



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. 293 OF 2011**

**DAVID MUSAU MUTETI**

**WINNIE NYAMBURA KIMANI**

**NDURUBU THUO**

**T/A GITHURAI URBAN SELF HELP GROUP.....PLAINTIFFS**

**V E R S U S**

**REDSKY LIMITED**

**SAFARICOM (K) LIMITED.....DEFENDANTS**

**RULING**

This is an application (Notice of Motion dated 15<sup>th</sup> July 2014) by the 2<sup>nd</sup> Defendant seeking an order for dismissal of the Plaintiffs' suit for want of prosecution. It is brought under Section 3A of the Civil Procedure Act (the Act); Order 17, Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules (the Rules).

It is the 2<sup>nd</sup> Defendant's case that since 17<sup>th</sup> October 2011, the Plaintiffs have not taken any steps to prosecute the suit. It is averred that the Plaintiffs' conduct of leaving the matter in abeyance for 3 years is unjust and unfair to the Defendants. A chronology of events is set out in the supporting affidavit sworn by Daniel Ndaba, the Principal In-House Counsel of the 2<sup>nd</sup> Defendant.

The Plaintiffs have opposed the application as set out in the replying affidavit filed on 27<sup>th</sup> January 2015 which is sworn by the 1<sup>st</sup> Plaintiff. The grounds for opposing the application as disclosed by the replying affidavit are:-

1. That when the suit was filed in 2011 the Counsel proceeded on a contingency basis which was difficult for him as the suit was complex and required great financial outlay and labour;
2. That they have sought for the court file for the better part of 2013 and 2014 from the registry without success.
3. That the claim is valid, serious and requires the adjudication of the court to determine if indeed

the concept of the football tournament was stolen from them by the Defendants to gain unfair marketing and financial advantage.

4. That they are a small organization with little or no funds who came to court with the support of well-wishers and the community.

5. That it is the non-availability of the file that has delayed the suit otherwise the Summons to enter Appearance was ready when suit was filed.

The Defendants filed written submissions addressing the contentious issues herein.

The Defendants contend that the suit is a non-starter as the Plaintiffs have since 2011 never bothered to take out Summons to Enter Appearance for service upon them. The plaintiffs on their part contend that it is the disappearance of the court file that had their hands tied as well as lack of funds as they depend on well-wishers to sustain the claim financially.

Under **Order 5, rule 2(2)** of the **Civil Procedure Rules, 2010** (the **Rules**), where summons has not been served on a Defendant the court may extend the validity of the summons from time-to-time if satisfied it is just to do so. Under **sub-rule (5)** of the same rule, an application for an order under **sub-rule (2)** shall be made by filing an affidavit setting out the attempts made at service and their results. It is thus apparent that the court's discretion under sub-rule (2) is not unfettered. That discretion appears to be exercisable within the confines of such attempts as may have been made to serve the summons upon the Defendant. In the present case any attempt to serve the summons has not been exhibited. Apart from the statement in the Replying Affidavit that summons were taken out together with the Plea and application for injunction there is no more.

The Defendants also submitted that the delay herein goes against Article 50(2)(e) of the Constitution which guarantees the right to fair trial without unreasonable delay.

It appears from the court record that since the application for injunction was dismissed on 19<sup>th</sup> July 2011, the Plaintiffs have never taken any other step towards the hearing of the main suit on its merits.

It is now well settled that the court will not dismiss a suit for want of prosecution unless it is satisfied:-

1. That the default has been intentional.
2. That there has been prolonged or inordinate and inexcusable delay on the part of the Plaintiff or his advocate.
3. That such delay will give rise to a substantial risk that it will not be possible to have a fair trial of the case, or is such as is likely to cause or to have caused serious prejudice to the defendant.
4. That except in cases of unbecoming conduct by the plaintiff, the power to dismiss an action for want of prosecution should not be exercised within the currency of any relevant period of limitation as the plaintiff could then simply file another action.

The power to dismiss a suit for want of prosecution being so drastic, should be exercised only as a last resort, and where the suit can be heard without further delay, an application for dismissal ought to be refused.

Having considered the application at hand, there is no evidence that the Plaintiffs have failed to prosecute the case due to some ulterior motive. Nor have they been in disobedience of any court order requiring them to take some action towards prosecution of the case.

But there has been a fairly long delay of some three (3) years between the dismissal of their application for injunction on 19<sup>th</sup> July 2011 and the filing of this application on 15<sup>th</sup> July 2014. The Plaintiffs did not

take any action at all in those three years towards prosecution of the suit. There is no satisfactory explanation for the delay, which delay is inordinate and inexcusable in the circumstances of this case and is contrary to Article 50 (2)(e) of the Constitution.

It has not, however, been demonstrated by the Defendants that it will not be possible to have a fair trial of the case, or that the delay is such as is likely to cause or has caused serious prejudice to them. For this reason alone the application must be refused. It is hereby dismissed. The Plaintiffs are hereby condemned to pay costs for the delay to the Defendants. The same shall be paid within fourteen (14) days of delivery of this ruling.

The Plaintiff should also within thirty (30) days of delivery of this ruling, take demonstrable steps towards prosecution of the suit. In default the suit shall stand dismissed for want of prosecution without necessity of any further application.

As for the contention that failure to serve the Summons to Enter Appearance on the Defendants renders the application a non-starter, though the explanation of the Plaintiffs for the failure is neither here nor there, in the interests of justice, the court exercises its inherent power to extend validity of the summons for a period of 12 months from the date of this ruling.

***Dated, signed and delivered at Nairobi this 7<sup>th</sup> day of July, 2015***

**A. MBOGHOLI MSAGHA**

**JUDGE**