Amana v Nation Media Group Ltd (Civil Suit 157 of 2006)
[2024] KEHC 1913 (KLR) (Civ) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1913 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 157 OF 2006

CW MEOLI, J

FEBRUARY 29, 2024

BETWEEN

RISHAD HAMID AMANA ..... PLAINTIFF

AND

THE NATION MEDIA GROUP LTD ..... DEFENDANT

RULING

1. The motion dated 27.06.2023 by The Nation Media Group Ltd, the Defendant herein, seeks that the suit by Rishad Hamid Amana, the Plaintiff herein, be dismissed for want of prosecution. The motion is expressed to be brought under section 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and order 17 rule 2(1) & (3), order 51 rule 1, 3 & 4 of the *Civil Procedure Rules* (CPR). The grounds on the face of the motion are amplified in the supporting affidavit sworn by Sekou Owino, the Head of Legal at the Defendant, who asserts being conversant with the facts in controversy, duly authorized and competent to depose on behalf of the Defendant.

2. The gist of his affidavit is that the Plaintiff filed his suit via a plaint dated 17.02.2006 seeking damages for defamation and breach of contract by the Defendant and that the latter entered appearance and filed its defence on 24.04.2006. However, to date the suit has never been set down for hearing. He states that the Plaintiff had earlier filed an application dated 05.10.2006 seeking to strike out the Defendant's statement of defence and interlocutory judgment in his favour; that the application was dismissed by a ruling delivered on 11.12.2006; and subsequently, the Plaintiff filed a Notice of Appeal dated 03.02.2010. He goes on to depose that on 20.01.2014 the Plaintiff withdrew the aforesaid appeal but has since failed to take any steps to prosecute the suit.

3. That counsel on record for the Defendant made efforts to trace the file for the purpose of filing the present motion. Pointing out that it is over thirteen (13) years since the matter was last in court, the Plaintiff having neglected and or refused to take any steps to prosecute his suit. He asserts that the

delay is inordinate, inexcusable, and unjustifiable and occasioning prejudice to the Defendant. The deponent states that it is evident that the Plaintiff is not been interested in prosecuting the suit, having abandoned the duty of tracing the court file to the Defendant. In conclusion, he deposes that it is in the interest of justice and fairness that the motion be granted as prayed with costs.

4. The Plaintiff opposes the motion through a replying affidavit dated 13.10.2023. Reiterating in part the Defendant's affidavit material, he states that the file has been missing since 2018 leading to numerous unsuccessful attempts by his counsel to trace the file, and eventual application for reconstruction on 27.09.2018, a copy of which together with pleadings and documents were forwarded via a letter to the Deputy Registrar. Blaming the delay on the missing file, he asserts that its reconstruction as sought would not be prejudicial to the Defendant. He also cites the onset of the Covid-19 Pandemic in 2020 as a factor that further delayed the determination of the matter. He states that delay in prosecuting the suit is not of his own making but due to unfortunate circumstances set out. In summation, he asserts that allowing the Defendant's motion would be an infringement of his rights to access to justice.

5. Directions were taken to canvass the motion by way of written submissions. Only the Plaintiff complied.

6. Counsel for the Plaintiff began by reiterating the Plaintiff's response to the motion and emphasized that the delay in prosecuting the suit was occasioned by unfortunate events that were beyond the control of the Plaintiff. Counsel went on to assert the Plaintiff's constitutional right to access to justice and stating that allowing the motion would be a violation of the right especially as the Plaintiff is not to blame for the delay. Calling to aid the decisions in *Abdulshakoor Khandwalla v East African Building Society* [2008] eKLR and *James Mungai Magari v Housing Finance Company of Kenya* [2019] eKLR counsel submitted that the events highlighted in the Plaintiff's affidavit material curtailed the expeditious disposal of the suit meanwhile the issue concerning. In conclusion, the court was urged to take cognizance of the facts leading to the motion and to dismiss it in the interest of justice.

