REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 545 OF 2011

TELKOM KENYA LIMITED….....PLAINTIFF

VERSUS

JOHN OCHANDA…….1ST DEFENDANT

NAPHTULY KIBUTU KANYORO……..…….2ND DEFENDANT

JOSHUA AYIEKO MBAGO……..……..…..3RD DEFENDANT

ESAU MAHANJI IMONJE……..……..….4TH DEFENDANT

MICHAEL AKEYO……..……...….5TH DEFENDANT

MOSES OBIERO……..……..6TH DEFENDANT

MICHAEL ODANGA……..……...….7TH DEFENDANT

RULING

1. The suit was filed in court on 1st December 2011. Simultaneously with the plaint, the plaintiff filed an application for an interlocutory injunction. The said application was filed under a certificate of urgency, prompting the court to hear it *exparte*, in the first instance.

2. Having given due consideration to the application, the court granted an interlocutory injunction on 1st December 2011, barring the defendants from presenting a petition to wind-up the plaintiff. The orders made on 1st December 2011 were made *ex-parte*, and the court directed that the application be canvassed *inter partes* on 15th December 2011.

3. After giving all the parties an opportunity to be heard on 15th December 2011, the court eventually delivered its Ruling on 23rd February 2012. By the said Ruling, the court held that the defendants had taken hasty steps to threaten the plaintiff that it would be wound up, before the defendants had fulfilled the requirements of the provisions of Section 220 (c) of the Companies Act.

4. The court did express the view that an order for the winding-up of the plaintiff could threaten the plaintiff's ability to satisfy the judgement-debt.

5. At the same time, the court appreciated the need for all the parties to resolve the disputes concerning the quantum of the decretal amounts, without recourse to protracted proceedings.

6. The court restrained the defendants from presenting a Winding-up petition against the plaintiff until the suit was heard and determined.

7. The defendants have, by an application dated 6th July 2015, requested the court to dismiss the suit for want of prosecution. The reason why the defendants want the suit dismissed is that the plaintiff's inactivity was seriously prejudicial to the defendants.

8. The defendants have pointed out that the court did direct, on 23rd February 2012, that the case be prepared for Hearing within 60 days. After being prepared for Hearing, the case should have been fixed for Hearing within the period of 14 days after the lapse of the period for the preparations.

9. Notwithstanding the court's said Directions, the plaintiff had taken no steps for a period of over 3 years. Therefore, the defendants expressed the belief that the plaintiff was only intent on benefitting from the interlocutory injunction, to the detriment of the defendants.

10. The delay of over 3 years was described as being inordinate; and the consequences of the said delay was to clog to Court's diary. Therefore, in order to give an opportunity to other parties to be heard, the defendants asked the court to dismiss this case, so that some space is created in the court diary, for deserving cases to be heard.

11. In their submissions, the defendants emphasized that the onus was on the plaintiff and their advocates, to get on with the case. However, the plaintiff and their lawyers are said to fallen into a deep sleep.

12. Indeed, the defendants fault the plaintiff for choosing to blame the defendants for allegedly failing to comply with Order 11 of the Civil Procedure Rules, instead of focusing their energy in prosecuting the case. According to the defendants, their failure to comply with Order 11 cannot be a plausible reason to justify the plaintiff's failure to take steps in the case.

13. The other issue that was raised by the defendants was in relation to the interlocutory injunction. It was said that, by virtue of Order 40 Rule 6 of the Civil Procedure Rules, the interlocutory injunction had lapsed when more than 12 months had gone by, from the time the injunction was granted.

14. It is clear to me that the submissions based on the provisions of Order 40 Rule 6 of the Civil Procedure Rules have no application to the question as to whether or not the suit ought to be dismissed for want of prosecution. The said rule provides as follows;

> ***"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of 12 months from the date of grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise?.***

15. Even if the interlocutory injunction lapses on the grounds that the suit was not determined within 12 months of the grant of the said injunction, the substantive suit would not lapse.

16. The defendants' current application targets the suit, not the interlocutory injunction. Therefore, I will not make a determination on a question that does not flow from the substantive issues arising from the application.

17. Pursuant to Order 17 Rule 2, a suit may be dismissed for want of prosecution if no application had been made or if no step had been taken by either party, for one year.

18. Therefore, whereas the plaintiff would be the party who should strive to prosecute his case diligently, the rules recognize the fact that applications can be made or other steps can be taken in the suit, by either party.

19. When no application was made or no step was taken in a suit, 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. If cause was not shown to the satisfaction of the court, the suit may be dismissed.

20. However, if cause was shown to the satisfaction of the court, appropriate orders would be made by the court to ensure the expeditious hearing of the suit.

21. From the provisions of Order 17 Rule 2 (1) and (2), the court can take action at its own instance.

22. Meanwhile, pursuant to Order 17 Rule 2 (3), any party to the suit may apply for the dismissal of the suit for want of prosecution. In this case, the defendants invoked that rule, in an endeavour to have the suit dismissed.

23. The court records show that on 18th June 2015, the case was before Kiarie J. The reason why the case was before the court was that the plaintiff was required to show cause why the case should not be dismissed for want of prosecution.

24. The plaintiff was represented by Mr. Okoth advocate. The said lawyer informed the court that the case emanated from other proceedings which had been at the High Court.

25. According to the plaintiff, the cases had been escalated to the Supreme Court, where they were still pending.

26. The court was also told that there had been changes of the directors of the plaintiff. The said changes had given rise to conflicts of interest.

27. In the circumstances, the plaintiff sought the court's indulgence. The plaintiff specifically asked the court to have the case mentioned before the Presiding Judge of the Commercial Division, on 8th July 2015, so that the court could give further Directions.

28. 2 days before the scheduled mention of the case, the defendants filed the present application, for the dismissal of the suit for want of prosecution.

29. In the said application, the defendants did not mention the fact that the case had come up before Kiarie J. on 18th June 2015.

30. Meanwhile, the plaintiff has exhibited a Notice dated 23rd June 2015, through which the defendants were informed that the case was scheduled for Mention for further Directions before the Presiding Judge of the Commercial and Admiralty Division on 8th July 2015.

31. It is thus evident that by the time the defendants filed the present application they knew that the case was already scheduled for mention for further Directions.

32. If the defendants had wished to verify the circumstances under which the case was fixed for mention, they could have done so through either a perusal of the court file or by asking the plaintiff.

33. The inquiry could have revealed that it was the plaintiff who had taken the step of asking the court to fix a date for the mention of the case, for purposes of getting further Directions.

34. In my considered view, the request by the plaintiff for a date for mention constituted a step in the proceedings. Therefore, the very foundation upon which the application as based has collapsed. The

application itself must therefore, also, collapse.

35. But before concluding the Ruling I deem it necessary to point out that a plaintiff can no longer cause a case to delay if the defendant was keen on having it dealt with expeditiously. I say so because either party has the requisite authority to take steps to make the case ready for trial. And if the other party was not making ready their case for trial, the court would be entitled to direct that the party who had failed to comply with pre-trial procedures be deemed to have made a choice that they either would not be calling witnesses or that they would not be making available any documentary evidence.

36. The point I am making is that no party to a case can sit back and complain that he was being prejudiced by the inactivity of the other party, whilst the party who was complaining had also failed to take steps to make ready his own case.

37. In the final analysis, the defendants' application dated 6th July 2015 is dismissed, with costs to the plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **19th day** of **January** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

……for the Plaintiff

…….....for the 1st Defendant

…….....for the 2nd Defendant

…….....for the 3rd Defendant

…….....for the 4th Defendant

…….....for the 5th Defendant

…….....for the 6th Defendant

…….....for the 7th Defendant

Collins Odhiambo – Court clerk.