

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 104 OF 2006

KIPRONO SIELE SIGIRA.....PLAINTIFF

VERSUS

TELKOM (K) LTD DEFENDANT

RULING

Pursuant to the provisions of **Order 17 rule 2(3)** of the **Civil Procedure Rules**, Telkom Kenya Ltd, the Defendant herein took out the Notice of Motion dated 20th March, 2012 in which it sought for this suit to be dismissed for want of prosecution with costs. The motion is supported by the affidavit of one **Edward Ombima** and by a further affidavit by **Collins Kenga**. **Mr. Kiprono Siele Sigira**, the Plaintiff herein, opposed the Motion by filing a replying affidavit he swore on 18th April, 2012. When the motion came up for interpartes hearing, the Defendant was permitted to prosecute the application ex parte when the Plaintiff failed to turn up in court. However, this court is enjoined to consider the replying affidavit already filed and served despite the Plaintiff's absence from court.

Mr. Langat, learned advocate argued the Motion on behalf of Mr. Kenga learned advocate for the Defendant. The defendant's learned advocate simply relied on the grounds set out on the face of the motion and the facts deponed in the two supporting affidavits. It is the defendant's submission that the last time this case was fixed for hearing was more than one year ago. It is further argued that the continued pendency of this suit is prejudicial and unjust to the Defendant. The Plaintiff is accused for losing interest to pursue this case. The Plaintiff responded by stating that he was persuaded by telephone conversations he had with the firm of Nyaundi Tuiyott & Co. Advocates to have the matter settled out of court hence the delay to prosecute the case. It is the Plaintiff's submission that when it became apparent that an out of court settlement could not be reached, he prepared and served the Defendant with the issues in dispute. The Plaintiff expressed his willingness to have the case listed down for hearing expeditiously.

I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for or against the motion. It is not in dispute that this suit was filed on 24th November, 2006 in which the Plaintiff sought for exemplary damages and for an order for mandatory injunction against the Defendants. It would appear the Defendant was accused by the Plaintiff of unlawfully disconnecting the Plaintiff's telephone line prompting the Plaintiff to file this action. It is therefore right to state that this case has been pending in court for the last seven years. Under the provisions of **Order 17 rule 2(3)** of the **Civil Procedure Rules**, a suit is liable to be dismissed for want of prosecution if no step is taken for a period of one year since the last time the case was in court for hearing. It is alleged by the defendant that the Plaintiff has failed to take any step to have the suit fixed for hearing for more than one year. It is pointed out that this case was last in court on 11th June, 2007. The record shows that this case was fixed for hearing on 11th June, 2007 but come that date, the Defendant's advocate informed the Court that parties were negotiating for an out of court settlement. The defendant's learned advocate further requested the court to adjourn generally the hearing of the case. The court acceded to the defendant's request. Nothing appears to have taken place until 23.3.2012 when the defendant filed the current motion. Mr. Kiprono Siele-Sigira, has specifically deponed in the replying affidavit that he has been in constant telephone conversation with the firm of Nyaundi Tuiyott & Co. Advocates seeking to record an out of court settlement all this time. According to Mr. Sigira, he only filed and served the Defendant with the issues in dispute when he realized that an out of court settlement was not in the offing. The defendant

has not specifically controverted that averment. In paragraph 4 and 5 of the affidavit of Edward Ombima, it is deponed that this case was mentioned on 25th July, 2007. The record does not bear out the deponent. I think the letter dated 8th June, 2007 which was copied to the Plaintiff had intimated that the case should be mentioned on the aforesaid date. However, the advocate who held brief for the firm of Nyaundi Tuiyot & Co. Advocates did not adhere to that instruction but instead applied for the hearing of the case to be adjournment generally. In the circumstances of this case, I think the Plaintiff is not wholly to blame for the delay to prosecute the case. He was simply tricked to adjourn the hearing of the case to enable the parties negotiate for an out of court settlement. There is no doubt in my mind that the parties were involved in negotiations for an out of court settlement. The conduct of the Plaintiff in this case cannot be said to be that of someone who has lost interest in pursuing the matter. For the above reasons, I refuse to dismiss the suit for want of prosecution. The motion is dismissed with costs abiding the outcome of the suit.

Dated, signed and delivered this 4th day of September,2013

J.K. SERGON

JUDGE