



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT CIVIL CASE NO. 414 OF 2012**

**CELL TOURS & TRAVEL LIMITED.....APPLICANT**

**VERSUS**

**CHARLES MAINA MURIITHI.....1<sup>ST</sup> DEFENDANT**

**REAL INSURANCE LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

This suit was filed on 21st August, 2012 appearance was entered on behalf of the 2nd defendant on 19<sup>th</sup> September, 2012 while the defence of the 2<sup>nd</sup> defendant was filed on 4<sup>th</sup> October, 2012. A reply to the defence was filed on 25<sup>th</sup> October, 2013 a year after the said defence was filed.

Since then, no action was taken to move the suit forward until this application for dismissal of the suit was filed and served. The application which is dated 1<sup>st</sup> September, 2016 is under Order 17 Rule 2 (3) and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act. Upon service of the application, the plaintiff filed grounds of opposition and pre-trial questionnaire on 27<sup>th</sup> September, 2016. The 2<sup>nd</sup> defendant was allowed leave to serve the 1<sup>st</sup> defendant with this application by way of substituted service.

Both parties have filed submissions. The submissions on behalf of the plaintiff were filed by the firm of Kerongo Bosire and Co. Advocates while the advocates on record on for the plaintiff are Wachakana and Company Advocates. It is not clear when the firm of Kerongo Bosire and Co. Advocates took over the matter from the firm of Wachakana and Company advocates. No issue however has been raised in that regard.

It is true that it took the 2<sup>nd</sup> defendant's action of filing this application to prompt the plaintiff file the pre-trial questionnaire. Even then, no overt action has been taken to demonstrate the plaintiff's interest in the prosecution of the suit. I say so because the application for dismissal is not an impediment to moving the court under Order 11 of the Civil Procedure Rules and therefore, from 2006 no action has been taken.

When the record is taken into consideration, it actually amounts to six years without any action being taken to prosecute this suit. I know the order being sought has drastic consequence and courts have always tilted in favour of maintaining a suit rather than dismissing the same.

From the grounds of opposition, and the submissions advanced, it is clear the prolonged delay has not been explained. It has also been left open for anyone to guess the reasons for the delay and therefore no excuse has been offered. It may or may not be intentional, but it behoves a party to advance reason with sufficient clarity why a suit has remained dormant for six years. If indeed the plaintiff suffered any loss as pleaded and submitted, it should have been more enthusiastic to ensure that the suit is prosecuted expeditiously.

The provisions of Order 17 Rule 2 (3) are instructive. These provisions are there to aid expeditious disposal of cases, and when read alongside Section 1A, 1B and 3A of the Civil Procedure Act, the intended achievement is to ensure that justice is met by balancing the rights of both parties.

In the circumstances, informed by the record before me, I am satisfied that the 2<sup>nd</sup> defendant has justified the order sought and therefore this suit is dismissed with costs to the 2nd defendant.

***Dated, signed and delivered at Nairobi this 19<sup>th</sup> Day of June, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**