

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 978 OF 2002

PIPELASTIC SAMKOLIT KENYA LTD.....PLAINTIFF

VERSUS

AFRICAN BROADCASTING CORPORATION.....DEFENDANT

RULING

1. The application dated 25th July, 2017 seeks orders that the Plaintiff's suit against the Defendant be dismissed for want of prosecution.
2. It is stated in the affidavit in support that the Plaintiff has not taken any steps to prosecute this matter since September, 2013. That the Plaintiff has lost interest in the suit and the delay is prejudicial to the Defendant as memories of witnesses may fade or the witnesses may become unavailable.
3. The application is opposed. The delay is blamed on the Multiplicity of applications herein including the Defendant's applications dated 6th May, 2005 and the Plaintiff's dated 15th February, 2007 which are still pending. It is further stated that the Defendant has not complied with Order 11 Civil Procedure Rules while the Plaintiff has fully complied.
4. I have considered the application, the reply to the same and the submissions made by the counsels for the respective parties.
5. The principles governing dismissal of a suit for want of prosecution are that; delay must be inordinate, the inordinate delay is inexcusable and the Defendant is likely to be prejudiced. Chesoni, J. (as he then was) applied these principles in the case of **Ivita v. Kyumbu [1984] KLR, 441**. He stated as follows in the said case:-

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and 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 disappearance of human memory resulting from lapse of time. The Defendant must however 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

6. The record shows that no step has been taken to prosecute the suit herein since September, 2013. The record also confirms that the Defendant's application for dismissal of suit dated 6th May, 2005 and the application by the Plaintiff dated 15th February, 2007 for the amendment of the Plaint are still pending. No directions have been given under Order 11 Civil Procedure Rules.
7. The Plaintiff is the prime mover of his suit. The explanation for the delay is therefore not satisfactory. The Defendant also seems to have contributed to the delay by having a pending application on record. The application dated 6th May, 2005 seeking orders for the dismissal of the suit has been overtaken by events. Even the Defendant's position is that the same may be marked as withdrawn. The Plaintiff has not made any comments in respect of it's application for amendment dated 15th February, 2007. The Plaintiff has however asked for a chance for their case to proceed to full hearing. This court is inclined to give the case a chance to be heard on merits but upon conditions.
8. The application is allowed with costs in cause. The application dated 6th May, 2005 is hereby marked as withdrawn. The Plaintiff to fix the application dated 15th February, 2007 for hearing within 30 days from date hereof. In default the application to stand as dismissed with costs. The Plaintiff to fix the suit for directions within 60 days from today. In default the suit to stand dismissed.

Date, signed and delivered at Nairobi this 27th day of March, 2018

B. THURANIRA JADEN

JUDGE