



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL SUIT NO. 173 OF 2010**

**MASTRADE HOLDINGS LIMITED ..... PLAINTIFF**

**V E R S U S**

**THE NATION MEDIA GROUP LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ECOBANK KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Plaintiff filed this case against both Defendants on 4<sup>th</sup> June 2010. Both Defendants filed their respective defences and pleadings closed on or about 26<sup>th</sup> August 2010. After the close of pleadings Plaintiff took no action in this matter. It was the 2<sup>nd</sup> Defendant who brought to an end the inactivity of this matter when it filed a Chamber Summons dated 3<sup>rd</sup> February 2014 which is being considered by this Ruling.
2. Notice of Motion dated 3<sup>rd</sup> February 2014 seeks the dismissal of the Plaintiff's suit for want of prosecution. The ground that 2<sup>nd</sup> Defendant seeks that dismissal is that the Plaintiff has failed to fix this case for hearing now more than three (3) years since it filed it. That such delay is inordinate and inexcusable and by the affidavit in support of that application Caroline Mbenge, 2<sup>nd</sup> Defendant's Legal Counsel further stated-
9. **THAT I am well aware and on advice received from the aforementioned advocate and which advice I trust to be veracious that in principle litigation must come to an end in that the parties are clear as to their outstanding obligations in law and thus where the Plaintiff has lost interest in bringing his case to the Court the existence of such a matter amounts to abuse of the Court process and violates the Overriding Objectives of the Civil Procedure Rules.**
10. **THAT I verily believe it is in the interest of sound**

**administration of justice through the Court process and in furthering the overriding**

**objective of the Civil Procedure Act that litigation must be conducted expeditiously, proportionately and in one way or the other come to an end thus the instant suit ought to be dismissed with costs to the Applicant.**

3. In its defence the Plaintiff by the Replying Affidavit sworn by its Director James Mureu blamed the lack of activity on this file on its failure to trace its witness only referred to by one name Jamleck. The following are some of the depositions of that Director-
4. **THAT the delay in listing this suit for hearing or preparing the same so as to take a date for pre-trial hearing, was occasioned by the fact that the Plaintiff's former accountant namely Jamleck left employment in 2009 following the 1<sup>st</sup> Defendant's termination of the supply of its products to the Plaintiff Company which essentially gave rise to this suit.**
5. **THAT all efforts made by the Plaintiff to locate Jamleck bore no fruit as he could not be reached on the cell phone number that he used while in the employment of the Plaintiff.**
6. **THAT I confirm having received several emails from our Advocates on record requesting that Jamleck calls on them for purposes of preparing the suit for hearing but I was totally unable to do so since I could not trace him. Annexed hereto and marked 'JM-1' is a bundle of emails from our Advocate regarding this matter.**
7. **THAT I finally managed to trace Jamleck on 18<sup>th</sup> March 2014 through his friends and I have scheduled an appointment with our Advocates to prepare the witness statements and Plaintiff's bundle of documents.**
8. **THAT it is not true that the Plaintiff has completely lost interest in ventilating its claim as against the Defendants herein. The delay in listing this matter for hearing has duly been explained.**
9. **THAT owing to the fact that I have now traced the principal witness in this case namely Jamleck, it would only be fair and just that the Plaintiff be given an opportunity to prepare this suit for it to be heard on merit.**
4. In case the FITZ PATRICK –Vs- BATGER & CO. LTD (1967)2 ALLER 657 the duty of a Plaintiff who has filed a case was set out as follows-

**“It is the duty of the Plaintiff's advisers to get on with the case. Public Policy demands that the business of the Courts should be conducted with expedition ...”**

5. Let us examine if the Plaintiff has met its obligations, having filed this case in this Court. Plaintiff through its Director blamed the inability to trace its former Accountant who is to be a witness in this case. That former accountant's name is given as Jamleck. How strange. Jamleck does not have a middle name nor a surname. The question then is, does he exist or is he a pigment of the Plaintiff's Directors imagination.
6. Secondly and more importantly Plaintiff stated that Jamleck was its Accountant at the material time. It is to be assumed that the Plaintiff's documents of accounts relating to this case were kept by Jamleck. Does it then follow that Plaintiff's present Accountant could have been called to testify in this case.
7. Thirdly the Plaintiff was very cagey on the efforts that were made from 2010 to trace Jamleck. Surprisingly after 2<sup>nd</sup> Defendant filed its application to dismiss the suit, Jamleck was traced. No evidence is before Court that indeed Jamleck has been traced. If he was traced where is his witness statement. He apparently was traced on 18<sup>th</sup> March 2014. The 2<sup>nd</sup> Defendant's application was argued before me on 12<sup>th</sup> May 2014. The hearing of the application was almost

two months after Jamleck supposedly was traced. There was no intimation by Plaintiff's Learned Counsel that he had signed a witness statement in readiness of pre-trial directions. Plaintiff has also failed to file their documents which presumably have all along been in the custody of the Plaintiff's Company.

8. Fourthly and more importantly according to the depositions of Plaintiff's Director, Jamleck went missing from him in 2009. This case was filed on 4<sup>th</sup> June 2010. Why did the Plaintiff file the case when it had not secured its vital witness.
9. With the above outlined failure of Plaintiff to 'get on' with its case I do find that Plaintiff is in serious breach of the overriding objective set out in Section 1A of the Civil Procedure Act which provides-

**"1A.**

**Objective of Act**

1. **The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."**

Section 1A (3) obligates parties and their Advocates to assist the Court to further that overriding objective. Needless to say from what is stated above Plaintiff has not assisted the Court to facilitate the expeditious proportionate and affordable resolution. Plaintiff has not only failed to move with haste to conclude this case but has put the Defendant at an expense of having to retain Counsel now for more than three (3) years, which Counsel undoubtedly is being paid. The Constitution of Kenya at Article 159(2)(b) provides-

**"Justice shall not be delayed."**

Plaintiff has no doubt delayed justice in this case for both Defendants. I can do no better than echo the words of Justice G. K. Kimondo in the case NETPLAN EAST AFRICA LTD -Vs- INVESTMENT & MORTGAGE BANK LTD (2013)eKLR where he stated-

**"I find that delay in this matter has been established. When such delay is established, unless it is well explained, it becomes inexcusable. See Ivita Vs Kyumbu [1984]KLR 441, Allen Vs McAlpine [1968]1 ALL ER 543, Ramuka Agencies Ltd Vs Esther Wanjira Maina and Another Nairobi, High Court ELC 1187 of 2007 [2012]eKLR. From what I have stated earlier, the Plaintiff has failed to offer any plausible reason for its failure to fix the suit for hearing since 23<sup>rd</sup> November 2009 .... A portrait emerges of a lethargic litigant completely disinterested in prosecution of its suit. Under such circumstances, the Court was well entitled to dismiss the suit under Order 17 rule 2 of the Civil Procedure Rules 2010 and the inherent powers of Court. See Mukisa Biscuit Manufacturing Company Vs West End Distributors Limited [1969]E.A. 696."**

10. This is a suit that should be dismissed for want of prosecution and in the exercise of my inherent jurisdiction, I will dismiss it against both Defendants. I order that this suit be and is hereby dismissed against both Defendants. Both Defendants are awarded costs of the suit and the 2<sup>nd</sup> Defendant is additionally awarded costs of Notice of Motion dated 3<sup>rd</sup> February, 2014.

**DATED and DELIVERED at MOMBASA this 5<sup>TH</sup> day of JUNE, 2014.**

**MARY KASANGO**

**JUDGE**