

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 413 OF 2009

SAUM SURAJ.....PLAINTIFF

VERSUS

NETWORK SUPPORT SERVICES (SUDAN) LTD.....DEFENDANT

RULING

1. The Defendant filed the notice of motion dated 16th July, 2014 under Order 17 Rule 2 (3) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act seeking the striking out of this suit for want of prosecution.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of David Muthee Michuki dated 16th July, 2014. The Defendant averred that three years have lapsed since this matter was last in court on 18th May, 2010 and it is apparent that the Plaintiff has no interest in prosecuting it. He contended that the delay in prosecuting this case has left the Defendant eager to have the matter disposed of. Despite service being effected, the Plaintiff did not respond to the application and the facts deposed by the Defendant are taken to be true. However, the law prohibits a court of law from such impulsive inclination. Further enquiries ought to be made into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution.

3. The test to be applied by courts in an application for dismissal for want of prosecution is whether or not the delay in setting down the suit for hearing is inordinate and inexcusable and an abuse of the court process. The Defendant must thus show that justice will not be done due to the prolonged delay on the part of the Plaintiff before the court exercises its discretion in its favour. It means therefore that even if the delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay, the action will not be dismissed. (See: **Ivita v. Kyumbu [1984] KLR 441**).

4. In view of the foregoing, there is no measure of what amounts to inordinate delay rather it is such delay that can prejudice the Defendant in a manner not able to be compensated by an award of costs. The Plaintiff herein has tendered no reasons for the delay in prosecuting this matter, in fact, he has not responded to the application at all despite being served with the application. In view of the foregoing, the delay is therefore inexcusable and is an abuse of the court process. I have also considered the age of this case, it is in the interest of justice that the Defendant is not left hanging onto this matter indefinitely. The upshot is that this suit is dismissed for want of prosecution with costs to the Defendant.

Dated, Signed and Delivered in open court this 24th day of April, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant