



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 1261 of 2002

KENYA POSTAL DIRECTORIES LIMITED
PLAINTIFF

versus

YELLOW PAGES
PUBLISHING

AND MARKETING LIMITED DEFENDANT and PLAINTIFF TO THE
COUNTERCLAIM

and

KENYA POSTAL DIRECTORIES LIMITED 1ST DEFENDANT TO THE
COUNTERCLAIM

and

TELCOM KENYA LIMITED 2ND DEFENDANT TO THE
COUNTERCLAIM

RULING

Introduction

1. The Matter before the Court concerns a suit that was filed in 2002. The Defence was filed on 3rd April. The Defence in fact comprises a Defence and Counterclaim. The Plaintiff is Kenya Postel Directories Ltd. The Defendant is Yellow Pages Publishing and Marketing Ltd. The Counterclaim introduces an additional party to the proceedings, namely Telcom Kenya Ltd, the Second Defendant to the Counterclaim. It is important to note the pleadings closed in 2005, that is about 10 years before this Application came before the Court.

2. As to representation the Plaintiff is represented by Messrs Shapley Barrett and have been so represented throughout. The Defendant is represented by Messrs LJA Advocates and the Second Defendant to the Counterclaim is represented by Messrs Hamilton Harrison and Matthews. The Court Record Suggests that representation has been consistent throughout.

3. There are now before the Court two separate applications. They are:

(1) The Notice of Motion dated 28th April 2015 and filed on 30th April 2015 and

(2) The Notice of Motion dated and filed on 22 May 2015

4. In summary both Applications are seeking an Order striking out the Suit and for want of prosecution. Both Applications were brought by Notice of Motion the First in time was on behalf of the Defendant under **Order 17 rule (2) and Order 51 Rules (1) and (3)** of the **Civil Procedure Rules** and under the inherent powers of the Court. The first Application seeks Orders that:-

“1. That the Plaintiff’s suit against the Defendant be struck out for want of prosecution,

2. That costs of the suit and of this Application be awarded to the Defendant.”

I did wonder whether the Second Defendant to the Counterclaim was perhaps really seeking an order for striking out the Counterclaim but that does not seem to be the case.

5. The Application is supported by the Affidavit of James Singh Gitau, Advocate which sets out a detailed history of the proceedings. At paragraph 10 he states:

“10. That the matter came up for mention on 20th November 2012 when the Judge directed that parties to file and exchange documents together with Witness Statements within 30 days thereof and fix the matter for hearing.

At paragraph 11 he states;

11. That whilst the 2nd Defendant to the Counterclaim Telkom Kenya Limited has complied with the Orders of 20th November 2013, the Plaintiff to the original action has not bothered to do so”.

Both Applications were brought by Notice of Motion. The First in time was on behalf of the Defendant under **Order 17 rule (2) and Order 51 Rules (1) and (3) 8 of the Civil Procedure Rules** and under the inherent powers of the Court. The Application seeks Orders that:-

“1. That the Plaintiff’s suit against the Defendant be struck out for want of prosecution,

2. That costs of the suit and of this Application be awarded to the Defendant.”.

6. The Application is supported by the Affidavit of James Singh Gitau, Advocate which sets out a detailed history of the proceedings. At paragraph 10 he states:

10. That the matter came up for mention on 20th November 2012 when the Judge directed that parties to file and exchange documents together with Witness Statements within 30 days thereof and fix the matter for hearing.

11. That whilst the 2nd Defendant to the Counterclaim, Telkom Kenya Limited has complied with the Orders of 20th November 2012, the Plaintiff to the original action has not bothered to do so.

7. The Second Application is dated 22nd May 2015 or is brought on behalf of the Second Defendant to the Counterclaim and seeks the following Orders that:

(1) This suit be dismissed for want of prosecution (emphasis added) , and

(2) The costs of this application and of the suit be paid to the second defendant to the counterclaim.

That prayer does not say who should be ordered to pay those costs.

8. The Grounds relied upon are that (a) this matter was last in court on 20th November 2012 when Musinga J (as he then was) directed the parties to file and exchange bundles of documents and witness statements within 30 days then fix the matter for trial and (b) The Second Defendant to the Counter Claim filed its witness statement and bundle of documents on 1st February and 1th February 2013 respectively, and served them on all the Parties. The Grounds go on to say that the Plaintiff has not taken any steps to comply. The Application is supported by the Affidavit of Mr George Gitonga Murugara which explains that as a result of the plaintiff's failure to comply with the Court's directions this matter has not been set down for trial. He says he believes that the Plaintiff has lost interest in the suit. He says;

7. The plaintiff has failed and/or refused to file its witness statements and bundle of documents to date in compliance with the court's directions given on 20th November 2012.

8. As a result of the plaintiff's failure to comply with the court's directions, this matter has not been set down for trial.

9. The plaintiff has not taken any other steps to prosecute this suit since 20th November 2012 and a period of over two years has since lapsed.

10. The defendant has also made an application to dismiss the suit for want of prosecution.

11. Going by the conduct of the plaintiff and its failure to comply with the court's directions I verily believe that the plaintiff has lost interest in this suit.

12. In the circumstances it is necessary and in the interest of justice that this suit be dismissed for want of prosecution.

9. The Plaintiff's position is set out in its Written Submissions. It has filed a Replying Affidavit sworn and filed on 3rd June 2015, in other words at the last moment before this matter was to come before the Court. It opposes the Applications on two grounds, firstly that the Second Defendant to the Counterclaim, Telkom does not have locus because that is a separate suit and secondly that it is not the Client's fault because the Advocate with conduct had a case somewhere else at some unspecified point in time. It should also be mentioned, that notwithstanding any historical excuse, the Plaintiff has taken no steps since April 2015 to comply with the Order and ensure the matter is ready for trial whether pursuant to **Order 11** of the **Civil Procedure Rules 2010** or the new **Practice Direction** that came into force in 2014. Nothing, in fact, has been done.

10. The Defendant's position is likewise set out in its Written Submissions filed on 17th September 2015. It relates the issues and then sets out the law. The Second Defendant to the Counterclaim has also filed its written Submissions filed on 24th June 2015.

11. A summary of the undisputed facts are that the Suit was filed in 2002, the Defence in 2003 and Pleadings closed in 2005. On 8th March 2011 the Court made an Order for exchange of witness statements and documents but which was in effect seeking compliance with **Order 11** so that the suit could be set down for final hearing. That Order was not complied with and a further Order was made on 20th November 2012.

12. I have considered each of the Submissions and the Authorities relied upon. In support of the Applications it is argued that notwithstanding the conduct of the Advocates, it is the responsibility and duty of each litigant to diligently pursue its own case (***Estate of Waringa Gitau deceased 2010***).

13. According to Mr Murugaru the overriding objective is to ensure that the business of the Court is concluded expeditiously. In fact at this stage we are at the point of preparation for the hearing and have been at that stage for 10 years with little or no progress. The Plaintiff, also argues that the Defendant too

has failed to comply with the Order of Musinga J. It seems that is the case. In any event that is not an excuse. The Plaintiff surprisingly does not make an application for the Counterclaim to be dismissed for the same reason.

14. Dealing with the question of locus, the Claim and the Counterclaim may be described as different suits but in terms of hearing and directions they are one and the same suit. The Parties are, even if in part, the same and the issues coalesce. Further the progression of the Claim and Counterclaim all the Parties and any prejudice caused by delay impacts on all the Parties therefore the Second Defendant has locus to bring the Application.

15. Again, equally surprisingly the Second Defendant has not brought an application for the dismissal of the Counterclaim as that too has not progressed and the Defendant/Plaintiff to the Counterclaim has not complied with the 2011 and 2012 Orders nor with Order 11. The Defendant argues that the delay has been inordinate and inexcusable and is such to do grave injustice to one side or the other. That can be summarised in the maxim that “justice delayed is justice denied”. The Defendant goes on to rely on public policy considerations. However, in this jurisdiction it is not a “policy” but a requirement of the Constitution of Kenya 2010 that delay should be avoided.

16. The authorities cited in support provide limited guidance but the principles are clear. I am also conscious that striking out is a draconian step and a plaintiff should, where the interest of justice dictates, be given the benefit of the doubt. Here the delay is indeed inordinate. More than 10 years after the closing of pleadings nothing has been done to prepare for trial – with or without the Court’s Directions. Directions have been ignored and even now the Plaintiff’s response to the Applications is half hearted and lackadaisical. Even in the course of these Applications the Plaintiff’s conduct is characterised by delay and non-compliance. Therefore the principles that I am guided by in reaching my decision are that such a long delay causes prejudice in terms of a fair trial as witnesses’ memories can lapse and fade or they may no longer be available to give evidence even if they are around.

The Law

17. The starting point must be **Civil Procedure Rules Order 17 Rule 2**. It provides:

Notice to show cause why suit should not be dismissed.

2. (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 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.

Therefore, it is undeniable that before a suit is dismissed the party presumed not to pursue the matter is given an opportunity to “show cause why the suit should not be dismissed”. In this case that opportunity is provided by the two applications

19. The Defendant also relies on **Order 51 Rules 1 and 3** which provide :

(1) All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.

(2).....

(3) No motion shall be made without notice to the parties affected thereby: Provided, however, that the court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as to the court seems just, and any party affected by such order may move to set it aside.

20. Starting with **Article 159 (2) of the Constitution of Kenya 2010**, it provides:

“159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

21. Further **Article 50** provides –

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

That points to the Overriding Objective (**Sections 1A and 1B of the Civil Procedure Act**) together with **Section 3A** which provides:

“In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of Justice of prevent an abuse of the process of court”

Those provisions militate against delay.

22. It seems to me (as enunciated by Hon Mr Justice Havelock in ***Dubai Bank HCC 907 of 2009***) the Court has a wide discretion in relation to this Application, saying *“In my Opinion looking at the two differing positions as regards the authorities, the Court has complete discretion as to whether to dismiss ... or allow it to proceed to a hearing and a logical determination and conclusion of the suit”* .

23. I am also conscious that striking out is a draconian measure and should not be ordered lightly. To that end I note that in the case of ***Ari Credit and Finance Ltd v Trans-National Bank Ltd (2005)*** it was held that:

‘The court should be slow to dismiss the case for want of prosecution where the suit can be heard without further delay or where the defendant will suffer no hardship and where there has been no flagrant and comfortable inactivity on the part of the plaintiff’

24. Having considered all the arguments and the extent of the delay I am satisfied that the Plaintiff has failed to demonstrate a willingness to pursue its claim and pursue the suit to trial. I therefore exercise my discretion to dismiss the suit with costs.

25. As to costs, the Plaintiff shall pay the costs of the Defendant of the Application and the Suit. The Plaintiff shall also pay the costs of the Second Defendant to the Counterclaim for the Application only.

Dated 2nd March 2016

Order accordingly,

FARAH S M AMIN

JUDGE

Signed and Delivered on the 2nd day of March 2016

In the presence of

Irene – Court Clerk

No Appearance from M/s Shapley Barratt for Plaintiff

Mr Masimwe Holding Brief for Mr Singh for the Defendant

Ms Aliwala Holding Brief for Mr Murugarafor the Second Defendant to the Counterclaim