



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 534 OF 2011**

**RUGA DISTRIBUTORS LIMITED .....PLAINTIFF**

**VERSUS**

**NAIROBI BOTTLERS LIMITED .....DEFENDANT**

**RULING**

By an application dated 8<sup>th</sup> May 2015 the defendant/applicant –**Nairobi Bottlers Ltd** seeks for dismissal of this suit as filed by **Ruga Distributors Ltd** for want of prosecution. In the alternative, the defendant urges the court to strike out the suit for being frivolous, vexatious and/or an utter abuse of the process of the court.

The application is brought under the provisions of Order 2 Rule 15 (1) (b) (c) and (d) as read with Order 51 Rule 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.

The defendant further urges this court to make such further orders that are expedient and necessary for the ends of justice.

The application is predicated on the grounds that since the filing of this suit in 2011, about 4 years ago, no significant step has been taken by the plaintiff to set down the suit for hearing hence the plaintiff is guilty of inordinate and inexcusable delay, which conduct has caused the defendant irredeemable prejudice. In addition, it is contended that the suit as framed against the defendant is in any event frivolous, vexatious and an abuse of the process of the court and therefore in the circumstances it is only fair and just that the court grants the orders sought.

The application is further supported by the supporting affidavit sworn by Mshai Ngulo an employee of the defendant in the Finance Department. According to Mr Mshai Ngulo, since 7<sup>th</sup> December 2011, no significant step has been taken by the initiator of this suit to have it set down for hearing. In addition, that albeit the plaintiff is described as Ruga Distributors Ltd, all the documents filed in the suit with the plaint show that Ruga Distributors is a business name whose registered legal person is Peter Kangethe Mwangi as per annexure exhibit MN. That despite the above revelation, the person of Peter Kangethe Mwangi has in his witness statement described himself as a Director of the plaintiff.

Further, that albeit the plaintiff seeks for damages for breach of contract, there are no particulars of loss /or damage rendering the suit untenable and unsustainable. That despite the defendant writing to the plaintiff on 22<sup>nd</sup> March 2013 seeking for particulars of loss and or damage, the said particulars have not been furnished. That due to effluxion of time, it has become next to impossible to get any witnesses

whom the defendant may have intended to rely upon, which delay therefore has caused prejudice to the defendant.

The application is opposed by the plaintiff who filed a replying affidavit sworn by Peter Kangethe Kangi one of the Directors of the plaintiff company on 6<sup>th</sup> July 2015. Mr Kangethe deposes that the application by the defendant lacks merit. That he had on occasions visited the chambers of George Wakahiu & Njenga Advocates who filed the suit on his behalf but he had been advised that the said law firm had closed office and the counsel was outside the jurisdiction of Kenya. That his efforts to locate the said advocate were futile hence on 15<sup>th</sup> March 2015 he appointed the current advocates Munyasya & Company Advocates to conduct the suit on his behalf.

According to the Mr Kangethe, the orders sought are unwarranted as they will defeat justice to dismiss the suit for the mistake of his counsels. That he is keen to have the suit prosecuted on merit and that the plaintiff would suffer irreparable loss if the suit is dismissed.

The parties agreed to dispose of the application by way of written submissions. The applicant's submission dated 28<sup>th</sup> July 2015 were filed on 29<sup>th</sup> July 2015 together with list of authorities whereas the respondent's submissions dated 8<sup>th</sup> October 2015 were filed on 12<sup>th</sup> October 2015, though erroneously headed defendant's/respondent's submissions, which error is nonetheless curable on the court's own motion by reference to the correct party who filed the submissions.

The applicant submits that Article 159(2) (d) of the Constitution provides that justice shall not be delayed and that justice is for both the plaintiff and defendant. It relied on **Hassan Nyange Charo V Khahb Mwashetani & 3 Others C App 14/2014(SC)** Rawal DCJ, & Tunoi SCJ wherein they stated:

***“.....in order to dispense justice, it is incumbent upon judicial officers and courts in general to expedite the matters before them. Indeed Article 159(2) (b) of the Constitution provides that justice shall not be delayed. “***

The applicants further relied on the case of **Kuchanga Mwambue Kalama V Joseph Omoth Tenywa [2014] e KLR** where it was stated that once a party files a suit in court, it is incumbent upon him to put in motion mechanisms to comply with the law within a reasonable period and prosecute the case expeditiously, and without undue delay, referring to Article 159(2) (d) of the Constitution and Sections 1A of the Civil Procedure Act.

The applicant further submitted that Order 17 Rule 2 and Order 2 Rule 15 of the Civil Procedure Rules 2010 form the basis of the application as they confer upon this court discretionary power to dismiss suits or strike out pleadings which the claimants evidently had lost interest in. That in this case, it had been shown that one year had lapsed since any action had been taken in the suit and no cause had been shown why the suit should not be dismissed.

In the alternative, it is contended that the suit herein fits the description of one under Order 2 Rule 15 of the Civil Procedure Rules and therefore this court must strike it out. The defendant/ applicant relied on **Kiama Wangai V John N.Mugambi & Another [2012] e KLR** where the court held that where the suit is without substance or groundless or fanciful and or brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of process, the court will not allow its process to be used as a forum for such ventures. That to do that would be opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objectives which requires the court to allot appropriate share of the court's resources while taking into account the need to allot resources to other cases.

According to the applicant, there has been inordinate delay which is not sufficiently explained and that injustice has been occasioned to the defendant since justice delayed is justice denied. They relied on the case of **Ivita V Kyumbu HCC 346/1971** by Chesoni J ( as he then was ) and **Allen V Sir Alfred MC**

**Alpine & Sons Ltd[1968] 1 ALL ER 543** that unless a credible excuse is made out, the natural inference would be that it is an inexcusable delay which is likely to seriously prejudice the defendant. Further, that as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

The defendant attacked the replying affidavit filed by the plaintiff/ respondent on the eve of the hearing of this application submitting that such belated action only serves to show the callousness of the respondent in dealing with the matter. That the applicants did serve the firm of George Wakahiu and Njenga advocates with this application on 26<sup>th</sup> May 2015 and therefore the respondent was misleading this court by alleging that the office of his former advocates was closed and or that the advocate was outside the jurisdiction of Kenya.

That as a result of laches the defendant would not be able to trace its witnesses and even if they were traced they would be unwilling to testify in the matter as a result of the time lapse. They relied on **Reggentine V Beech Olm4 Bakerries Ltd [1967] 111 SOL. Jo 216** and **Fitzpatrick V Batger & Company Ltd[1967] 2 ALL ER 657** where it was stated that it is the duty of the plaintiff's advisors to get on with the case and that public policy demands that the business of the courts should be conducted with expedition. The applicant also relied on **Utalii Transport Company Ltd & 3 Others V NIC Bank & Another [2014] e KLR** citing with approval **Communications Courier & Another V Telkom (K) Ltd [1999] e KLR** where it was stated that justice is to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time.

The applicant further submitted that the objectives of the Civil Procedure Act as captured in Sections 1A and 1B of the Civil Procedure Act and the case of **Kamlesh Manukhal Pattni Vs Central Bank of Kenya and Another [2013] e KLR** must be applied particularly on the timely disposal of proceedings in a just and fair manner. They also relied on the case of **Unga Ltd V Magina Limited HCC 1250/99[2014] e KLR** where the court was disinclined to sustain the suit which had been delayed for 13 years and found the delay prejudicial to the defendants beyond monetary compensation. The applicants/defendant urged the court to find this application meritorious and allow it as prayed with costs.

In their opposing submissions, the plaintiff/respondent submitted that the suit herein should not be dismissed for want of prosecution because the plaintiff had visited his counsel's offices only to be advised that the said law firm had closed office and counsel was outside the jurisdiction of Kenya and that he tried to locate the advocate to no avail. The plaintiff maintained that there was no inordinate delay in having the suit prosecuted and that for there to be inordinate delay it has to be delay beyond acceptable limits, citing **Utalii Transport Ltd(supra) and Lee Waigwa Wariungi (supra)** as well as **Charles M. Kahumka V Wilson Mugo Mwangi (Nairobi HCC 455/2012-** that unless a party has contributed to his mistake, he ought not to be punished for the mistakes of his counsel.

The respondent also contended that having already paid a substantial sum of money to his previous advocates he expected services from them and thus, that was the reason for delaying in appointing another firm of advocates where he would be compelled to pay other legal fees.

The plaintiff relied on the case of **Common Camera Satellite Services (supra) Janet Gakheri Kithela Vs Nation Media Group & Another Nairobi HCC 311/2013** and **Umbisa Moses Gweliona V SDA EAA Union Nairobi HCC 254/2009** and maintained that he had offered reasonable cause as to why the suit herein should not be dismissed for mistakes of his counsel which were the cause for the delay.

In the plaintiff's view, the defendant had not satisfied the court that it will be prejudiced by the delay in prosecution of the suit which can be set down for hearing in the interest of justice. The plaintiff admitted that indeed there had been delay in prosecuting his suit but blamed his advocates and relied on the cases of **Moses Muriira Maingi & 2 Others V Maingi Kamuru & Another Nyeri CA 151 of 2010 citing Ivita V Kyumbu (supra)** where it was stated that the power of the court to dismiss a suit for want of prosecution is a discretionary power but which should be exercised judicially. That since

the plaintiff is interested in the disposal of its case it should be given audience and that no serious prejudice will be occasioned to the defendant if the suit is set down for hearing and that instead it is the plaintiff who will be seriously prejudiced by the dismissal of his suit since both parties have not complied with Order 11 of the Civil Procedure Rules. That the plaintiff is willing to abide by any conditions that the court may set.

I have carefully considered the application and the affidavits. I have also considered the submissions by counsels for the parties and the authorities relied on in extenso. There are two issues here for determination.

**1. Whether the applicant has satisfied the court that this suit ought to be dismissed for want of prosecution and if not;**

**2. Whether the suit herein should be struck out under Order 2 Rule 15 of the Civil Procedure Rules**

### **The facts:**

This suit was instituted on 7<sup>th</sup> December 2011 under fast track, seeking damages for breach of contract with costs and on 27<sup>th</sup> December 2011 the defendant herein entered an appearance and filed defence on 10<sup>th</sup> February 2012 denying the plaintiff's claim.

On 21<sup>st</sup> May 2012, the plaintiff's counsel George Wakahiu & Njenga advocates wrote to the defendant's advocate inviting them to send a representative to the court registry on 12<sup>th</sup> June 2012 at 10.30am with a view to fixing a suitable hearing date. That invitation was served on the defence counsel on 22<sup>nd</sup> May 2012 and received in court on 12<sup>th</sup> June 2012.

On 12<sup>th</sup> June 2012, one, Moses of George Wakahiu advocates for the plaintiff appeared in the court registry in the absence of the defendant's representative and a hearing date was fixed for 18<sup>th</sup> December 2012 but crossed out.

Since then- 12<sup>th</sup> June 2012, no other step or action has been taken by the plaintiff to cause this suit to be heard and determined. On 8<sup>th</sup> May 2015, the defendant's counsel's applied to have this suit dismissed for want of prosecution.

### **The Law**

Both parties' advocates correctly submitted that the power to dismiss a suit for want of prosecution is a discretionary power donated by Order 17 Rule 2 of the Civil Procedure Rules, which discretion, nonetheless, must be exercised judicially and not capriciously.

The leading case which has received approval from the Court of Appeal on dismissal of cases for want of prosecution is **Ivita V Kyumbu [1984] KLR 441** where Chesoni J( as he then was ) held that:

***“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. This even is delay is prolonged if the court is satisfied with the plaintiff's excuse for the***

***delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”***

In a nutshell, the delay complained of should not be inordinate or prolonged but should be inexcusable. If the plaintiff gives an explanation which excuses the delay, even if it is prolonged, the suit may not be dismissed. In addition, the defendant should show what prejudice it stands to suffer due to the delay complained of. The court should also be satisfied that justice will still be done to both parties despite the delay to excuse it. That is the gist of all the decisions which the parties advocates have relied on, whether from the High Court, Court of Appeal or Supreme Court.

Thus, where the plaintiff's side files suit and sleeps on the job and forgets to prosecute the case for unjustified and or unexplained length of time and reasons, it may be time to hunt the hunter. Such delay that is inordinate and unexplained may be a perfect opportunity for the defence or even the court to turn the tables on the plaintiff's side and put it on the defensive. In some instances the defence may get away with dismissal of an otherwise meritorious case.

Dismissal of suit for want of prosecution is meant to and helps stem injustice caused to defendants as a result of delays in prosecuting suits such that if the dismissal fails then the plaintiff is nudged into taking a hearing date.

Section 3A of the Civil Procedure Act gives the court unlimited power and preserves its inherent power to make such order as may be necessary for the ends of justice or prevent abuse of the process of court. Equally, Section 63(e) of the Civil Procedure Act which is the statutory basis for all interlocutory applications gives courts the discretion, where it is so prescribed, in order to salvage justice from defeat to make such interlocutory orders inter alia, as appear to the court to be just and convenient. Order 17 Rule 2 is then the procedural repository of the operative law on application and conditions or applications for dismissal of suits for want of prosecution.

The courts have variously been called upon to interpret and apply the law on application for dismissal of suit for want of prosecution and now that law is settled. However, each case has to be considered on its own merits and peculiar circumstances.

**E.T. Monks & Company Ltd V Evans [1985] 584** established that public policy interest demands that the business of the court must be conducted with expedition, citing with approval Lord Denning MR in the off cited case of **Fitzpatrick V Batger & Company Ltd[1967] 2 ALL ER 657** wherein he warned that:

***“Public policy demands that the business of the courts should be conducted with expedition.”***

In **Agip Kenya Ltd V Highlands Tyres Ltd [2001] KLR 630**. Visram J (as he then was) considered and articulated the flip side of the issue stating:

***“ It is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. It is, therefore, not possible that the Rules committee intended to leave the plaintiff without a remedy and to take away the authority of the court when it made Order XV1( now Order 17) Rule 5 of the Civil Procedure Rules.”***

In the case of **Naftali Opondo Onyango Vs National Bank of Kenya[2005] e KLR**, the court reiterated the burden of proof that a defendant seeking a dismissal of suit for want of prosecution must meet quoting **Salmon LJ in Allan V Sir Alfred MC Alphine & Sons Ltd [1968] 1 ALL ER 543**, where F. Azangalala J (as he then was) stated that

“The defendant must show;

- i. *That there has been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. They vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.*
- ii. *That this inordinate delay is inexcusable as a rule until a credible excuse is made out the natural inference would be that it is inexcusable.*
- iii. *That the defendants are likely to be seriously prejudiced by the delay.*

*This may prejudice at the trial of issues between themselves and the plaintiff or between each other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudices can sometimes be directly proved. As a rule the longer the delay the greater the likelihood of prejudice at trial.”*

The Court of Appeal in **Salkas Contractors Ltd Vs Kenya Petroleum Refineries: Mombasa CA 250 of 2003** (unreported) stated that the above principles apply in Kenya and had been consistently followed by Kenyan courts.

For instance, as earlier stated, in the **Ivita Vs Kyumbu (supra)** case, nonetheless, courts have been slow to dismiss suit for want of prosecution where the court is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the plaintiff.

In the **Naftali case, (supra)** the learned judge declined to dismiss the suit on the ground that the plaintiff had shown interest in having it heard on merit and expeditiously. Visram J in the **Agip (K) supra** case stated that:

*“Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the plaintiff an opportunity to have his case determined on merit. The court must also consider whether the defendant has been prejudiced by the delay.”*

In the **Agip (supra)** case the delay was for 8 months and counsel for the plaintiff had offered an explanation that the delay was caused by the process of relocating their offices and that they were willing to take an early hearing date and the court found that 7 months delay was not inordinate. The court also considered the prejudice that would be occasioned to the plaintiff if the claim for a substantial amount claimed amounting to shs 50 million was dismissed and found it to be a relevant factor and stated that the claim was not a simple amount to be taken lightly and that the court would not be upto its duty if it were to drive the plaintiffs’ claim out of the seat of justice because of the 8 months delay which had been explained. The learned Judge also reminded himself of the familiar plea to courts that they exist to do justice and participate in sustaining suits rather than throwing them out on minor procedural defects.

The Court of Appeal in the case of **Japheth Pasi Kilonga & 8 Others V Mombasa Autocare Ltd [2015] e KLR** stated that the single most drawback in the administration of justice in this jurisdiction is the delay in the determination of cases, resulting in the overwhelming case back log. Citing Lord Denning MR in the off cited case of **Fitzpatrick V Batger & Company Ltd (supra)** that:

*“ public policy demands that the business of the courts should be conducted with expedition”* the Superior court observed that *“ Like never before today this policy is emphasized more as it is underpinned in the Constitution. Article 159(2) (b) and (d) enjoins courts to ensure justice is not delayed and is administered without undue regard to procedural technicalities. Sections 14(5) of the Supreme Court Act, 3A and 3B of the appellate jurisdiction Act and 1A and 1B of the Civil procedure Act have also enacted overriding objectives which require the courts to facilitate the just, efficient, expeditious, proportionate and affordable resolution of disputes. Order 17 Rule 1 of the Civil Procedure Rules requires, as a general rule, that hearing of suits once commenced continue from day today.....”* It is therefore possible for the court to demand expedition in the disposal of cases

***and do justice at the same time; balancing the scales of justice.”***

Whether or not to allow this application for dismissal of the plaintiff's suit for want of prosecution goes to the question of exercise of judicial discretion. That discretion is now firmly settled, should be exercised in a judicial and reasonable manner, upon proper material, after the court has considered, in addition, the party's overall conduct in the case and the sufficiency of the reasons for the delay.

According to the plaintiff, the delay was occasioned by its advocates; That the plaintiff's director on occasions visited their advocates offices and were advised that the office had been closed and the advocate had gone outside the jurisdiction of the court. On many occasions, this court has had to hold that mistakes of counsel should not be visited on their innocent clients. Nonetheless, it is not in every case that the court will fault the advocate for the delay and excuse the client. It depends on the facts and circumstances of each case. In the instant case, the plaintiff has not been candid. The plaintiff's director Mr Peter Kangethe Kangi in his replying affidavit has made very casual depositions that are not supported or at all. He does not state who advised him of the closure of their advocate's office. He does not state who informed him that the advocate had gone out of the jurisdiction of Kenya and to which jurisdiction he had moved to and when and why for that matter. He does not state when he last visited his advocate's law firm only to be advised that the firm had been closed and the advocate gone out of the jurisdiction of Kenya.

In the written submissions, the present advocate for the plaintiff makes statements of facts from the bar which matters were never deposed by the client that ***“..... the plaintiff having already paid a substantial sum of money to his previous advocates, expected services from them, and that was the reason for delaying in appointing another firm where he would be compelled to pay other legal fees.”***

Payment of legal fees is a factual issue .Nowhere in the replying affidavit does the plaintiff depose that he had paid a substantial sum of money to his previous advocate, and that he could not have retained another advocate to represent him to prosecute this suit on that account.

In addition, the plaintiff does not disclose to this court how he learnt of the application herein for dismissal of his suit. His present advocates Muasya & Company Advocates came on record on 8<sup>th</sup> July 2015 after the application for dismissal of the suit for want of prosecution had been filed on 8<sup>th</sup> May, 2015 and service thereof effected upon the plaintiffs advocates then on record. When this matter first came up for hearing on 9<sup>th</sup> July 2015, the plaintiff's advocates had just filed their notice of change of advocates.

The court had perused the record on the morning of 9<sup>th</sup> July 2015 and seen the affidavit of service filed on 8<sup>th</sup> July 2015 showing that on 26<sup>th</sup> May 2015, the process server had effected service of the application upon the plaintiff's former advocates Ms George Wakahiu & Njenga Advocates. To my utter surprise, as I write this ruling, that affidavit of service appears to have vanished from the court file and in the mind of the court, the affidavit of service vanished before the file was reserved for ruling with a view to hood winking this court to believe the plaintiff's story. This court is vigilant enough particularly on issues of service of court process as an omission thereof can occasion an injustice to a party who may be denied an opportunity to be heard where there is no service of process.

Where and how could the defendant's counsels have traced the offices and firm of the plaintiff's former advocates if the plaintiff alleges that he was advised ( by an undisclosed person) that the firm closed and the advocate had gone outside the jurisdiction of Kenya?

I find the plaintiff to be a very dishonest person and his deposition reflects that judicial ingenuity on his part. That conduct of an ingenuine plaintiff militates against the exercise of the court's discretion in its favour. Further dishonesty is reflected in their present advocate's submissions on record which are carefully couched to say the plaintiff was trying to trace the 'advocate' and not the firm. This court does not fall for such cheap theatrical maneuvers. Whoever comes to equity must come with clean

hands. The plaintiff's hands are soiled beyond peradventure and it does not, therefore, deserve the discretion of this court to be exercised in its favour.

I have no doubt that the plaintiff must have been notified by his former advocates on record about this application and that is when he instructed Muasya & Company Advocates to file notice of change of Advocates, which notice was filed in the eve of the hearing of this application. I have perused the said notice of change of advocates and again, carefully speaking, the present advocate omitted to indicate that it ought to be served on the former advocates for the plaintiff.

Under Order 9 Rules 5 of the Civil Procedure Rules:

*“ A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with Rule 6, the former advocate shall, subject to Rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”*(Emphasis added).

