



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 48 OF 2014

RUDI MARQUARDT ELECTRONIC CO. LTD.....PLAINTIFF

VERSUS

VALLERY JIMOI KHAZALWA.....1ST DEFENDANT

JOHN ODINDO OGILO.....2ND DEFENDANT

OSCAR OGILO ONDINGO.....3RD DEFENDANT

STALINE YUAYA ODINDO.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. The Plaintiff moved the court through the motion dated 4th September 2018, seeking for the court to set aside the order of 10th May 2018 dismissing the Plaintiff's suit, and reinstate it for hearing and determination. The application is based on the six (6) grounds on its face and supported by the affidavit sworn by Rudolf Georg Marquardt, the majority shareholder and managing director of the Plaintiff, on the 1st August 2018.

2. The application is opposed by the 1st Defendant through their five (5) grounds of opposition dated the 18th September 2018.

3. The application is also opposed by the 2nd Defendant through his replying affidavit sworn on the 5th November 2018 on his own behalf, and that of 3rd and 4th Defendants.

4. The application came up for hearing on the 15th November 2018 when Counsel for the Plaintiff and 1st to 4th Defendants agreed to file and exchange written submissions. The Counsel for the 5th Defendant informed the court that they are supporting the Defendants position in the application but will not be filing any reply or submissions. That consequently the learned Counsel for the Plaintiff and 1st Defendant filed their submissions dated the 7th March 2019 and 9th March 2019 on the 8th March 2019 and 11th March 2019 respectively.

5. The following are the issues for the court's determinations;

a) Whether the Plaintiff has presented reasonable explanation why no steps to prosecute the suit were taken for more than twelve (12) months.

b) Whether the prayers sought should be allowed.

c) Who pays the costs.

6. The Court has carefully considered the grounds on the motion and grounds of opposition; affidavit evidence and written submissions; the record and come to the following determinations;

a) That these proceedings were commenced by the Plaintiff vide the plaint dated the 28th February 2014 against the 1st to 4th Defendants. That through the Amended plaint dated the 9th April 2014, The Attorney General was added as the 5th Defendant. That by the time the court issued the notice to show cause why the suit should not be dismissed for want of prosecution dated the 29th March 2018 and for hearing on the 10th May 2018 at 9.00 a.m. the last step taken was of fixing the suit for hearing on the 8th

September 2015. That step, according to the record, had been taken by one Keen for Kabue Thumi & Co. Advocates for the Plaintiff on the 10th March 2015. That there is no confirmation whether the hearing notices were ever issued and or served as no party or Counsel attended the court on the 8th September 2015. That the foregoing shows that by the time the notice to show cause under **Order 17 Rule 2 of Civil Procedure Rules** dated the 29th March 2018 was issued, a period of about three (3) years had lapsed since the last step was taken to prosecute the suit.

b) That whereas the three (3) years period may look long and probably inordinate, the Plaintiff appears to heap all the blame to his Legal representative on record at the time. That the Learned Counsel for the 1st Defendant has in their written submissions pointed out correctly, that the Plaintiff has not tendered any evidence to confirm that he has been contacting his legal Counsel on record on the progress and updates for that period of three (3) years when no action was taken. That there is also no confirmation from the Plaintiff's Counsel then on record to confirm that allegation or explain why Counsel did not take any steps. That the Plaintiff's Counsel has correctly appreciated in their submissions that it is the duty of the litigant to constantly check with their advocate for the progress of their case [See **Savings & Loans Ltd vs Susan Wanjiru H.C.C.C No. 397 of 2002**]. That it follows that where a litigant, like the Plaintiff herein, wishes to have the court exercise its discretionary jurisdiction in its favour, then it is legally bound to present reasonable explanation for the failure to take steps for the period in question.

c) That the fact that the deponent of the supporting affidavit and the 1st Defendant are shareholders and directors of the Plaintiff, and that they are at opposite sides of these proceedings, and the uncontested fact that the deponent of the said affidavit resides outside the Country, are factors put forward by the Plaintiff to explain the delay in making follow up with the Counsel on record for the Plaintiff. That the fact that the Plaintiff or any other litigant in a suit resides outside the Country where their suit is pending is not an excuse not to ensure their suits are processed and prosecuted within the timelines set by the Law. That the court is obligated by **Article 159 2 (b) of the Constitution 2010 and Sections 1A, 1B and 3A of Civil Procedure Rules** to ensure the matters before it are heard and decided expeditiously, so as not to delay justice to the parties. That a party or litigant who fails to take steps to prosecute their case as required and whose suit is dismissed for want of prosecution regularly, legally, and procedurally cannot turn around and say the action contravenes their rights to property, or justice or to be heard under **Articles 47, 48 and 50 of the Constitution** as the Plaintiff appears to claim.

d) That the foregoing notwithstanding and considering the relationship the deponent of the supporting affidavit and the 1st Defendant have to the Plaintiff, and further as none of the Defendants have shown that they would be prejudiced in any way if the dismissal order was lifted and suit reinstated, the court accepts the explanation given for the three (3) years delay as reasonable, and finds the delay as excusable. [See **Utali Transport Company Limited & 3 Others vs NIC Bank Limited & Another [2014] eKLR**] where a delay of eighteen (18) months was found not inordinate or inexcusable].

e) That though the Plaintiff has succeeded in the application and under **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya** would have been entitled to costs of the application, the court awards the costs of the application to the Defendants who participated in its hearing, that is 1st to 4th Defendants.

7. That in view of the foregoing the court finds merits in the motion dated 4th September 2018 and orders as follows;

a) **That the order dismissing the Plaintiff's suit under Order 17 Rule 2 of Civil Procedure Rules of 10th May 2018 be and is hereby set aside and the suit reinstated for hearing.**

b) **That the Plaintiff will pay the 1st to 4th Defendants' costs of the application in any event.**

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26TH DAY OF JULY, 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Mweisigwa for the Plaintiff

Ms. Oroni for Onsongo for 1st Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE