



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 173 OF 2016**

**ADMULT COLLOS LIMITED ..... PLAINTIFF**

**-VERSUS-**

**NDIMA TEA FACTORY LIMITED ..... DEFENDANT**

**RULING**

**A. THE DEFENDANT'S APPLICATION**

1. By a notice of motion dated 9<sup>th</sup> January, 2018 brought under **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21), Order 17 rule 2(3), Order 51 rule 1 of the Civil Procedure Rules 2010 (the Rules), and all enabling provisions of the law**, the Defendant sought dismissal of the Plaintiff's suit for want of prosecution.

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Venessa Lwila, the Defendant's advocate, on 9<sup>th</sup> January, 2018. It was contended that the Plaintiff had failed to take steps to prosecute the suit for more than one year without just cause or excuse. It was contended that the Plaintiff was guilty of undue delay in the prosecution of the suit and that the Defendant had consequently suffered prejudice. The Defendant was of the view that the Plaintiff had lost interest in prosecuting the suit hence the same should be dismissed for want of prosecution.

**B. THE PLAINTIFF'S RESPONSE**

3. The Plaintiff filed a replying affidavit sworn by Jackson Mahugu Mwangi, a director of the Plaintiff, on 1<sup>st</sup> March, 2018 in opposition to the said application. It was contended that the parties had been undertaking negotiations for the purpose of amicably settling the dispute hence the suit could not be set down for hearing. The Plaintiff accused the Defendant of making the application prematurely and attempting to mislead the court on the true state of affairs.

4. The Plaintiff denied being indolent and prayed for a chance to be heard on merit. It was contended that it was the policy of the court to encourage alternative dispute resolution and that the Defendant had not demonstrated that it shall suffer any substantial prejudice should the suit proceed to full trial. The court was consequently urged to dismiss the application and allow the Plaintiff to set down the suit for hearing.

**C. THE SUBMISSIONS OF THE PARTIES**

5. The material on record shows that the application was listed for *inter partes* hearing before Hon. Waithaka J on 11<sup>th</sup> March, 2019 when it was canvassed orally. The Defendant's advocate prosecuted the application on the basis of the grounds set out in the notice of motion and the supporting affidavit whereas the Plaintiff's advocate opposed it on the basis of the replying affidavit on record. None of the parties cited any authorities in support of their respective submissions.

**D. THE ISSUES FOR DETERMINATION**

6. The court has perused the Defendant's notice of motion dated 9<sup>th</sup> January, 2018, the Plaintiff's replying affidavit in opposition thereto as well as the submissions and material on record. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether the Defendant has made out a case for dismissal of the Plaintiff's suit for want of prosecution.*

(b) *Who shall bear costs of the application.*

## **E. ANALYSIS AND DETERMINATION**

### **(a) Whether the Defendant has made out a case for dismissal of the Plaintiff's suit for want of prosecution.**

7. The court has considered the submissions and material on record on this issue. The Defendant's application is essentially grounded upon **Order 17 rule 2 of the Rules** which stipulates as follows:

**“(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**

**(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**

**(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

**(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”**

8. The test to be applied in applications for dismissal of a suit for want of prosecution was enunciated by Hon. Justice Chesoni J (as he then was) in the case of **Ivita v Kyumbu [1984] KLR 441** at page 449 as follows:

**“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite and delay... Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time...”**

9. Similarly, in the case of **Utalii Transport Company Limited and 3 Others v NIC Bank Limited and Another [2014] eKLR** it was held, *inter alia* that:

**“Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases. See the case of *Allen v Alfred McAlphine and Sons [1968] 1 All ER 543*: where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases of *Agip (Kenya) Limited v Highlands Tyres Limited [2001] KLR 630* and *Sagoo v Bhari [1990] KLR 459*, where delay of eight (8) months and five (5) months, respectively was considered not to be inordinate. And also NRB HC ELC Case No. 2058 of 2007 where delay of about 1 ½ years was considered not to be inordinate. At this point, I think I should examine the circumstances of this case and the amount of delay involved to determine whether it is inordinate and inexcusable”**

10. The court has noted that the Plaintiff's delay in prosecuting the suit was just over one year by the time the instant application was filed. Even though the **Constitution of Kenya** encourages resolution of disputes through alternative dispute resolution mechanisms, that does not mean that suits are to be filed and abandoned for years in search of an amicable settlement. The court is of the opinion that a party who initiates legal proceedings is obligated to take steps to prosecute his action even as alternative dispute resolution is attempted. In fact, it would be a good idea to keep a suit active and brief the court from time to time on the progress of any negotiations intended to settle the dispute.

11. The court is of the opinion that the Plaintiff's delay of about one year is not inordinate nor inexcusable. Promoting alternative dispute resolution was not unreasonable in the circumstances. The court is not satisfied that the Defendant has suffered any prejudice that cannot be remedied by an award of costs or that it shall be impossible to have a fair trial due to passage of time. There is no evidence on record to demonstrate that the Defendant has lost any evidence or witnesses due to passage of time. In fact, the Defendant's officers

have not sworn any affidavit on the issue of the prejudice. The supporting affidavit was sworn by an advocate in the firm of J. K. Kibicho and Company Advocates which is on record for the Defendant.

12. In the circumstances of this case the court is of the opinion that the suit is not ripe for dismissal for want of prosecution under **Order 17 rule 2 of the Rules**. A fair trial is still possible and the court shall give appropriate directions to facilitate expeditious trial of the action. Accordingly, the court is not inclined to grant the Defendant's prayer for dismissal of the suit.

### **(b) Who shall bear costs of the application**

13. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. Although the court is not inclined to grant the Defendant's application for dismissal of the suit for want of prosecution, the court is, nevertheless, satisfied that the Plaintiff has not been a diligent litigant. Accordingly, the court shall penalize the Plaintiff in costs and direct that it bears the costs of the application. The Defendant shall consequently be awarded costs of the application.

## **F. CONCLUSION AND DISPOSAL**

14. The upshot of the foregoing is that the court finds no merit in the Defendant's application for dismissal of the suit for want of

prosecution. Accordingly, the court makes the following orders for disposal of the application:

*(a) The Defendant's notice of motion dated 9<sup>th</sup> January, 2018 is hereby disallowed.*

*(b) The Plaintiff shall pay the Defendant thrown away costs of the application in the sum of Kshs.25,000/= within 14 days from the date hereof.*

*(c) The Plaintiff shall file and serve its case summary, issues for determination and trial bundle duly bound and paginated within 14 days.*

*(d) The Defendant shall also file and serve similar documents as stated in (c) above within 14 days upon the lapse of the Plaintiff's period.*

*(e) In the event of the Plaintiff defaulting in compliance with either of the two orders (b) and (c) above the plaint shall stand struck out without further order.*

*(f) The suit shall be mentioned on 27<sup>th</sup> October, 2021 before the Environment and Land Court at Nanyuki to confirm compliance and fix a hearing date.*

Orders accordingly.

**Ruling dated** and **signed** in chambers at **Nyeri** and **delivered** via Microsoft Teams platform this **28<sup>th</sup>** day of **July 2021**.

In the presence of:

Ms Rono holding brief for Ms Mwangi for the Plaintiff

Mr. Nyoro for the Defendant

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**Y. M. ANGIMA**

**ELC JUDGE**