The importance of notice of change of advocates has further been emphasized in Order 9 Rule 6 of the Civil Procedure Rules that stipulates that:

*“ The party giving the notice shall serve on every other party (emphasis added) to the cause or matter( not being a party in default) as to entry of appearance ) and on the former advocate a copy of the notice endorsed with a Memorandum stating that the notice has been duly filed in the appropriate court( naming it). (Emphasis added).*

No doubt, the notice of change filed by Muasya & Company Advocates on 8<sup>th</sup> July 2015 without service thereof being effected on the plaintiff's former advocates on record took no effect and the firm of George Wakahiu & Njenga advocates were and are for all purposes and intent deemed to be the proper advocates on record for the plaintiff herein and therefore the proceedings wherein the firm of Muasya & Company Advocates participated in including filing of submissions were improperly on record. Even if such irregularity were to be curable by Article 159 of the Constitution, the question is why did the plaintiff misrepresent to the court the facts and flout the law as above? The court infers that the conduct of the plaintiff is intended to steal a march on the defendant and defeat justice and therefore undeserving of the court's discretion.

This court, in view of the conduct of the plaintiff concludes that the delay by the plaintiff to prosecute its suit since June 2012 was intentional, deliberate, contumelious, inordinate, inexcusable and unexplained and unworthy of any discretion of the court and the blame game being shifted to his advocate is to shift the attention of this court from the real issues.

In my view, the explanation on the plaintiff's advocate purported mistake has no merit as the plaintiff failed to demonstrate that (i) he had contacted his advocate since June 2012 or (ii) that he had been advised that the firm closed and or (iii) that the advocate had gone out of the jurisdiction of Kenya. Nothing would have prevented the plaintiff to disclose who advised him concerning his advocate's closure of office and or departure from this jurisdiction. The plaintiff does not say that it ever wrote to the advocate and received return to the sender or that Mr Kangethe made any telephone calls to his advocate without success. I find his depositions concerning the disappearance of his advocate a barren truth and lacking in candour. Further, whereas the court may excuse a party for mistake of counsel, it is not in every case that a mistake allegedly committed by an advocate which is not even proved, that would be a ground for exercising the discretion of the court in favour of a party (client). In **Savings and Loans Ltd V Susan Wanjiru Muritu Nairobi HCC 397/2002**, Kimaru J correctly stated that:

*“ Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her*

*advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a traversery of justice for the court to exercise its discretion in favour of such a litigant."*

I wholly agree with the above persuasive holding by Honourable Justice Kimaru and add that it is not enough for a party to blame their advocates but to show the tangible steps taken by him in following up his matter. From the conduct of the plaintiff herein, especially by his failure to disclose who advised him of his counsel's office closure and as to how he came to know of this application to instruct the present advocates on record, this court finds his conduct not that of a vigilant litigant. Further, Order 19 Rule 3(1) of the Civil Procedure Rules is clear that:

*" Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: provided that in interlocutory proceedings, or by leave of court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."*

The plaintiff's replying affidavit states at paragraph 4 *" That I have on occasions visited the chambers of the said advocates and been advised that the said law firm had closed office and the counsel is outside the jurisdiction of Kenya.*

*That to date I have tried to locate the said advocate by my efforts have been futile."*

What a contradiction of sorts. If the deponent had on (undisclosed ) occasions visited the chambers of the said advocates and been advised ( by undisclosed persons) that the said law firm had closed office and that the counsel was outside the jurisdiction of Kenya, are those the chambers that he occasionally visited and received advise from?

In a nutshell, the plaintiff's replying affidavit is incapable of belief. It is devoid of the deponents' source of information or their basis of belief regarding the matters stated in the highlighted paragraphs on information and belief. As a result, I find that part of the affidavit by the plaintiff fatally defective and to be of no evidential value. In the Court of Appeal for **East Africa case of Caspair Ltd V Henry Garddy [1962] EA page 414** the court held that the affidavit did not state the deponent's knowledge of or grounds of his belief in the matters set out in the affidavits nor did it distinguish between matters stated on information and belief and matters to which the deponent swore from own knowledge. Thus, where an affidavit is made on information it should not be acted upon by any court unless the means of information are disclosed.

In the absence of any credible explanation for the delay in prosecuting this suit, and in view of the defendant's contention that it shall be prejudiced by the delay as its witnesses may not be traced or if traced may not be willing to testify in this case due to lapse of time which is unexplained to the satisfaction of the court, I hereby allow this application and proceed to dismiss the plaintiffs suit for want of prosecution.

Even if I was to be faulted for dismissing this suit for want of prosecution I would determine here whether or not the suit is frivolous, vexatious and an abuse of the court process as follows: The plaintiff claimed for damages for breach of a contract of distribution of the defendant's products and according to the plaint dated 1<sup>st</sup> November 2011 which has never been amended, the particulars of loss is set out at paragraph 17 as:

- a. *Claims by employees for unlawful termination of employment.*
- b. *Loss of income.*

The law is clear that there can be no general damages for a breach of contract and that damages arising out of breach of a contract are special damages. See **Joseph Ungadi Kedera V Ebby Karai CCA 239 OF 1997 Kisumu**). The usual remedy for breach of contract is damages to compensate the aggrieved and put them back in the same position that they would have been if the contract had been performed. ( see **British Westing House Electric Company V Underground Electric [1912] AC 673**).

In the **Joseph Ungadi Kedera** (supra) case, the Court of Appeal was categorical (Kwach, Lakha, Owuor JJA that

***“As to the award of shs 250,000 as general damages, Mr Adere submitted that there can be no general damages for breach of contract. We respectively agree. There can be no general damages for breach of contract. Damages arising from a breach of contract are usually quantifiable and are not at large. “Where damages can be quantified they cease to be general”***

The defendant deposed that by a letter dated March 2012, annexed and marked MN, their advocates wrote to the plaintiffs advocate George Wakahiu & Njenga Advocates seeking for particulars of loss and or damage alluded to in the plaint but that there was no response. Again that deposition was never controverted or rebutted by the plaintiff.

The plaintiff’s pleadings which have been archived in this court since 16<sup>th</sup> June 2012 claim for damages for breach of contract and particularized ***as claims by employees for unlawful termination of employment and loss of income***. That kind of loss cannot be general in nature. It is a special damage which was not specifically pleaded and no attempt has been made to correct the situation by seeking to amend the plaint.

Accordingly, I am in agreement with counsel for the defendant that such a claim raises no reasonable cause of action. It is frivolous vexatious and an abuse of the court process. It is only intended to put to expense the defendant. It was intended for speculation and such hopeless litigation cannot be sustained by the court since no attempt has been made to amend the plaint. In my view, the plaintiff in this case does not deserve the protection of the decision on **D.T.Dobie and Company Vs Muchira [1982] e KLR**.

Lord Buckley in **Carl Zeiss- Stifting V Rayner [1969] 2 ALL ER 897 at page 908** put it aptly this way:

***“.....to ensure that the defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle, if there is any room for escape from the law well and good, it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay a large sum of money and a plaintiff permitted to waste his own money in an attempt to pursue a cause of action which must fail.....The object is to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation.”***

This court in deciding this issue warns itself that the power to strike out a suit is a draconian, coercive and drastic one. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumstances and only in the clearest of cases as regards the facts and the law (see **LJ Fletcher Moulton in Dyson V AG [1911] I KB 410**).

However, in the instant case, I am persuaded beyond peradventure that in striking out this suit, I shall not have driven the plaintiff from the judgment seat to ventilate its grievances against the defendant and without the court having considered the plaintiff’s right to be heard because on the face of it, the cause of action is obviously and almost incontestably bad such that the plaintiff did not even respond to the prayer for striking out the suit under Order 2 Rule 15 of the Civil Procedure Rules.

The second aspect touches on the capacity of the plaintiff to sue. The defendant contended that albeit the plaintiff is described as **Ruga Distributors Ltd**, a limited liability company registered under Cap 486 Laws of Kenya, the documents in support of the claim as filed by the said plaintiff, among them, a certificate of registration and Kenya Revenue Authority Certificate for the business show that the name Ruga Distributors is registered as a business name under the registration of Business Names Act Cap 499 Laws of Kenya under certificate No. 437176 of 1<sup>st</sup> March 2006 and the person who is certified to be carrying out business in that name is one **Peter Kangethe Kangi**. The Kenya Revenue Authority Certificate for Value Added Tax annexed as VAT 2 also shows that the person who was paying VAT for plot 250/1, Door C, Ngewa Market, which particulars are also provided for on the certificate of registration under the Business Names Act is **Peter Kangethe Kangi**. It is that business name under which the person of **Peter Kangethe Kangi** traded with the defendant, from the statement of accounts annexed.

For the purposes of litigation, the law only recognizes juridical or natural persons as having the capacity to sue and be sued in their own names. A registered limited liability company is a juridical person with capacity to sue and be sued in its own name and it is separate from its owners or directors. On the other hand, the person in whose name the business is registered can sue in his own name, with additional trading as or t/a (the business name).

The question of proper parties before a court of law was elaborately dealt with by this court in **HCC 69/2015 Football Kenya Federation Vs Kenya Premier League Ltd [2005] e KLR**, citing a plethora of other authoritative decisions.

