IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MAKHANDIA, JJA)

CIVIL APPEAL NO. 7 OF 2013

BETWEEN

CHARTERHOUSE BANK LIMITED.............1ST APPELLANT

SANJAY SHAH..2ND APPELLANT

AND

NATION MEDIA GROUP.............................1ST RESPONDENT

WANGETHI MWANGI.................................2ND RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi

*(**G. V. Odunga, J.**) dated 9th July, 2012*

in

H.C.C.C. No. 1238 of 2004)

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JUDGMENT OF THE COURT

This interlocutory appeal seeks to impugn the ruling and orders of the High Court dated 9th July 2002. By that ruling, the High Court allowed a notice of motion made by **Nation Media Group** "*the 1st respondent*" and **Wangethi Mwangi**

"*the 2nd respondent*" seeking in main that Nairobi **HCCC No. 1238 of 2004** "*the suit*" be dismissed for want of prosecution. The application was premised on grounds that **Charterhouse Bank Limited** "*the 1st appellant*" and **Sanjay Shah** "*the 2nd appellant*", as the plaintiffs in the suit, had failed to take steps to prosecute the suit for a period of more than six (6) years as at the time of filing the application. It was pleaded that the delay had caused the respondents to suffer unnecessary anxiety and stood to be greatly prejudiced in terms of witnesses and accuracy of their testimony. On that premise, the respondents successfully argued that justice and fairness demanded that the application be allowed.

Facts informing the application were that the appellants had instituted the suit against the respondents, a newspaper publishing company and its editor respectively, accusing them of publishing defamatory articles against them and seeking appropriate reliefs. The said articles had been published on various dates in November 2004 in the Daily Nation and Saturday Nation and had also been posted on their websites. Upon filing the suit, the respondents obtained *ex parte* orders against the appellants on 23rd December 2004 and the *inter partes* hearing was set for 26th November 2004. The hearing however did not take off and the matter was stood over generally with the subsisting interim orders extended till the hearing of the application or till further orders of the court. The matter was again fixed for hearing on 28th July 2005 but the same was taken out of the cause list and the interim orders further extended. Thereafter, the matter lay dormant, with no steps being taken by the appellants to set the suit down for hearing until the respondents

filed the application for dismissal.

The gist of the appellants' reply to the application was that the delay had been occasioned by out of court negotiations. They alleged that their advocates on record had communicated to the respondents' advocates on 11th May 2006 proposing settlement terms. However, the letter did not elicit any response from the respondents. After the respondents filed the motion to dismiss the suit on 8th March 2012, the appellants were again spurred into action and wrote to the respondents vide a letter dated 5th April 2012 renewing the settlement proposal. That letter was responded to by the respondents who stated that they were not amenable to the proposal. According to the appellants, it was unfair to have the suit dismissed without being considered on its own merits. They therefore prayed that they be allowed to set the suit down for hearing since the respondents were not willing to pursue an out of court settlement.

The application fell for determination before **Odunga, J.** who in his ruling aforementioned allowed the respondents application and dismissed the suit for want of prosecution. According to the learned Judge, it was unjust to allow litigation to hang over a party for an indefinite period of time. According to the Judge, the same was reflected in Order 17 rule 2 (1) of the Civil Procedure Rules, under which the application was *inter alia* premised, which gave courts powers to dismiss a suit where no action has been taken for a period of more than one year. The learned Judge also stated that a delay of 7 years to prosecute a suit of defamation which suit is required to be brought within a period of one year from the date of the cause of action was *prima facie* inordinate.

Aggrieved by the findings, the appellants filed the instant appeal. The appellants fault the learned Judge for failing to appreciate that the delay in prosecuting the suit was occasioned by ongoing out-of-court negotiations for settlement which made taking steps to prosecute the suit inappropriate. They also challenge the ruling on the basis that the respondents were also guilty of not taking steps to set the suit down for trial; for failing to appreciate that the respondents had suffered no prejudice as a result of the delay; for failing to appreciate that the 1st appellant had been placed under statutory management making its board of directors unable to function and therefore time could not run against it during the period of disability.

During the case conference pending the hearing of the appeal, counsel for the respective parties opted to canvass the appeal by way of written submissions which they subsequently filed and exchanged. The appellants submitted that the delay was excusable. It was submitted that the 1st appellant was placed under statutory management by the Central Bank of Kenya vide Gazette Notice No. 4935 dated 30th June 2006, and which notice was still in force. The appellants claimed that in the light of the statutory management, which they deemed or termed as a period of disability, time could not truly run against them. They reiterated that offers for settlement were indeed discussed by the parties which rendered taking steps to prosecute the suit inappropriate. They claimed that at no time did the respondents formally terminate the settlement discussions as to put the appellants on notice that the avenue for settlement was closed. They maintained that delay in fixing the suit for hearing was occasioned by the fact that negotiations had already began with a view to reaching an out of court settlement.

