**REPUBLIC OF KENYA**

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

**CIVIL CASE NO.134 OF 2004**

LINEAR COACH COMPANY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

TELKOM KENYA LIMITED.....DEFENDANT/APPLICANT

**RULING**

1. In an application dated 22nd August, 2014, the defendant/applicant sought orders as follows:

**1. That the suit herein be dismissed for want of prosecution.**

**2. That the Plaintiff/Respondent be condemned to pay costs.**

2. The said application was supported by the affidavit of the one Alfred Kingoina Nyairo the applicant's counsel on record and on the grounds that:

**a) That this suit was filed on 13th September, 2004.**

**b) That this matter was last in court on 3/3/2009.**

**c) That since 3/3/2009 the plaintiff/Respondent has taken no steps to prosecute the same.**

**d) That it is clear the plaintiff/Respondent has lost interest in prosecuting this suit.**

**e) That this matter has previously come up for hearing of an application for dismissal of this suit for want of prosecution dated 17/5/2005 and the plaintiff/respondent was granted an opportunity to prosecute this suit.**

**f) That even after being granted an opportunity to prosecute the suit herein the plaintiff/respondent has not taken steps to prosecute this suit.**

**g) That litigation ought to be concluded and hence this application.**

**h) That the Defendant/Applicant is deserving the orders sought as it serves justice in the circumstances.**

**i) That this suit has been in court for over 10 years.**

**j) That continued existence of the suit is greatly prejudicing the Defendant/Applicant.**

**k) That the court has power to grant the orders sought**

**Applicants' affidavit**

3. The affidavit in support of the application repeated and expounded on the grounds already stated in the body of the application. The applicant's deponent stated that the period of inaction by the respondent in prosecuting the case amounted to an inordinate delay that prejudiced the position of the applicant.

**Respondent's replying affidavit**

4. In the replying affidavit sworn on 18th June, 2015, the respondent's counsel Mr. Kennedy Bosire Gichana deposed that he had on several occasions between 5th July, 2010 and 21st May, 2012 attempted to fix the matter for hearing but the court file could not be traced and that at one point in the year 2013 the court diary was closed early and this, coupled with the advocates strike in the region, prevented the respondent from listing the case for hearing.

5. The respondent further states that since the year 2009, parties had been attempting out of court negotiations that did not yield any fruits and therefore, it was not right for the applicant to state that the respondent has been indolent since the year 2005 when it faced a similar fate of having its case almost dismissed for want of prosecution.

6. The respondent further observed and deposed that pretrial directions and conferences had not been undertaken in this case as a pre-requisite for fixing matters for hearing under order II of the Civil Procedure Rules and therefore, the instant application was premature and misconceived.

7. On 6th July, 2015 when the instant application came up for hearing the counsels for the parties agreed to canvass the same by way of written submissions.

**Applicant's submissions**

8. In the submissions filed on 7th December, 2015 the applicant revisited the earlier court proceedings in this matter in which this court faced by a similar application to dismiss this case for want of prosecution and on 30th May, 2007 declined to order for a dismissal but ordered the respondent herein to set down the suit for hearing within 90 days from the date of the ruling was delivered.

9. The applicant submits that subsequently, the suit was fixed for hearing on various dates but did not proceed for one reason or another and that form July 2010, the respondent had neither listed the suit for hearing nor complied with the provisions of order II of the Civil Procedure Rules thereby necessitating the filing of this application.

10. The applicant relied on the case of **Ivita vs Kyumbu (1984) KLR 441** in which Chesoni J (as he then was) stated as follows:

> ***"The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."***

11. The applicant contended that it is now more than 11 years since this suit was filed and no reasonable grounds had been adduced by the respondent to explain the long delay in prosecuting the case.

12. The applicant further argued that the respondent had not furnished this court with any proof of his attempts to list the case for hearing in terms of any correspondence that the respondent's counsel had with

the court's registry.

13. The applicant reiterated that the respondent went to sleep in this case and its ground that the court file could not be traced was a mere gimmick devoid of any truth.

14. To further justify their submissions, the applicant stated that the defendant is a limited liability company that has undergone many changes and depends on institutional memory and therefore the over 12 years period that the case has been pending in court was prejudicial to the applicant's procurement of its witnesses. The applicant sought the orders and further relied on the findings in the case of **Sitarani Hiralal Shirolal Luthra vs Loresho Gardens Ltd and Another [2013] eKLR.**

**Respondent's submissions**

15. The respondents submissions filed on 8th December, 2015 repeated the reasons advanced in the replying affidavit for not fixing the case for haring ranging from the non-availability of the court file to the an unsuccessful attempt at a negotiated settlement.

16. The respondent further argued that the pretrial directions and pre-trial conference had not been undertaken in this case and therefore the instant application was premature and misconceived.

The respondent relied on the findings **in Ivita vs Kyumbu (supra) and Nathan Opondo Onyano vs National Bank of Kenya Ltd (2005) eKLR** in which it was held that even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time.

**Analysis and determination.**

17. I have taken due consideration of the application before me, the response to it filed by the respondent, the submissions filed by the parties and the authorities cited.

18. It has not been disputed by the respondent that this suit has been pending in court since the year 2004 when the plaint was filed and that in the year 2005, the respondent faced a similar threat of its case being dismissed for want of prosecution but was given a lifeline by the court on 30th May, 2007 when a similar application was disallowed but on condition that the plaintiff sets down the suit for hearing within 90 days whereupon, costs of the application was granted to the applicant.

19. I note, from the court record, that the case was subsequently listed for hearing on many occasions when the case did not proceed but that on 3rd March, 2007 the case proceeded partly with the testimony of PW1 Reuben Mongare Kaba who was stood down before cross-examination on basis that some documents (receipts) had not met the provisions of the Stamp Duty Act.

20. I further note that the last time the matter appeared before the court prior to the filing of this instant application was on 31st January, 2010 when the case was adjourned yet again at the instance of the respondent who claimed that he had not served the applicant with the hearing notice.

21. The respondent has alleged that he thereafter wrote numerous letters to court seeking to list the case for hearing but that the court file went missing and could not be traced.

The respondent has further claimed that there were attempts at a negotiated out of court settlement which failed.

22. I do not accept the respondent's excuse that the court file went missing or that there were attempts to negotiate the matter out of court because there is not a single letter exhibited by the respondent to show that his correspondence to the court was received, acknowledged and stamped or that he had any

correspondence with the applicant on the alleged out of court settlement bid.

23. The last time that any meaningful correspondence took place between the applicant and respondent was on 21st May 2012 when the respondents counsel wrote to the applicant's counsel inviting them to attend the registry was to fix the case for hearing. After the said correspondence, the matter went quiet upto the time when the instant application was filed in august 2014.

24. I further find that the respondent cannot hide behind the cover of order II of the Civil Procedure Rules as a ground for stating that the instant application is premature because the order had not been complied with. This is so because even as at May, 2012 when the respondent invited the applicant to appear in the registry for purposes of fixing a hearing date, the respondent was aware of the existence of the order II Civil Procedure Rules but did not make any attempts to comply with it.

25. I observe that the respondent should have been more vigilant to ensure that this case was listed for hearing bearing in mind the fact that it (respondent) had narrowly escaped an earlier attempt in 2005, to have the case dismissed for want of prosecution. I find that the saying that "once beaten twice shy" does not ring a bell to the respondent in this case as it chose to go back to its pre-2005 position by sitting on its laurels only to be rudely awakened by the applicant through the instant application.

26. While it is possible that the court file could have gone missing for some time as is alleged by the respondent, the fact that there is no letter of complaint, enquiry or an application to reconstruct the file from the respondent's end makes me hold that the allegation that the court file went missing a mere gimmick by the respondent to avoid responsibility for the inordinate delay in fixing the case for hearing.

27. The behavior displayed by the respondent in this case is not that of a party who is eager to have his case concluded. In a nutshell, I am not satisfied with the reasons given by the plaintiff/respondent for the delay more so given the fact that this is not the first time that such an application is coming up for hearing. The court cannot be made to encounter the same scenario over and over again with no end in sight.

28. It is for the above reasons that I find that this instant application has merit.

29. In the end, I allow the application dated 22nd August, 2014 with costs to the applicant/defendant.

**Dated, signed and delivered in open court this 19th day of April, 2016**

**HON. W. A.OKWANY**

**JUDGE**

**In the presence of**:

- **M/S Ombati for Bosire** for the Plaintiff/Respondent
- **N/A for Nyachiro** for the Applicant
- **Omwoyo** court clerk