



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL CASE 1736 OF 1994**

**ANDREW KIPNGENO KENIK .....PLAINTIFF**

**V E R S U S**

**TELKOM KENYA LIMITED .....DEFENDANT**

**R U L I N G**

On 15<sup>th</sup> December, 2000 this court (Mbogholi, J) ordered that TELKOM KENYA LIMITED (hereinafter called the Applicant) be joined in these proceedings as the Defendant. A subsequent application by the Applicant seeking an order to review and set aside the said order of 15<sup>th</sup> December, 2000 was dismissed on 29<sup>th</sup> September, 2003 (Hayanga, J). Telkom Kenya Limited then lodged a notice of appeal. But as it happens, it has not yet lodged a record of appeal before the Court of Appeal.

The Applicant has now come back to court by notice of motion dated 9<sup>th</sup> March, 2004 seeking an order under Order 41, rule 4 of the Civil Procedure Rules (the Rules) to stay proceedings herein pending hearing and determination of its aforesaid intended appeal. The application is premised upon the grounds, *inter alia*, that the intended appeal is “highly arguable” and raises substantive issues; that the Applicant would otherwise suffer substantial loss in the event that its intended appeal succeeds; that any further proceedings herein are likely to render the Applicant’s intended appeal nugatory; and that the Applicant is ready and willing to offer such security as may be imposed by the court. There is a supporting affidavit sworn by one PAUL BONGO JILANI, the company secretary of the Applicant.

The Substituted Plaintiffs (the original plaintiff having died in the meantime) have opposed the application as set out in the replying affidavit filed on 30<sup>th</sup> March, 2007. The grounds of objection emerging from the replying affidavit are, *inter alia*:-

1. That consent judgment for the Plaintiff was entered herein in 1996, yet the Applicant has refused to pay the Plaintiff’s retirement benefits and has sought deliberately to delay conclusion of the suit.
2. That the original Plaintiff died in 2004 in abject poverty without enjoying his retirement benefits.
3. That the deceased Plaintiff’s estate is now greatly prejudiced by the delay in concluding this matter.
4. That there has been inordinate and unexplained delay in bringing and prosecuting the present application.
5. That it has not been demonstrated that the Applicant stands to suffer substantial loss.

6. That the Applicant's intended appeal has no probability of success.

I have considered the submissions of the learned counsels appearing, including the cases cited. I have also perused the court record. This is an old matter, having been filed in 1994. On 13<sup>th</sup> May, 1996 the following consent order was recorded (Mbogholi, J):-

**“By consent the arrears of salary up to and including May 1996 amounting to KShs. 246,935/00 to be paid to the Plaintiff/Applicant on or before 31<sup>st</sup> May, 1996. The Defendant/Respondent hereby agrees to retire the Plaintiff with full benefits. Mention on 13<sup>th</sup> June, 1996 when the Defendant/Respondent is expected to provide the figures.”**

It appears that the Plaintiff was indeed retired, but by the time he died in the year 2004 he had not been paid his “full benefits”. In the meantime the original Defendant had become defunct by statute; in its place some three corporations were created, including the Applicant.

There is no good explanation at all why, some four (4) years down the line, the Applicant has not lodged a record of appeal before the Court of Appeal. Its plea that it is because it has not been supplied with proceedings is not credible. Four years is a long time; due diligence would have ensured that it got the proceedings. There is not any evidence of due diligence exerted.

There has also been inordinate delay in filing and prosecuting the present application. It was filed some five (5) months after the order sought to be appealed against was made. It has been prosecuted nearly three and half (3½) years after it was filed. There is not any acceptable explanation.

The order sought is at the discretion of the court. The court will not easily indulge an indolent litigant whose conduct smacks of a deliberate effort to delay the course of justice.

An applicant for an order such as is sought in the present application must satisfy the court that there is sufficient cause to grant it. I am not persuaded that the Applicant's intended appeal, if it will ever be lodged, will be rendered nugatory if the order is not granted; nor am I satisfied that substantial loss may be occasioned to the Applicant.

Having considered all matters placed before the court, I do not find any merit in this application. I must refuse it. It is hereby dismissed with costs. Orders accordingly.

**DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2007**