It was further the appellants' contention that the learned Judge failed to consider that the respondents would suffer no prejudice if the suit proceeded to trial while noting that its dismissal would occasion them prejudice. The reason for that contention was that they were greatly injured by the libellous articles which were authored and published by the respondents. The authorities of **Allen v Sir. Alfred McAlpine & Sons Ltd (1968) 1 All ER 543** and **Abdurrahman Abdi v Safi Petroleum Products Ltd & 6 Ors (2011) eKLR** were cited for the propositions that in exercising discretion, court ought to weigh the hardship to the plaintiff if the action is dismissed and on the other hand, hardship to the defendant and the prejudice to the due administration of justice if allowed to proceed.

The case of **Richard Ncharpi Leiyagu v IEBC & 2 Ors (2013) eKLR** was also cited by the appellants. In that case, the Court of Appeal held that the right to a fair hearing is a protected right in our Constitution and is also the cornerstone of the rule of law; that even where the courts have inherent jurisdiction to dismiss a suit, it ought to be done in circumstances that protect the court process from abuse that would amount to injustice and always maintaining proportionality.

In response to the appellants' submissions, the respondent pointed out that the suit in the High Court was

filed 12 years ago on 12th November 2004; that the suit was filed contemporaneously with an application for injunctive relief which was successful; that thereafter, the appellants seemingly lost interest in the matter and became lax since they had secured the orders they desired. The appellants failed to take steps to prosecute the suit for 7 years which prompted the respondents to seek to have the suit dismissed for want of prosecution. The respondents took issue with the evidence the appellants presented to court purporting to prove the on-going out of court negotiations which they submitted painted a totally different picture. They pointed to the letter dated 11th May 2006 addressed to them which first proposed out of court settlement, which they never responded to. The next letter from the appellants was dated 5th April 2012, which came after they had filed their application for dismissal.

According to the respondents, no sufficient explanation was given by the appellants for the 7 years delay in prosecuting the suit. They denied any obligation on their part to fix the suit for hearing, which the appellants had alluded to in their submissions. Contrary to claims made that the delay did not prejudice them, they claimed that indeed they had been prejudiced. On the authority of **Allan v Sir Alfred** (supra), they submitted that, as a rule until a credible excuse is made out the natural inference would be that it is inexcusable. That in explaining the 7 year delay, the appellants gave one sole reason, that the parties had been negotiating all along and the negotiations had taken focus away from the suit. They, however, pointed out that during the 7 years, only one letter had been exchanged between the parties and the same was in fact not responded to. That despite that, the appellants failed to fix the suit for hearing. According to the respondents, the documents produced before the court did not reveal parties who were in a state of serious negotiations. As such, they submitted that the explanation that there were out of court negotiations going on was incredible. They instead revealed appellants who had lost interest in the suit. They submitted that it was not expected that appellants would wait indefinitely to prosecute their case. They explained that the appellants' duty was to prosecute the case they had presented in court which they failed to carry out for 7 years.

In response to the appellants' submission that time could not run against the 1st appellant while it was under statutory management, the respondents contended that there was no statutory or legal authority for the proposition that a bank becomes paralysed in such a manner when placed under statutory management.

They pointed out that despite being under statutory management, the 1st appellant managed to oppose their application for dismissal before the High Court and even managed to file the present appeal. In the respondents view, those actions betray the purported incapacity. In any case, they contend that the excuse could not apply to the 2nd appellant. On the authority of the case of **Nilani v Patel (1969) EA 341**, they stated that in circumstances where the plaintiff delays in prosecuting a suit, a defendant ought to invoke the process of court to dismiss the suit or even set the suit down for hearing. They submitted that since their objective was to bring the matter to a speedy conclusion, once there was a delay of one year they were entitled to apply for dismissal of the suit, instead of setting it down for hearing. According to the respondents, a plaintiff cannot be heard to suggest that a defendant had failed to expedite its own prosecution. In their submissions, they also argue that if the suit was reinstated, they stood to be prejudiced in terms of availability of witnesses and the accuracy of their testimony.

During the highlighting of the submissions, **Miss Ngania** holding brief for **Mr. Fred Ngatia,** challenged the exercise of discretion by the learned Judge in dismissing the suit. She submitted that the Judge did not consider the factor of on-going out of court negotiations. That the Judge failed to consider and weigh both parties cases. According to counsel, the test used by Judge to determine the application was wrong since the Judge used standard of Limitation of Actions Act and failed to exercise discretion. The respondents were represented by Mr. **Gabriel Mwangi**, learned counsel who opined that the delay had been inordinate. According to counsel, it was the appellants' duty to bring the suit to speedy conclusion. Counsel urged that it mattered not that the respondents had consented to extension of the interim orders until the final determination of the suit. It was the appellants' duty to prosecute the suit and not the respondents.

