REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 216 OF 2009

DUNCAN MURIUKI…..1ST PLAINTIFF

MANIAGO SAFARIS LIMITED……...……2ND PLAINTIFF

VERSUS

STANDARD GROUP LIMITED…….....…….....……..1ST DEFENDANT

PAUL WANYAGAH…….……...……..2ND DEFENDANT

JOHN BUNDOTICH…….…….3RD DEFENDANT

ZIPPORAH MUSAU……..4TH DEFENDANT

RULING

By a Motion brought on Notice dated 3rd May, 2012 expressed to be brought under the provisions of Order 51 Rule 1 and Oder 17 Rule 2(3) of the Civil Procedure Rules, 2010 and Sections 3A of the Civil Procedure, the defendants herein seek orders that this suit be dismissed for want of prosecution as well as the costs of the application. The application is premised on the ground that the plaintiffs have failed to set down the suit for hearing for over two years and nine months since the pleadings were closed and that that delay is inordinate and should not be tolerated by the Court. Further the defendant is anxious for an expeditious disposal of the case and the continued existence of suit is causing the defendants indefinite anxiety.

The application is supported by an affidavit sworn by **Rose N M Ochieng**, the defendants' advocate sworn on 3rd May 2012. In the said affidavit, it is deposed that this suit was filed on 20th April 2009 and the defendants entered appearance and filed their defence on 7th and 20th May 2009 respectively. A reply to the defence was presented in Court on 26th May, 2009 by the Plaintiff's Advocates. Since then there have been no further activities a period which is more than 2 years and nine months. The defendants, it is averred, have a good defence case against the plaintiff's claim and as such, the Defendants herein should

not be kept indefinitely in abeyance by the plaintiffs which is exactly what the plaintiffs are doing by not prosecuting their case.

The application was opposed by a replying affidavit sworn by **Donald B. Kipkorir,** the plaintiff's advocate on 28th May 2012, in which he states that as indicated in the defence, the criminal case Nairobi High Court No. 171 of 2009 is an issue in this matter. It is deposed that the plaintiff's case is that the material publications by the Defendants directly contributed to him and others being arraigned in court as per the annexed copy of the charge sheet. It is deposed that on the information received from the client, the said criminal proceedings are now completed and judgement is scheduled for 13th August 2012 a fact which the defendants are aware of. Having made the said criminal proceedings an issue, it is deposed, the defendants cannot be allowed to raise an argument of delay in prosecuting the instant matter. It is therefore fair and just, in the deponent's view, to allow the criminal proceedings be completed whereupon the instant proceedings can proceed and hence this application is not justiciable.

In her submissions, **Mrs. Ochieng**, learned counsel for the defendants reiterated the contents of the supporting affidavit and contended that under the law if no step is taken within one year a good cause must be shown. In counsel's view, either the reason advanced in the replying affidavit should have been communicated to the defence or made an application for stay of this suit. According to her the application should be allowed.

Mr. Kipkorir, learned counsel for the defendant, on his part submitted that under Order 17 rule 2 of the Civil Procedure Rules the power to dismiss a suit is discretionary and the discretion can only be exercised if the respondent has no just cause. It is submitted that the suit was filed in April 2009 while the defence was filed in May 2009. In between, the criminal case was instituted and in the defence, the defendant indicated that they would rely on the said criminal proceedings. Accordingly there is joinder of issues in the criminal case whose judgement the defendants are aware of is due for delivery on 13th August 2012. The circumstances, it is submitted, would have been otherwise if the defendants were not relying on the said criminal proceedings.

I have now considered all the matters raised in this application as well as submissions of counsel.

The decision whether or not to dismiss a suit, as rightly submitted by Mr Kipkorir, 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 terminate 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…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...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 defendants have not claimed that they have been prejudiced by the delay. The only reason given in the supporting affidavit is that the defendant has a good defence to the suit and should not be kept in indefinite abeyance by the plaintiffs. In other words, the defendants are raring to go but are being slowed down by the plaintiffs' lethargic conduct. As indicated above, the both affidavits in support of and in opposition to the application were sworn by the advocates rather than their clients. 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. It is now well settled in our jurisprudence that counsel should be discouraged from swearing affidavits 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 to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. 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 like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted. Prejudice, though, 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 indefinitely and that a prolonged delay in prosecuting cases invariably causes unnecessary anxiety on the part of the persons who are to defend the suits hence the need to expeditiously get on with the suit. In my view, in matters where the defendant alleges prejudice resulting from long delay is 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 expected after such a long delay.

In this case, the cause of action is some publication of alleged defamatory matter by the defendants. The defendants have indicated that they intend to rely on the proceedings in Chief Magistrate Court, Anti-Corruption Case No.17 of 2009. It is this case that is alleged is pending the delivery of judgement in a months' time. In my view where there are criminal proceedings pending which may have a bearing on the civil case, whereas it is not mandatory to await the outcome of the criminal proceedings before getting on with the civil case, it is not imprudent for a party to do so either. In most cases depending on the determination of the criminal case, the result thereof may form part of the evidence in the civil matter. See **Khoshi Mohamed & Another vs. Suleman Haji & Another (1946) LRK 54**

Accordingly, I am not prepared to hold that the delay in setting down this suit for hearing was unreasonable in the circumstances. Since the defendants have indicated that they have a good defence and that defence has not been lost as a result of the delay in setting down the suit for hearing, I believe it would be in the interest of all parties to set down the case for hearing as soon as possible.

In the circumstances of this case I adopt the wise words of **Chesoni, J** (as he then was) 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, while I decline to dismiss the suit at this stage, I however direct the plaintiff to, within the next 45 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 costs of this application shall be in cause.

Ruling read, signed and delivered in court this 12th day of July 2012

G.V. ODUNGA

JUDGE

In the presence of:

Mr. Kipkorir for the Plaintiffs

Mr. Billing for the defendants