



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 765 OF 2002

OTIENO ODONGO & PARTNERS

MUAMBI ASSOCIATES

WESTCONSULT.....PLAINTIFFS

VERSUS

NGOTHO ARCHITECTS.....DEFENDANT

R U L I N G

1. The Defendant seeks by **notice of motion dated 26th February 2014** dismissal of the Plaintiffs' suit for want of prosecution. The application is brought under **Order 17, rule 2(1)** as read with **subrule (3)** of the **Civil Procedure Rules, 2010** (the **Rules**). Grounds for the application appearing on the face thereof are -

- (i) That the Plaintiffs have been guilty of prolonged, inordinate and inexcusable delay in prosecuting the suit.
- (ii) That the suit was last scheduled for hearing on 25th and 26th April 2007 when it was adjourned generally.
- (iii) That the Defendant stands to suffer prejudice if the suit is permitted to continue pending.

There is a supporting affidavit sworn by one **John Nyaribo**, the Defendant's advocate. It elaborates the grounds for the application.

2. The Plaintiffs have opposed the application by **replying affidavit filed on 24th June 2014**. It is sworn by one **Harrison K Mwambi**, the sole proprietor of the 2nd Plaintiff. He has deponed, *inter alia*, that the Defendant is an **unlimited liability** company which was under the sole directorship of one **Antony Ngotho**; that the said Antony Ngotho died before the suit was heard; that following Antony Ngotho's death the Plaintiffs were unable to proceed with the suit on account of him having been the sole proprietor and director of the Defendant; and that being an unlimited liability company there is no distinction between the personal debts and liabilities of the said Antony Ngotho and those of the Defendant.

3. It is further deponed that for the suit to proceed to hearing it is necessary to substitute the legal representative of Antony Ngotho in the suit; that no application has ever been made in that regard; that in any event, there having been no application for substitution within a year since the death of Antony Ngotho, the suit as against the Defendant has abated; and that it is intended to apply for revival of the suit.

4. I have considered the submissions of the learned counsels appearing. No authorities were cited. It was pointed out for the Defendant that the delay in prosecuting the suit at the time of filing the application was about eight (8) years. In response to issues raised in the replying affidavit, learned counsel for the Defendant submitted that the Defendant is an unlimited liability company duly registered under the **Companies Act, Cap 486** and recognized as such under **section 4(2) (c)** of the Act; that the Defendant therefore is a body corporate separate from its shareholders and directors; and that the death of a shareholder or director of the Defendant could not stop the Plaintiffs from pursuing their case against the Defendant. Learned counsel further submitted that if substitution were required in respect of the Defendant (which it is not), such substitution ought to have been sought within one year from the date of death of Mr Ngotho, which was on 9th January 2007. Without such application for substitution the suit against him would have abated by law anyway.

5. For the Plaintiffs it was submitted that Mr Ngotho was the sole proprietor of the Defendant and therefore the true defendant, and that substitution of his legal representative in his place ought to have been sought within one year of his death. Learned counsel conceded that such substitution ought to have been sought by the Plaintiffs.

6. The position taken by the Plaintiffs regarding the legal capacity of the Defendant in this suit is profoundly erroneous in law. It is common ground that the Defendant is an **unlimited liability company** duly incorporated under section 4(2) (c) of Cap 486. It is thus a corporation having its own legal persona and existence separate from those of its shareholders and directors. Mr Ngotho may have been the main shareholder and director of the Defendant; but that does not mean that he was the company and the company him. The company (the Defendant) as a legal entity was separate from him. The Defendant did not die with the Mr Ngotho; it continued to exist. There was nothing to stop the Plaintiffs from prosecuting their suit against the Defendant notwithstanding the death of Mr Ngotho.

7. No credible reason has been offered by the Plaintiff why they have not prosecuted their suit for so long. The death of Mr Ngotho, as already seen, is not an acceptable excuse.

8. I find no good reason why this suit should be permitted to continue hanging over the head of the Defendant. It is hereby dismissed for want of prosecution with costs to the Defendant. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF OCTOBER 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2014