Albeit the law is clear that misjoinder of parties or misdescription of parties cannot defeat suit, but in this case, where it is apparently clear that the plaintiff is alleged to be a limited liability company registered under Cap 486 Laws of Kenya, yet the documents in support of that alleged registration are a certificate of registration of a business name, no doubt, there is no competent party with capacity to sue and be sued before this court and the suit herein is merely fanciful. The defect of bringing an improper party before the court goes to the jurisdiction of the court. There must be a suable party before the court. A suable party is essential to jurisdiction whether by compulsory or voluntary submission. (See **Football Kenya Federation Vs Kenya Premier League Ltd** (supra).

Lord Eldon opined as follows in **Llyod V Loaring [1802] CD 6 Ves 773,777. Accord: Pipe V Bateman [855]**

*“ It is an absolute duty of a court of justice not to permit persons, not incorporated, to effect to treat themselves as a corporation upon the records.....I desire my ground to be understood distinctly. I do not think the court ought to permit persons, who can only sue as partners, to sue in a corporate character; and that is the effect of this bill.”*

Thus the capacity to sue and be sued is conferred by law. It is a privilege appertaining to corporate or natural persons only. For corporate bodies, that right to sue and be sued in its own name is a corporate franchise.

For the above reasons, I agree with the defendant’s counsel’s submissions and find that the body in the name of **Ruga Distributors Ltd** not being a limited liability company lacked the legal capacity to sue in its own name. The suit therefore herein had no initiator and since no attempt was made to amend the plaint to substitute the plaintiff with an appropriate party with a legal personality, there is no suit before this court capable of being determined on merits. In my view, that issue was timeously raised by the defendant in its defence at paragraph 2 of the defence filed on 10<sup>th</sup> February 2012 that :

*“ 2. The defendant denies in toto the descriptive contents of paragraph 1 of the plaint with regard to the plaintiff, in particular, the defendant denies that the plaintiff is a limited liability company and the suit as framed is incompetent and defective.”*

Despite the above point raised by the defendant’s defence which was served on the plaintiff, the

plaintiff's eyes remained shut. The defendant again by prayer No. 2 and 3 of this application dated 6<sup>th</sup> January 2015 sought in the alternative the striking out of this suit under Order 2 Rules 15 (b) (c) and (d) for being frivolous, vexatious and an utter abuse of the process of the court. The defendant also swore an affidavit through Mshai Ngulo and at paragraph 3 and 4 deposed to the matters complained of herein but in the replying affidavit of Peter Kangethe Kangi and even the submissions of the plaintiff's advocates, they carefully avoided any reference to that prayer and grounds which in itself is a preliminary point of law which this court was bound to determine in the first instance such that even if this court was to find that the delay in prosecuting this suit was not inordinate or that despite the delay (which delay must have been satisfactorily explained to this court), justice could still be done; and that no prejudice would be done to the defendant if the suit is sustained and heard on merit despite the delay, this court would on the basis that this suit is frivolous, vexatious, raises no reasonable cause of action and an abuse of the court process and strike it out and dismiss it.

In this case, I find that the suit herein was filed without the legal standing of the plaintiff whose cosmetic description as a limited liability company by virtue of the word "Limited" being added does not give **Ruga Distributors** which is a business name any legal capacity to sue and be sued. The presence of proper parties before a court is sine quo non exercise of jurisdiction of the court. This court has no jurisdiction to hear and determine a suit filed by a non entity camouflaged as a legal entity by description only and not by law. I am fortified by the decision in the case of **Appex International Ltd & Anglo Leasing & Finance International Ltd V Kenya Anti-corruption Commission [2012] e KLR** citing with approval **Goodwill & Trust Investment Ltd & another V. Will & Bush Ltd** (Supreme Court of Nigeria) where the court held:

*"It is trite law that to be competent and have jurisdiction over a matter, proper parties must be indentified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court, the court lacks jurisdiction to hear the suit and where the court purports to exercise jurisdiction which it does not have, the proceedings before it and its judgment will amount to a nullity no matter how well reasoned."*

The above decision is relevant to this case. Accordingly, I find the defendant's prayer for striking out this suit in the alternative to dismissing it for want of prosecution merited. In the end, this suit is struck out and dismissed with costs to the defendant.

**Dated, signed and delivered in open court at Nairobi this 25th day of November, 2015.**

**R.E. ABURILI**

**JUDGE**