7. The court has considered the material canvassed in respect of the motion. As earlier noted, the Defendants motion is primarily anchored on the provisions of order 17 rule 2(1) & (3) of the *CPR*. Order 17 Rule 2 of the CPR echoes the constitutional injunction in Article 159(2)(b) of *the Constitution* and the overriding objective in section 1A and 1B of the *CPA* for the expeditious dispensation of justice. Order 17 Rule 2 of the *CPR* provides inter alia that:

> "(1) In any suit in which 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, may dismiss the suit.
>
> (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
>
> (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
>
> (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
>
> (5) .....
>
> (6) ..... "

8. The locus classicus on the above rule is the case of *Ivita v Kyumbu* (1984) KLR 441 which has been followed in a long line of authorities, including those cited by the Plaintiff herein. The Court of Appeal

restated the principles enunciated therein in the case of *Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR by stating that:-

> " The test for dismissal of a suit for want of prosecution is stated in the case of *Ivita -v- Kyumbu* (1984) KLR 441). The test was expressed as follows:
>
> The test is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite such delay. Justice is to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff."
>
> See also *Argan Wekesa Okumu v Dima College Limited & 2 Others* [2015] eKLR.

9. The court has a limited record of this matter as what is before it is a "skeleton file". This makes it difficult to trace the entire history of the suit. What this court gathers from the rival affidavit material and scanty record before it is that the Plaintiff's suit was filed on 2006 relating to a cause of action that allegedly arose in 2005. The Defendant entered appearance and filed its statement of defence on 24.04.2006. Save for the Plaintiff's application dated 05.10.2006 seeking to strike out the Defendant's Defence and interlocutory judgment, that was dismissed on 11.12.2006, there was no further activity in the matter. The Plaintiff's subsequent appeal from the ruling having been withdrawn on 20.01.2014 no steps were taken to progress the suit until the application for reconstruction dated 27.09.2018, not filed in the usual way, but forwarded via a letter to the Deputy Registrar dated 19.09.2018 and presented at the registry on 1.11.2018.

10. The application has since lain dormant and unheard. Four years later, on 19.09.2022 the registry on its own motion fixed the suit for mention before the Deputy Registrar on 29.05.2023. On 29.05.2023, the parties appeared before the Deputy Registrar. Counsel for the Plaintiff while claiming to have complied with Order 11 of the *CPR* sought a hearing date. Ditto for counsel for the Defendant. No reference was made by the Plaintiff's counsel to the pending application for reconstruction, and the matter was set for mention before me on 29.06.2023. In the intervening period, the Defendant filed the instant motion on 27.06.2023. On his part, the Plaintiff did not attempt to fix a date for his pending motion.

11. The court has reviewed the parties' rival positions on the motion. The basic facts are undisputed, namely, that the suit herein was filed in 2006, pleadings closed soon after, and that after the delivery of the ruling on 11.12.2006, the file went missing. Although the Defendant admits the fact of the missing file, there is no clear indication of the year when that happened. For his part, the Plaintiff claims, that the file went missing from 2018 hence his application for reconstruction on 27.09.2018. To shore up the foregoing, he relied on two letters addressed to the court dated 26.10.2015 and 19.10.2018, which were exhibited as annexure RHA-1 and RHA-2, respectively. As earlier indicated, the latter correspondence was lodged in court on 1.11.2018 with the unprosecuted application. Regarding the letter dated 26.10.2015 (annexure RHA-1), there is no indication that it was ever lodged at the registry and besides, if believed, it would mean that the Plaintiff was aware as from 2015 that the file was missing.