The singular issue for determination in this appeal is whether the delay occasioned in prosecuting the suit was excusable or justifiable. Resolution of that issue will determine whether the Judge erred in the

exercise of his judicial discretion which would in turn warrant this Court's intervention. It was held in the **Allan v Sir Alfred** (supra), that as a rule, until a credible excuse is made out the natural inference is that it is inexcusable. As seen, the main reason for the delay had been given as on going out of court negotiations though the appellants also claimed that the 1st appellant had been under disability as a result of being placed under statutory management. However, the latter reason was only adverted to in the appellants' written submissions. It was never the fulcrum of their response. As proof of the ongoing out-of-court negotiations, the appellants produced one letter dated 11th May 2006, addressed to the respondents proposing settlement terms. The letter was never responded to by the appellants. Thereafter, the matter lay dormant for close to seven years until the respondents filed their application for dismissal. As correctly submitted by the respondents and with respect, those circumstances do not reflect parties who were in a state of negotiations and renders the explanation that there were ongoing settlement talks incredible. In our view, that sole letter cannot be said to be sufficient to prove ongoing negotiations upon which the decision to hold the matter in abeyance was premised. One letter, in a period of 7 years of thereabouts simply falls short of disapproving the assertions that the appellants were not keen in prosecuting their suit resulting in the inordinate inexcusable delay. The argument that the respondents did not formally terminate the settlement discussions to put the appellants on notice that the avenue was closed is similarly untenable. The respondents' not responding to that letter was sufficient notice that the respondents were not keen to pursue an out of court settlement.

It was also alleged that the 1st appellant had been placed under statutory management and were thus disabled. The 1st appellant was placed under a statutory manager by the Central Bank of Kenya on 30th June 2006 and is still under such state of affairs. The appellants contended that its board of directors could not function during this time of disability and so time could not '*truly*' ran against it. With respect, the 1st appellant was ably represented by the advocates on record in the matter and the said advocates did not raise the issue or deposed on to any difficulties in getting instructions to prosecute the suit or otherwise. On the contrary, the appellants managed to oppose the application for dismissal before the High Court and later even managed to file the present appeal. As submitted by the respondent, those actions betray the purported incapacity or disability. Again, even if that was the case, the 2nd appellant cannot be said to have suffered same disability.

The appellants have also sought to challenge the High Court's ruling on the basis that the Judge did not sufficiently appreciate that the respondents had not suffered or stood to suffer any prejudice by the suit being reinstated and being considered on its merits. The Judge addressed the issue in his ruling and observed that it is unjust to allow litigation to hang over a party's head for an indefinite period. Still the respondents make compelling arguments before this Court as to why prejudice would be occasioned to them if the appeal was to succeed. Pertinently, they point out that the suit in the High Court was filed 12 years ago on 12th November 2004. To defend themselves against the defamation claims made by the appellants in their suit, they were bound to call witnesses to demonstrate that the comments were fair comment and were made in good faith. As such, they argued that they stood to be prejudiced in terms of availability of witnesses and the accuracy of their testimony.

They explained further that reporters and writers working for them had a high turnover and it was difficult to have them for a period of 7 years. In such a scenario, they argued that a defendant who had a solid defence at the beginning might be left with no witnesses to call. They also pointed out that writers and reporters are confronted within a barrage of information on a daily basis in their nature of work and it was therefore difficult for them to remember the pertinent facts of a seven year case. Since it was now 13 years since the publication was made, the respondent submitted that it would be almost impossible for them to get a fair trial in the event the suit was reinstated and will be greatly prejudiced. In our view, those arguments appear well-founded and have not been controverted by the appellants.

It has been intimated by the appellants at some point in these proceedings that the respondents also had a duty to set the suit down for hearing or ought or could have set the suit down for hearing. It was held in the case of **Nilani v Patel (1969) EA 341** that;

"**It is only too trite to say that as in every civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of**

his claim. He should not be guilty of latches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the Court towards that end as soon as it is convenient by either applying for its dismissal or settling down the suit for hearing... Delay in these cases is much to be deplored. It is the duty of the plaintiff's advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died where a period of over nine years have elapsed. ... documents may have been mislaid, lost or destroyed and the memory tends to fade." (*emphasis provided*)

As the Judge stated in his ruling, it is not enough to request settlement of a matter and await such settlement indefinitely since the duty to prosecute the matter was the appellants. The upshot is that the appeal ought to fail on those sentiments. It is so ordered.

The respondents shall have the costs of the appeal.

Dated and delivered at Nairobi this 8th day of February, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR