



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO. 1261 OF 2002**

**KENYA POSTAL DIRECTORIES LIMITED ..... PLAINTIFF**

**VERSUS**

**YELLOW PAGES PUBLISHING AND MARKETING LIMITED .....DEFENDANT**

**AND PLAINTIFF TO THE COUNTERCLAIM**

**AND**

**KENYA POSTAL DIRECTORIES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**TO THE COUNTERCLAIM**

**AND**

**TELCOM KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**TO THE COUNTERCLAIM**

**RULING**

1. The Court has before it two applications filed by different Parties to the original suit and counterclaim but they seek similar orders so were heard together. There were two Applications the first was filed on 8<sup>th</sup> April 2016 and the second on 25<sup>th</sup> May 2016. The Applications seem to have been occasioned by the Ruling of this Court delivered on 2<sup>nd</sup> March 2016. That decision dismissed the Plaintiff for want of prosecution. The Plaintiff in question was filed in 2002 and the Counterclaim in 2003. By 2016 neither had been heard.

**The Parties**

2. The Parties to the Application and underlying suit/counterclaim are:

- i. **Kenya Postal Directories** (hereinafter KPD); it was the Plaintiff to the original Plaintiff and is now the 1<sup>st</sup> Defendant to the Counterclaim. It is represented by Messrs Shapley Barrett and appeared in Court by Mr Oyatsi, in the main and save for highlighting in November 2016;

ii. **Yellow Pages Publishing and Marketing Ltd** ( hereinafter YPM) which is the Plaintiff to the Counterclaim and was initially the First Defendant to the original suit. It is represented by Messrs LJA Associates and has appeared in Court by Mr Singh Gitau in the main save for the highlighting. It is the Respondent to both Applications.

iii. **Telecom Kenya Limited** (hereinafter TKL) is the Second Defendant to the Counterclaim. It is represented by Messrs Hamilton Harrison & Matthews and has appeared by Mr Murugara in the main save for the Highlighting. It is the Applicant in the Application filed on 8<sup>th</sup> April 2016

### The Applications

3. As stated above, the Court has before it two Applications before it as follows:

i. The First Application dated 7<sup>th</sup> April 2016 and filed on 8<sup>th</sup> April 2016 is brought on behalf of TKL. The date of filing determines timing (**Order 51CPR** );

ii. The Second Application filed on 25<sup>th</sup> May 2016 filed on behalf of KPD.

4. The First Application seeks Orders that:

“1. The Order of this Court made on 2<sup>nd</sup> March 2016 be reviewed;

2. There be an order dismissing the defendant’s counterclaim with costs to the 2<sup>nd</sup> Defendant to the Counterclaim

3. The costs of the counter claim (sic) and of this application be paid to the 2<sup>nd</sup> defendant to the counter claim by the defendant/plaintiff to the claim.

4. Alternatively, the court does review the order of 2<sup>nd</sup> March 2016 dismissing the suit for want of prosecution to include a dismissal of the counter claim with costs of the suit including those of the counter claim being paid to the 2<sup>nd</sup> defendant by the defendant/plaintiff to the counter claim.”

5. Once again this Party presents the Court with the interesting proposition by making an application seeking an order, the outcome of which, does not affect it directly.

6. The Application is brought under **Order 17 Rule 2(3)** of the **Civil Procedure Rules** and under the Inherent powers of the Court. **Order 17 Rule 2** provides as follows:

**“Notice to show cause why suit should not be dismissed.**

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 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.....”

7. Therefore **Order 17 Rule 2(3)** provides for any party to the suit to apply for its dismissal. Within this Application that deals with the second prayer but not the first. The Applicant also relies on **Order 51 Rule 1** which provides;

*“1. All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide”.*

8. The First Application is brought on the Grounds that appear on its face which are:

*a. The defendant has not prosecuted the counter claim as required by law.*

*b. The plaintiff’s suit against the defendant has been dismissed for want of prosecution*

*c. The counterclaim also ought to have been similarly dismissed for want of prosecution with costs to the 2nd defendant to the counterclaim.”.*

The Application is supported by the Affidavit of George Gitonga Murugara, the nature of the case and other reasons to be adduced at the hearing.

9. The Affidavit in addition to facts included legal opinion to wit paragraphs 4 and 5 which state:

*“4. In my opinion it was not necessary to have the prayer as the entire suit including the counter claim were to be dismissed for want of prosecution and appropriate orders as regards costs made thereto.*

*5. In view of the Order made by the Court, it is necessary to have the ruling reviewed so that the counter claim is also dismissed with costs to the 2<sup>nd</sup> defendant to the counterclaim.”*

10. Notwithstanding that the purpose of an Affidavit is to present facts rather than legal opinion, it does raise the issue of whether any court has jurisdiction to strike out or dismiss a case or suit for delay of want of prosecution whether sui moto (of its own motion) or, alternatively on a review. That will be dealt with below. Mr Murugara confirms in his Affidavit that he is the Advocate with conduct for the Second Defendant.

11. The First Application is very different from the Second Application which is also brought under **Order 17 Rule 2(3)** and **Order 51 Rule 1 of the Civil Procedure Rules 2010**. The Second Application is dated 25<sup>th</sup> May 2016 and was filed on the same day. It seeks the following Orders:

**1. THAT** the Counter-claim dated 2<sup>nd</sup> April 2003 and filed herein on 3<sup>rd</sup> April 2003 in the above mentioned case against the applicant as the 1<sup>st</sup> Defendant in the Counter-claim be dismissed for want of prosecution.

**2. THAT** the costs of the Counter-claim and of this application be awarded to the Applicant and be paid by the Plaintiff in the Counter-claim M/s Yellow Pages Publishing and Marketing Limited.”

12. The Grounds on which the Application is brought appear on its face and are:

*a. A period of thirteen (13) years and one(1) month has elapsed since the above Counter-claim was filed;*

*b. The Plaintiff in the Counter-claim has to-date failed to take any or the required steps to prosecute the said Counter-claim for the last thirteen (13) years and one (1) month;*

*c. The said delay of thirteen (13) years and one (1) month is inordinate;*

*d. The said Plaintiff has abandoned the Counter-claim;*

*e. It is in the interests of justice that the Counter-claim be dismissed with costs to be paid by the*

*Plaintiff in the Counter-claim as the defaulting party”.*

13. The Application is supported by the Affidavit of Mr Desterio Oyatsi and the grounds to be adduced at hearing. Mr Oyatsi confirms he has conduct of the case on behalf of his Client (KPD). He states that it is more than 13 years since the Counterclaim was filed. He says the pleadings were closed in May 2003. At paragraph 9 he says; “*There are no judicial reasons known to me to explain the said delay or failure by the Plaintiff in the Counterclaim to prosecute the said counterclaim.*”. He goes on to say at paragraph 10 that; “*The only logical and legitimate reason for the said inordinate delay is that the Plaintiff in the Counter-claim abandoned its claim against the Applicant...*”. For those reasons, he says “*the Counterclaim ought to be dismissed with costs.*”.

14. The Respondent to both Applications, YPM eventually filed a Replying Affidavit on 27<sup>th</sup> June 2016. The Replying Affidavit is sworn by James Singh Gitau who is also the Advocate with conduct on behalf of the original Defendant. The Affidavit is in reply to both Applications. In relation to the allegation that YPM took no steps since the Pleadings closed, he relates the details of the correspondence exchanged and applications made to obtain further particulars of the Plaintiff. That Application was heard on 13<sup>th</sup> November 2009. The Application was re-listed for hearing on 8<sup>th</sup> March 2011. The Court Record confirms that it came before Hon Lady Justice Okwengu. The order on the record shows that she found that the Chamber Summons dated 5<sup>th</sup> November 2009 was covered by the Civil Procedure Rules 2010. She Ordered the Parties to exchange documents in compliance with those rules. The same application came before the Court on 20<sup>th</sup> November 2012 when Hon Musinga J found that it had been overtaken by events and directed the Parties to take a hearing date (for the suit). After that, the next date before the Court was for a Mention on 4<sup>th</sup> June 2015 on the Application dated 28<sup>th</sup> April 2015 and filed on 30<sup>th</sup> April 2015 seeking dismissal of the suit.

15. In relation to TKL’s Application, the Replying Affidavit, again descending into legal argument, declares that it is bad in law because it invites the Court to make an order that was not part of that Party’s pleadings. That is undeniable. The Court remarking that TKL had made an Application the suite cannot be interpreted as a finding on any other application that could have been made, and was not. The Affidavit also states that YPL could not trace the Court file or it could not be traced between 2<sup>nd</sup> March 2016 and 16<sup>th</sup> May 2016, that is, the day on which TKL served their Application.

16. In relation to the substantive issue, the deponent states that the Counterclaim hinged on the particulars that the Plaintiff was expected to provide. KPD disputes that. It is argued that the Counterclaim is a separate case in its own right and therefore could not be dependant on particulars from the Plaintiff. That must be the correct analysis. Had the Counterclaim have been issued first, it could or would not have been delayed for the provision of particulars. There may have been a notice to produce documents, the exercise which is now dealt with by exchanging documents. However, it is undeniable that to a certain extent a Defendant does rely on the Plaintiff to pursue the Plaintiff for the Hearing to commence.

17. The Parties filed Written Submissions which were highlighted on 21<sup>st</sup> December 2016. A hearing date was given subsequently due to the Judge’s transfer to a different Division of the High Court in Nairobi. They have been considered and form part of their record. They are not repeated here in the interests of brevity. No disrespect is meant by that approach.

18. However, the applicable principles to the Application now before the Court were set out at length in the Ruling delivered on 2<sup>nd</sup> March 2016 and are repeated here. They emanate from **Civil Procedure Rules, Order 17 r, 2, Order 51, Constitution of Kenya Articles 50, and 159.**

#### Decision and Reasons

19. The test set out in **Order 17** is very clear. It is “had the Party...taken any steps in the proceedings in the [12 month] period before the Application/” In this case, the answer to that must be in the positive. It had taken a step, it had brought an application for dismissal of the suit.

20. Although, that analysis may have drawn the ire of Charles Dickens as demonstrated by his famous phrase, the outcome does not, in effect, cause any prejudice to the other Parties as they preserve the right to defend that claim on its merits. If necessary they can ask for and get leave to amend their pleadings to take into account the dismissal of the Plaintiff.

21. In relation to the application for a review, the Rules provide for such an application. However, it is again a specific exercise. It does not give to the Court the leeway to substitute the application before it with a different application that is more useful to one party or the other. TKL made the application it wished, that was recorded and ruled upon. There are no grounds put forward for reviewing it. What are the facts and matters that the Court failed to consider, or that have subsequently come to light? None are set out. TKL is now making the Application to strike out the Counterclaim. That application must be considered on its merits after it has been made. It cannot be transplanted onto the earlier application, which is what, in effect TKL seeks. **Order 45 rule 1** does not provide for that.

22. The Applicants, no doubt, are looking for “equality before the law”. That comes from the application of Order 17 rule 2 to the specific circumstances of each application. It also comes from the right to defend. “Equality” in this sense does to guarantee identical outcomes whatever the circumstances.

23. For the reasons set out above, both Applications are dismissed. Costs to be costs in the cause.

Order accordingly,

**FARAH S M AMIN**

**JUDGE**

Signed and Delivered on the 20<sup>th</sup> day of April 2017

***NB:*** *Contains corrections to earlier typographical and grammatical errors pursuant to Section 99 of the Civil Procedure Act Cap 21.*

In the presence of:

Court Clerk: Patrick Mwangi

Ms Muhunja Holding Brief for Mr Oyatsi from M/s Shapley Barratt for Plaintiff

Ms Mumbi from LJA for the Defendant /Plaintiff to Counterclaim

Ms Olbara from HHM or the Second Defendant to the Counterclaim