12. No explanation has been offered on action taken by the Plaintiff between key dates in the material before the court that is from 11.12.2006 to 26.10.2015 and up until 27.09.2018 and to 29.05.2023, in progressing of the suit and or prosecution of the application for reconstruction. The fact of the file missing is not by itself an explanation for the elongated periods of delay since the ruling of 11.12.2006

and September 2022 when the court took steps to set down the matter for mention. Even assuming the file went missing in 2015 or 2018, there is no explanation for the delay in the period preceding those years. The onus was on the Plaintiff to take necessary steps for reconstruction and prosecution of his case. Yet even having "forwarded", rather than filed his reconstruction motion in November 2018, the Plaintiff had by May 2023 not prosecuted the motion.

13. No explanation has been offered for that delay of almost five years in respect of the said motion. The onset of the Covid-19 Pandemic in 2019 appears a flippant excuse in a case that has been unprosecuted since 2006. Besides, it is a matter of public record that soon after, practice directions were issued by the Judiciary leadership to transition the court business to online platforms, including the early adoption of the electronic filing system. Thus, although physical access to courts and registries was indeed limited, parties could correspond with the court and file processes electronically. There is no evidence that the Plaintiff made any attempts to progress his matter in the Covid-19 period, and afterwards. Cases belong to the litigants who lodge them in court, and in this instance, it is not available to the Plaintiff to blame the court or peripheral factors for his failure to take steps to progress his suit. Not once in his affidavit did the Plaintiff admit to his own role in the prolonged delay in prosecuting his case. This apparent absence of candour and owning of responsibility is hardly the conduct of a party pegging his hopes on the exercise of the court's discretion in his favour.

14. A hiatus of more than eighteen (18) years since the suit was instituted, demanded a reasonable and candid explanation from the Plaintiff. The delay is prolonged and inexcusable. Delay in litigation whether deliberate or inadvertent is often prejudicial to the party who has been dragged to court. The pendency of this suit occasions obvious prejudice by way of uncertainty to the Defendant, not to mention escalating litigation costs. As observed in Ivita's case, delay may affect the likelihood of a fair trial being eventually held as documents and witnesses may become unavailable, while memories of such witnesses may fade over time. However, in that case the Court highlighted an important consideration to the effect that:

> " 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 available time. It is a matter in the discretion of the court." (sic)

15. The lengthy period of delay herein poses a challenge to the procurement of witnesses, and whose memory of pertinent events may have faded. In addition, the case is hardly ready for hearing as the application for reconstruction is still pending, five years since filing. In the circumstances of the case, it appears doubtful that a fair trial will eventually be possible. Order 17 Rule 2(1) & (3) of the CPR cannot be read in isolation from myriad court pronouncements on the need to curb delay in the prosecution of cases through the firm application of the overriding objective in section 1A and 1 B of the *Civil Procedure Act*. At a time when the courts are deluged with heavy caseloads, they must firmly discharge their duty under the overriding objective and refuse to allow slovenly parties the costly privilege of litigating at their own leisure.

16. In *Karuturi Networks Ltd & Anor v Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 the Court of Appeal had the following to say concerning the application of the overriding objective in Section 1A and 1B of the *Civil Procedure Act*: -

> " The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective..... and its principal aims. In our view, dealing with a case justly

includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court…" (Emphasis added).

See also: *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR.

17. The Plaintiff's constitutional right to be heard on the merits cannot be disputed. But the necessary corollary to that is that the Defendant too has an equal right to expeditious determination of a suit in which they have been dragged to court. A plaintiff's right to hearing is not absolute and can certainly not be upheld in circumstances which portend detriment and prejudice to the innocent defendant he dragged to court. The present Plaintiff's attempt to deflect blame for the long delay herein to others, is disingenuous and his pleas to be heard on the merits ring hollow, given his tardy and slovenly conduct. Having squandered the opportunity to be heard for 18 years, he can only blame himself for his eventual karma.

18. In light of the foregoing, the court is of the considered view that the justice of the matter lies in allowing the motion dated 27.06.2023. Consequently, the Plaintiff's suit is hereby dismissed for want of prosecution, with costs to the Defendant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF FEBRUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff/Applicant: Ms. Khadija

For the Defendant/ Respondent: Mr. Angwenyi

C/A: Carol