CYRUS STANSLAUS MUASA MULI.....PLAINTIFF

VERSUS

WILFRED NJOKA MURITHI…….....……..DEFENDANT

RULING

By a Motion brought on Notice dated 18th November, 2010 expressed to be brought under the provisions of Order XVI Rule 5 (d) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, the defendant herein seeks orders that this suit be dismissed for want of prosecution with costs. The application is supported by an affidavit sworn by **Fredrick Otieno Mege**, the defendant's advocate. The defendant's case is that since 28th February 2006 when this matter was listed for hearing and did not proceed, the plaintiff's advocates have not taken any steps to fix the suit for hearing or otherwise prosecute the same with the result that it is evident that the plaintiff is no longer interested in pursuing the claim yet the onus is on him to not only prosecute the suit but also do so expeditiously.

The plaintiff, on the other hand opposed the application by way of a replying affidavit sworn by **Samson Ndegwa**, his advocate on 5th July 2012 in which it is deposed that the client (I presume this refers to the plaintiff) has been unwell and has been on and off the hospital and has had difficulties in his memory. He promised to present a report given appropriate time. He however annexed a copy of the report dated 25th February 2004 to show the extent of the plaintiff's injuries.

It is clear that this application was brought under the provisions of the repealed Civil Procedure Rules though the application was filed after the Civil Procedure Rules, 2010 came into effect.

The decision whether or not to dismiss a suit is purely discretionary. However, like any other exercise of discretion, the same must be based on reason and should neither be based on sympathy nor exercised capriciously. Each case must ultimately be decided on its own facts and it must always be kept in mind the court should strive to sustain the suit where possible rather than prematurely terminating the same. In the case of **Sheikh vs. Gupta and Others Nairobi HCCC No. 916 of 1960 [1969] EA 140 Trevelyan, J** 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".

The defendant has not claimed that he has been prejudiced by the delay. The only reason given in the supporting affidavit is that the plaintiff has lost interest in the claim. As indicated above, the supporting affidavit was sworn by the advocate rather than the client. It has not been alleged that the witnesses are dead, or that the documents are lost or that the memory has faded. Clearly the supporting affidavit does not mention the impracticability of holding a fair trial as the prejudice to be suffered. The law as I understand it is that counsel should not swear affidavit on disputed matters or matters that are likely to be disputed when the client is available and can depose to the said facts. The rationale for the said principle is not far-fetched. This rule is meant to insulate the advocate, an officer of the court, from the vagaries of

litigation which, on occasions may be very unattractive. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided by counsel at all costs. However innocent an averment may be, counsel should desist from the enticement to be the conduit through which such an averment is transmitted. Prejudice is a factual matter and not a matter of law although courts do take judicial notice of the fact that nobody enjoys the fact of litigation hanging over their heads indeterminately and that a prolonged delay in prosecuting cases invariably causes anxiety on the part of the persons who are to defend the suits hence the need to expeditiously get on with the suit. Nevertheless, in matters where the defendant alleges prejudice resulting from long delay in prosecution a suit, it is prudent that the defendant himself or an authorised officer thereof swears the affidavit explaining the reasons why a fair trial cannot be held after such a long delay.

In this case, the cause of action is alleged to be a road traffic accident in which, if the annexed medical report is anything to go by, the plaintiff sustained serious injuries to the head. It is the same injuries that are being blamed for the failure to get on with the matter. To dismiss this matter in such circumstances without allegation of serious blow to the defendant's case would, in my view, occasion a miscarriage of justice. In the premises, I am prepared to give the benefit of doubt to the plaintiff in line with the overriding objective in sections 1A and 1B whose aims *inter alia* include the just determination of proceedings.

In the circumstances of this case I associate myself with the decision in the case of **Ivita vs. Kyumbu[1984] 441**, that the test to be applied by the courts in an application for the 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 the delay and that 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 available time since it is a matter in the discretion of the Court.

In the result, I decline to dismiss the suit at this stage but direct the plaintiff to, within the next 30 days, complete all the pre-trial procedures and list the matter for hearing in default of which this suit shall stand dismissed with costs to the defendant. The defendant will have the costs of this application.

Ruling read, signed and delivered in court this 10th day of July 2012

G.V. ODUNGA

JUDGE

In the presence of:

Mr. Kingara for Mr. Mege for the defendant/applicant

No appearance for the plaintiff/respondent