matter to go to slumber for three years shy of a decade, they have a daunting task of making out a formidable case.

The formidable case made, according to the plaintiffs is that they were engaged in negotiations. In support of those contentions the plaintiffs have annexed a copy of a letter dated 11th May 2006 from their advocates to the defendant's advocates. That letter was apparently in reference to a letter dated 4th May 2006 which letter itself was not disclosed so that its terms could not be appreciated. It is admitted by the plaintiffs that they never received a response to this letter. Why the plaintiffs decided to wait for more than 5 years defeats reason. Surely a response to that one page letter could not have taken five years. The plaintiffs should have realized that the defendants were not interested in settling the matter out of court when no response was forthcoming. They were not entitled to wait forever to proceed with the matter since the reason they came to Court in the first place was that they were offended and they did not see prospects of settling the matter amicably. To sit back for 5 years waiting for a response to a letter is, in my view, imprudent taking into account the fact that litigation is not a luxury especially to a person against whom offending material has been published and who ordinarily would be eager to have his name cleared as soon as possible. See **National Bank of Kenya Limited vs. Joseph Philip Onyango & Another Kisumu HCCC No. 489 of 1994.**

I, with respect, refuse to buy into the explanation offered for the inordinate delay in this matter taking into account that for all that period the plaintiffs were enjoying gagging orders which were obtained *ex parte*.

It has been submitted that it has not been shown that any prejudice has been occasioned to the defendants. It is well accepted that it is unjust to allow litigation to hang over a party's head for an indefinite period. This is the very reason why the Court is empowered to dismiss a suit where no action is taken in the matter for a period of more than one year.

As for the issue of a freeze in the running of time by virtue of the appointment of a statutory manager, no authority was cited to me to support such robust submission and I am unaware of any. In any case the 2nd plaintiff was never under any such alleged disability.

In my view a plaintiff with a serious cause of action, as alleged by the plaintiffs herein, should be more diligent, vigilant and meticulous in prosecuting his case.

I have said enough to show that the Notice of Motion dated 8th March 2012 is merited. I accordingly allow the same with the result that this suit is dismissed for want of prosecution. The defendants will have the costs both of the application and the suit.

Ruling read, signed and delivered in court this 9th day of July 2012.

G.V. ODUNGA

JUDGE

In the presence of:

Ms. Nyaga for Mr. Ngatia for Plaintiffs

Mr. Nyausi for Mr. Mogere for Defendants