



REPUBLIC OF KENYA
IN THE HIGH OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL SUIT 114 OF 2006
COMMUNICATIONS CARRIER LTD AND
COMMCARRIER SATELLITE SERVICES LTD....PLAINTIFFS/RESPONDENTS
VERSUS
TELKOM KENYA LIMITEDDEFENDANT/RESPONDENT

R U L I N G

The Notice of Motion application has been brought under Order XVI rule 6 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. It is dated 24th March, 2009 and it seeks the following prayers.

- 1. THAT this suit be dismissed for want of prosecution.**
- 2. THAT the Plaintiffs do pay the Defendant the cost of this application and the cost of the suit.**

The application is premised on two grounds on the face of the application as follows:

- a. The Plaintiffs have failed to take requisite steps to prosecute the suit.**
- b. The Plaintiffs to date have not served summons to enter appearance in this suit.**

The application is supported by an affidavit sworn by Mr. Paul Julani the Defendant's Company Secretary. The application is opposed. The Plaintiff's Advocate Mr. Peter L. Simani has sworn an affidavit dated 26th May, 2009.

I have considered the application and the affidavits filed. I have also considered the submissions by counsels. The power of the court to dismiss a suit for want of prosecution is a discretionary power, but which should be exercised judicially. What the court has to consider in determining whether to dismiss a suit or not for want of prosecution, is not in dispute. The leading case of **Ivita vs. Kyumbu [1984] KLR 441**, Chesoni, J. (as he then was) held:

“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. Thus, even if 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."

To summarize the test to be applied, the delay complained of should not only 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 to this, 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.

In the current application, the Defendant is complaining that it has not been served with the summons to enter appearance since the Chamber summons application dated 15th March, 2006 and the plaint filed in this court on 16th March, 2006 were served upon it.

The Plaintiff filed an affidavit sworn by the Advocate to oppose the application. Mr. Adipo for the Defendant has urged the court to strike out this affidavit on grounds the Advocate was venturing into the arena of controversy by swearing the affidavit.

Under order XVIII nothing precludes an Advocate to swear affidavits in interlocutory applications. I have looked at the affidavit itself and agree that some of the paragraphs depone to issues of controversy, for instance paragraph 5, the Advocate depones that in April 2005 a dispute arose as to how much money was due to the Defendant from the Plaintiff. That is a matter which is in controversy. There are other issues however, which are not in controversy. For instance in paragraph 12 the advocate depones that its instructing client traveled to the United Kingdom and has not come back, that is also the reason given why no affidavit in reply to the instant application was sworn by the Plaintiff. In paragraphs 15 and 16 the Advocate has deposed that failure to serve the summons to enter appearance was due to an inadvertence on the part of the Advocate. In his submission before court Mr. Simani submitted that the inadvertence was caused because there are two similar suits between the two parties which have been proceeding simultaneously, and in which he had been acting for the Plaintiff herein, and that due to confusion and as a result of the matter being referred to arbitration, the service of summons was overlooked.

The delay in this matter is three years. On behalf of the Plaintiff, it has been contended that the cause of the delay is an arbitration in a similar matter which is pending. The Defendant has not controverted that point. Mr. Adipo for the Defendant urged the court to totally ignore the issue of the other pending suit as not being sufficient to explain the delay. Counsel did not however deny that the two suits are connected to each other. I do not accept Mr. Adipo's submission and suggestion that the other case (**HCCC 249 of 2005**) should be ignored especially where we have been told that the matter was referred to arbitration and the outcome is unknown. If indeed the two suits are related, that is a matter that ought to be of interest to the court.

Mr. Simani has shown that his instructing client has been ill. I have perused the records of the court and I can see proof of that fact from submissions made by Mr. Simani on two previous occasions. I think that illness is a reasonable explanation and acceptable excuse not to dismiss the suit for want of prosecution. It is shown that the Plaintiff's representative/director has been unable to swear an affidavit to give a proper explanation why the suit has delayed as a result of illness. It is most unfair and not in the interest of justice to dismiss this suit on the grounds that the Plaintiff has failed to give an explanation for the delay, when in fact the court is fully aware that the failure to have the explanation was caused by the illness of the instructing client.

I noted that the main reason for the delay seems to be the failure by the Plaintiff's advocate to perform their professional duty of ensuring that the summons to enter appearance have been served upon the Defendant, to enable the Defendant file a defence in the suit if any. That omission lay squarely on the

door of the Plaintiff's advocate and cannot be blamed on the Plaintiff himself. For this reasons also, it would be most unfair and un judicious to dismiss this suit for reason summons to enter appearance have not been served, when in fact that is an error of inadvertence or mistake on the part of the Plaintiff's advocate. I agree that the Plaintiff would have a reason to file a suit against its Advocate for professional negligence on that account. However, I find that the omission, mistake or slip has not been caused in order to delay this matter. That the same is excusable and that the Plaintiff cannot be blamed for it.

For this reasons, I dismiss the application dated 24th March, 2009. I order the Plaintiff to pay the costs of the application of the Defendant. I also order the Plaintiff to take all the necessary steps which are pending under Order X of the Civil Procedure Rules in order for the suit to be prepared for hearing. At the same time, I order that in any event, this suit should be set down for hearing before the close of this year, 2009. The Defendant is granted leave to apply, if necessary.

Dated at Nairobi this 19th day of June, 2009.

J. LESIIT,

JUDGE

Read and signed in presence of:

Mrs. Sirai holding brief Mr. Adipo for the Applicant/Defendant

Bundotich holding brief Mr. Simani Respondent/Plaintiff

J. LESIIT,

JUDGE