



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 553 OF 2015**

**AFRICA NEUROTECH SYSTEMS LIMITED..... PLAINTIFF/RESPONDENT**

**VERSUS**

**LINKSOFT COMMUNICATIONS SYSTEMS LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**ANTHONY WAHOME GITHINJI.....2<sup>ND</sup> DEFENDANT/ APPLICANT**

**RULING**

1. This ruling is in respect to the dated 4<sup>th</sup> December 2020 wherein the applicant seeks the following orders: -

**1. THAT this suit be dismissed for want of prosecution**

**2. THAT the costs of this application and the whole suit be borne by the plaintiff/respondent**

2. The application is supported by the affidavit of JOB MWANGI THIGA and is based on the grounds that: -

**a. THAT the last time the suit was in court was on 17<sup>th</sup> July 2018 for purposes of mention to confirm compliance with order 11 of the Civil Procedure rules.**

**b. THAT this suit was thereto marked as taken out on the Deputy Registrar's Cause List.**

**c. THAT since then, the suit has never been listed before the court for mention for pretrial directions.**

**d. THAT the matter has been pending in court with the plaintiff/respondent failing to approach the registry to fix a date for the mention or any other step in the prosecution of the matter.**

**e. THAT it has been over two years since the matter was last in court.**

**f. THAT the plaintiff/respondent has not taken any steps to prosecute the matter since it was last taken out and in particular, has failed to place this matter before a Deputy Registrar to fix a mention date for pre-trial directions.**

**g. THAT in the circumstances it is apparent that the plaintiff/respondent has lost interest in the suit and has slept on its rights and duties and is this guilty of laches.**

**h. THAT the continued pendency of the suit is prejudicial to the defendants/applicants.**

**i. THAT as a matter of public policy that requires litigation to be concluded expeditiously and in the wider interests of justice, the suit herein should be dismissed for want of prosecution.**

3. The respondent opposed the application through the replying affidavit of ANDREW OMBWAYO who states that the delay in fixing the suit was occasioned by the filing of Insolvency Petition No 6 of 2017 by the 2<sup>nd</sup> defendant. He further states that delay was caused by the Covid 19 Pandemic which stalled the hearing of the cases in the year 2020. He further contends that the court clerk who was tasked with

giving hearing dates could not trace the court file so as to fix it for hearing.

4. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicants have made out a case for the dismissal of the plaintiff's suit for want of prosecution.

5. Order 17 Rule 2 of the Civil Procedure Rules stipulates as follows on dismissal of suits for want of prosecution: -

***2. (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.***

6. The applicant contends that it has been two years since the suit was last in court and that the respondent is not been keen on pursuing it. He maintains that the plaintiff is guilty of laches.

7. In *Ivita vs Kyumbu (1984) KLR 441* the court observed that: -

***“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”***

8. In *Mwangi S. Kimenyi vs Attorney General and Another, Civil Suit Misc. No. 720 of 2009*, the court stated as follows: -

***“1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.***

***2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”***

9. In *Argan Wekesa Okumu vs Dima College Limited & 2 others [2015] eKLR* the court considered the principles for dismissal of a suit for want of prosecution and stated as follows: -

***“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3<sup>rd</sup> Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of Ivita –vs-Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”***

10. In the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows: -

***“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that 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.”***

11. In *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M.D. Popat and others & another [2016] eKLR*, the court stated as follows: -

***“Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay....”***

12. Applying the principles emerging from the above cited cases to the present application, the question that arises is whether the delay in prosecuting the instant suit is inordinate, unreasonable and likely to prejudice the defendant.

13. A perusal of the Court file reveals that the matter was last heard in court on 17<sup>th</sup> July 2018. This means that it is now over two years since the matter was last heard in court. The plaintiff attributed the delay to the filing of Insolvency Petition No. 6 of 2017 by the defendant and the Covid 19 pandemic which stalled the hearing of the cases in 2020.

14. My finding is that the delay is not inordinate that the defendant has not demonstrated that the delay prejudiced it or caused any injustice. I will therefore in the interest of justice decline the prayer to dismiss the suit for want of prosecution but with a rider that the plaintiff fixes the suit for hearing with three months from the date of this ruling failure of which the suit will automatically stand dismissed for want of prosecution.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 29<sup>th</sup> day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Thiga for Defendants/Applicants.

Mr. Ombwayo for Respondent

Court Assistant: Sylvia.