



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 170 OF 2011

ALEX M. GAKURU1ST PLAINTIFF/RESPONDENT
HUMPHERY ATUTI.....2ND PLAINTIFF/RESPONDENT
BRIAN KIMANI.....3RD PLAINTIFF/RESPONDENT
ALICE NJOKI MUCHIRA4TH PLAINTIFF/RESPONDENT
JOSEPH MWANGI NGATIA.....5TH PLAINTIFF/RESPONDENT
MWAURA DENNIS MBUGUA.....6TH PLAINTIFF/RESPONDENT
JACKSON ENONDA.....7TH PLAINTIFF/RESPONDENT

VERSUS

SAFARICOM LIMITED.....DEFENDANT/APPLICANT

RULING

1. The application dated 21st January, 2016 seeks orders that this suit be dismissed for want of prosecution.
2. The Applicant's complaint is that the Respondents are not keen on prosecuting this case and have not taken any steps in the matter for a period of over one year and ten months.
3. The application is opposed. It is stated in the replying affidavit that the Respondents have attempted to set down the case for hearing but no dates were available due to shortage of judges. It is further stated that the 1st Respondent's work involves international travel as a consultant and that has complicated the issue of the fixing of the hearing dates.
4. The application was canvassed by way of written submission. I have considered the said submissions.
5. The principles governing dismissal of a suit for want of prosecution are that delay must be inordinate, the inordinate delay is inexcusable and the Defendant is likely to be prejudiced. Chesoni, J. (as he then was) applied these principles in the case of **Ivita v. Kyumbu [1984] KLR, 441**. He stated as follows in the said case:-

“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 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.”

6. A perusal of the court record reflects that it is the Applicant’s side that has been fixing the hearing dates in this matter. The record has no entry of any date that has been fixed by the Respondents’ side from the day the suit was certified ready to proceed on 17th June, 2013. The explanation for the delay is therefore not satisfactory. Be as it may, this court is inclined to give the suit a chance to be heard on merits.

7. With the foregoing, I dismiss the application. The suit to be given a date in the registry on a priority basis and in any case not later than 90 days. The costs of the application to the Applicant.

Date, signed and delivered at Nairobi this 14th day of May, 2018

B. THURANIRA JADEN

JUDGE