



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 222 OF 2008

BROWSE INTERNET ACCESS LTDPLAINTIFF

VERSUS

TELKOM KENYA LTD.....DEFENDANT

R U L I N G

1. This application by the Defendant (**notice of motion dated 16th April** (filed on 23rd November!) **2012** under **Order 17, Rule 2** of the **Civil Procedure Rules, 2010** (the **Rules**) seeks dismissal of the Plaintiff's suit for want of prosecution. The Defendant has a liquidated counterclaim against the Plaintiff. It obtained default judgment on it for KShs 3,081,568/50 with costs and interest. This interlocutory judgment was entered on 2nd February 2009.

2. The grounds for the application appearing on the face thereof include –

- (i) That the Plaintiff has not taken any active steps or at all to fix the suit for hearing.
- (ii) That the pendency of the suit indefinitely has prejudiced the Defendant.
- (iii) That litigation must come to an end.

There is a supporting affidavit sworn by the Defendant's advocate, DANIEL O. ODHIAMBO.

3. The Plaintiff has opposed the application by replying affidavit filed on 7th May 2013. It is sworn by one STEPHEN OMWENGA. It is not stated who he is to the Plaintiff or in what capacity he swears the replying affidavit. He states two things in the affidavit –

- (i) That contrary to the Defendant's assertions that the Plaintiff has lost interest in its suit, "the Plaintiffs' representative did attend court at the registry on 26th October 2011 to fix a hearing date for the suit but the file could not be traced".
- (ii) That "when we enquired at the registry early April on getting a hearing date we were informed that the 2012 diary had closed and no dates were available".
- (iii) That the Plaintiff is "still interested in the matter and is ready to proceed on any condition that the court will set".

4. There was a subsequent similar application by the Defendant by notice of motion dated 6th August 2012, but the same was withdrawn on 7th May 2013 when the present application was argued.

5. I have considered the respective submissions of the learned counsels appearing. No authorities were cited. I have also perused the court record.

6. There is really no satisfactory explanation for the inactivity of the Plaintiff from 5th July 2010 when the suit had been fixed for hearing. The present application was filed on 23rd November 2012. That is a delay of over 2 years. It is inordinate.

7. But even without satisfactory explanation for the delay the court will not dismiss the suit if it is satisfied that a fair trial of the action will still be possible. There is no allegation that a fair trial will no longer be possible. Apart from the plea of prejudice on account of the suit hanging over the head of the Defendant for too long there is no plea of any specific prejudice.

8. Dismissal of a suit unheard is a drastic remedy; the court's inclination should be to preserve the suit for a hearing on the merits if that is still possible without undue prejudice to the defendant. I am satisfied that a fair trial of this action is still possible without too much further delay.

9. I will therefore refuse the application, and it is hereby dismissed. I will further direct that the parties do meet all pre-trial requirements within 60 days of today. A date for mention for further directions will be given at the delivery of the ruling.

10. The Defendant shall have costs of this application, hereby assessed at KShs 20,000/00. The same is payable within twenty-one days of today. In default the Defendant may execute for the same.

11. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF JUNE 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2013