



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 85 OF 2015

ONFON MEDIA LTD.....PLAINTIFF/RESPONDENT

VERSUS

VASONOMICS KENYA LTD.....1ST DEFENDANT/APPLICANT

IMMOBILE VAS KENYA.....2ND DEFENDANT/RESPONDENT

RULING

1. Onfon Media Limited, the plaintiff, filed this suit originally against two defendants but subsequently withdrew the case against Immobile Vas Limited, the 2nd defendant.

2. The plaintiffs claim is for injunction to restrain the 1st defendant, Vasonomic Kenya Limited, from breaching its registered copyright of its invention which is a technology consisting of mobile cell phone selected ring back tone voice-over. The plaintiff also seeks damages from the 1st defendant.

3. The plaintiff filed an application by Notice of Motion, dated 25th February 2015, seeking interlocutory injunction. That application was heard by Justice F. Gikonyo and a Ruling dated 6th October, 2015 was delivered on 12th October 2015 dismissing the application. That date was the last time, as evidenced in this file, that there was any meaningful prosecution of this matter. Indeed as I can see in the court file there was no action taken by any party in this matter since 12th October 2015. It is in that background that the 1st defendant filed the Notice of Motion dated 13th February 2019, for dismissal of this suit for want of prosecution, which is under consideration. In the 1st defendant's view the plaintiff, after the delivery of that Ruling, lost interest in this action. The 1st defendant through his learned counsel stated that the delay was prejudicial to it.

4. The plaintiff opposed the application by stating that the application is premature because parties have not gone through the pre-trial process. That it is the 1st defendant who, having failed to file its document, who occasioned the delay. The plaintiff further stated that the court file was missing at the court registry and when it was located the plaintiff was informed that the court diary was closed.

ANALYSIS

5. I have considered the parties affidavit evidence and their submission.

6. It is clear that plaintiff in opposing the application it made sweeping statements not backed by any evidence at all. It is the plaintiff who initiated this action and the plaintiff had the responsibility to ensure the suit was prosecuted without delay. Indeed that responsibility is clearly set out in Section 1A (3) of the Civil Procedure Act. The plaintiff cannot use the defendant's failure to file its list of documents as an exercise to fail to prosecute this suit. After all it is trite that the defendant need not call evidence. The defendant can chose to keep mum during the trial. In any case there is no evidence the plaintiff did request the defendant to file the list of document. In my view to use that failure, if at all, of the defendant to file list of document is a lame excuse.

7. The plaintiff equally did not produce evidence of this file missing in the court registry. It would be expected that the plaintiff would have communicated, in writing, to the deputy registrar requesting to have the file traced. There is no evidence of that.

8. The other reason given by the plaintiff for lack of prosecution of this case was that the court diary was closed. The plaintiff makes this bear statement without attaching any letter seeking to have the case fixed for hearing. Isn't it, anyway, contradictory for the plaintiff to say it failed to fix the case for hearing because the defendant did not file its list of document then to later state that the court diary was closed. I wish however to take judicial notice that the Commercial and Tax Division has been operating a case tracking system which is computerised

not dependant in a physical diary, and as a consequence parties have not had to wait for the opening of diary because the diary is available on line for the registry staff and the judicial officers. The days when diaries were closed at the end of the year is long gone.

9. The long and short of this discussion is that the plaintiff has failed to show cause why this suit should not be dismissed for want of prosecution. The defendant deponed that the delay has been prejudicial to it.

10. At this point I wish to refer to the case **NILESH PREMCHAND MULJI SHAH & ANOTHER t/a KETAN EMPORIUM VS M.D. POPAT** where it was stated as follows:

“Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.”

11. In my view no reason has been offered for the delay of the prosecution of this suit since October 2015 to date. The application is merited. The defendant cannot continue to have a case pending over it indefinitely. That on its own is prejudicial.

CONCLUSION

12. The following are the orders of the court:

a. The Notice of Motion dated 13th February 2019 is granted to the extent that the plaintiff’s suit, herein, is dismissed for want of prosecution.

b. The 1st defendant is awarded the costs of the suit and the costs of the Notice of Motion dated 13th February, 2019.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of October, 2019.

M. KASANGO

JUDGE

Ruling read in open court in the presence of

Sophie Court Clerk.

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANT