**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 97 OF 2011**

SERAH NYAMBURA T/A CRAYFISH CAMP.....PLAINTIFF/APPLICANT

VERSUS

1. FOOTBALL KENYA LMITED

2. MULTI CHOICE KENYA.....2ND DEFENDANT/RESPONDENT

3. NAGESH KARUTURI, DANIEL OMONDI, HERMANT TALANTHU (sued as the officials) OF SHER KARUTURI SPORTS.....3RD DEFENDANT/RESPONDENT

4. KENYA PREMIER LEAGUE LIMITED.....4TH DEFENDANT/RESPONDENT

5. MULTICHOICE AFRICAN LIMITED.....5TH DEFENDANT/RESPONDENT

6. KENYA PBOARCASINT GOCPORTATION.....6TH DEFENDANT/RESPONDENT

7. SHER KARUTURI LIMITED.....7TH DEFENDANT/RESPONDENT

**RULING**

1. The suit herein was filed on the 4th May 2011 against the defendants – together with an application seeking injunctive orders against the 2nd defendant. All the defendants filed their respective defences and pleadings were closed on the 11th November 2011 when a reply to defence was filed by the 2nd defendant. The plaintiff fixed a hearing date for its applicant dated 13th June 2011 but the same was stood over generally on the 4th June 2013 and since then, no other action was ever taken by the plaintiff to prosecute the case.

2. On the 11th February 2015, the 2nd defendant filed the application under consideration under the provisions of **Order 17 Rule 2(3) and 51 Rule 1 of the Civil Procedure Rules** that seeks dismissal of the plaintiffs suit for want of prosecution. It it is supported by an affidavit sworn by one Desmond Odhiambo Advocate who has conduct of the suit on behalf of the 2nd Defendant. It is his averment that the case was stood over generally by the court on the 4th June 2013 and that since then no action was ever taken towards prosecution of the same.

3. In opposing the application, the plaintiffs Advocate **Prof. Tom Ojienda, Sc** in his affidavit sworn on the 31st March 2015 deposes that attempts to take a hearing date since 4th June 2013 was

hampered by a clogged diary. He averred that the invited the defendants to attend the court registry to take a hearing date on the 29th January 2014 – but the 3rd and 7th defendants went under receivership on the 10th February 2014 which caused a temporary freeze in the litigation and thereafter receiver managers were appointed with limited activity under statute.

He further states that the suit in issue ought to be heard on merit and conclusively and not terminated through an application.

In his submissions, Mr. Biko for the Respondents, stated that steps are underway to bring the receiver-managers on board, and urged the court to allow parties to urge their cases on merit.

4. The overriding objective of the court as stated in **Section 1A, 1B and 3A of the Civil Procedure Act** is to dispose of matters expeditiously and efficiently.

**Ivita -vs- Kyumbu (1984) KRR** laid down the test on whether prolonged delay in prosecuting a suit is excusable and if it is, whether justice could be done to both parties despite the delay.

It was held that applying the test, both parties and the position of the Court(Judge) too must be considered because it is no easy tasks for documents and or witnesses may go missing and evidence could weaken due to disappearance of human memory resulting to the lapse of time.

The defendant must also satisfy the court that he will suffer prejudice caused by the delay.

5. In considering whether thee has been inordinate delay on the part of the plaintiff in prosecuting the case,the court ought to consider:

(1) Whether the delay is intentional, contumelious and therefore inexcusable.

(2) Whether the delay is an abuse of the court process.

(3) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice the defendant.

(4) What prejudice will be caused to the plaintiff by the dismissal.

(5) What does the interest of justice dictate?

The last action taken by the plaintiff was on the 4th June 2013 when the case was stood over generally and a direction given that a fresh hearing date be taken at the registry. That did not happen upto 20th January 2014 when an invitation was sent to the defendants to fix a hearing date. No hearing date was taken and an explanation by the plaintiff given that the 3rd and 7th defendants were placed under receivership on the 10th February 2014 which froze litigation. It is stated the delay ought not be interpreted as lack of interest in the case as there has been discussions for an amicable settlement and steps to bring on board he receiver-manager of the 3rd and 7th defendants. Does the above explanation meet the test set out in **Ivita -vs- Kyumbu?**

6. A delay is inexcusable if it is shown to be intentional and no reasonable explanations given; and that it is not being used to afford the opposite party collateral advantage in the case by buying time.

In assessing the prejudice caused the defendant by the delay the court ought also assess the likely prejudice the dismissal may be occasioned to the plaintiff if the case is dismissed. This principally goes to the nature and substance of the suit, importance of the claim and legal capacity of the parties in the suit.

The court has considered the test as stated in **Ivita -vs- Kyumbu (Supra),** and applied in **Utalii Transport co. Ltd -vs- Nic Bank and Others (2014) KLR.**

7. From the circumstances and explanation tendered by the Respondents, the court is satisfied that the delay of about two years though inordinate has been explained in that the legal capacity of the 3rd and 7th defendants changed when they were placed under receivership, and that there has been ongoing discussions to bring the subject case to a close. I have also looked a the subject matter as stated in the plaint and the defences filed.

That is not to say that the plaintiff is at liberty to keep the defendants waiting, with a case hanging on their necks indefinately. The primary duty of the plaintiff is to take steps to progress their case. They are the ones who dragged the defendants to court. The plaintiffs inertia runs contra to the overriding objective of the court as set out in **Section 1A, 1B and 3A of the Civil Procedure Act.**

8. It has been said that dismissing a case without hearing it is draconian and drives the plaintiff out of the court seat of Justice. The court has discretion to weigh the two rival positions an do what the justice of the case dictates. This court is a court of substantive Justice as enshrined in the constitution. The nature of the matter as demonstrated in the pleadings pursuades me to exercise my discretion in favour of the plaintiff, but not without caution. The delay of about two years has indeed caused prejudice to the defendant, a situation that the court will not condone or perpetuate without justifiable and sufficient reasons. The defendants have attempted to justify the delay. The explanation is puruasive in their favour.

Accordingly, the court finds that this is a case that ought to be heard on merits but without further delay.

In the interest of justice and fairness, I make the following orders:

1. That the plaintiff is directed to take all necessary steps to set down the case for hearing within 90 days of this ruling failing which the case shall stand dismissed unless otherwise by order of the court.

2. The 2nd Defendant shall have costs of the application, payable before the hearing of the case by the plaintiff.

**Dated, signed and delivered in open court this 3rd day of December 2015**

**JANET MULWA**

**JUDGE**