



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 388 OF 2010

MUSIC COPYRIGHT SOCIETY OF KENYA LIMITED.....1ST
PLAINTIFF

KENYA ASSOCIATION OF MUSIC PRODUCERS LIMITED.....2ND
PLAINTIFF

-VERSUS-

MULTICHOICE (K) LIMITED.....1ST DEFENDANT

MULTICHOICE (AFRICA) LIMITED.....2ND
DEFENDANT

RULING

1. The Notice of Motion dated **27th July, 2015** was brought by the 1st Defendant/Applicant for orders that this suit be dismissed with costs for want of prosecution on the grounds that:

1. **The 1st Defendant filed a Defence herein on 28th July, 2010.**
2. **That the Plaintiffs subsequently filed their amended plaint on 2nd September, 2010 over four years ago and that since then the Plaintiffs have failed to make any applications or take any steps in prosecuting this matter.**
3. **That the pleadings herein closed on 16th September, 2010 and therefore that the delay by the Plaintiff in prosecuting this matter is inordinate, unreasonable and inexcusable and has caused prejudice to the Defendant/Applicant in the form of costs and time spent in this matter.**
4. **That it is in the interest of justice and public policy that litigation must come to an end.**

2. The application was filed pursuant to Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 17 Rules 2(1) and 2 (2) and Order 51 of the Civil Procedure
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Rules, 2010. It is supported by the affidavit annexed thereto sworn by **DESMOND ODHIAMBO** on 27th July, 2015 in which it was averred that since the Plaintiffs filed an Amended Plaintiff on 2nd August, 2010 they have neither taken any steps nor made any application with a view of prosecuting this matter. It was further deposed that no efforts have been made by the Plaintiffs to serve summons to enter appearance on the 2nd Defendant, which they acknowledge is a company incorporated in Mauritius. Accordingly, it was the Applicant's case that failure by the Respondent to take any steps to have the matter set down for hearing is an indication of their lack of interest in pursuing the matter and that in the circumstances, it is only just and proper to have the suit dismissed for want of prosecution.

3. The Plaintiffs opposed the application and relied on the Replying Affidavit of **ZACCHAEUS KINYUA MURIITHI** in which it was deposed that the Plaintiffs and the 1st Defendant have been discussing and negotiating this matter with a view of settling the same out of Court, through their Officers, namely: **June Gachui** for the 2nd Plaintiff, **Peter Eyenze** for the 1st Plaintiff and **Stephen Isaboke** for the 1st Defendant. Annexed to the Replying Affidavit was a copy of a letter dated 11th April, 2011 marked ZKMI in support of that averment.

4. It was further the contention of the Plaintiff that it has taken steps to progress the matter in that, on 24th January, 2014 they caused the matter to be fixed for pre-trial conference, but no directions could be given on account of non-compliance with Order 11, Civil Procedure Rules and due to the fact that the parties were engaged in negotiations. The Plaintiffs therefore urged the Court to grant them an opportunity to conclude their negotiations with the objective of reaching an amicable settlement of the dispute herein. They thus urged that the application dated 27th July, 2015 be dismissed.

5. The Court has given due consideration to the Pleadings, the Proceedings, the affidavits filed in respect of the instant Notice of Motion as well as the Written Submissions filed by Learned Counsel. There is no dispute that the Plaintiffs commenced this suit via the Plaintiff filed on 7th June, 2010 or that Summons to Enter Appearance were issued for service on the Defendant which were served on the 1st Defendant on 29th June, 2010. In response thereto, the firm of Daly & Figgis Advocates filed a Memorandum of Appearance and Defence on behalf of the 1st Defendant on 14th July, 2010 and 28th July, 2010 respectively, in which they denied the Plaintiff's claim.

6. Following the filing of the Defence, the Plaintiff filed an Amended Plaintiff on 6th August, 2010 to indicate that the 2nd Defendant is a Limited Company incorporated in Mauritius, apparently in response to the averment in Paragraph 2 of the 1st Defendant's Defence. Again, there is no dispute that no attempt have been made by the Plaintiffs to serve the 2nd Defendant with Summons to Enter Appearance.

7. Contrary to the allegation by the 1st Defendant that since filing the Amended Plaintiff on 6th August, 2010 the Plaintiff has taken no steps to prosecute this case, the records shows that:

1. **On 24th November, 2010 the Plaintiff caused the suit to be listed for hearing on 6th April, 2011.**
2. **On 5th August, 2013 the case was again fixed for mention on 24th October, 2013.**

3. **On 6th November, 2013 the case was listed for pre-trial conference on 24th January, 2014.**

4. **On 24th January, 2014 the Plaintiff's Counsel attended Court for pre-trial conference but the matter did not proceed due to non-compliance by the parties.**

8. Accordingly, it cannot be said that the Plaintiff had not taken any steps to prosecute the case. Nevertheless, the question remains as to whether there has been inexcusable lethargy in the prosecution of this case. The application was predicated on Order 17 Rules 2(1) and 2 (3) of the Civil Procedure Rules, which provide thus:

“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 show cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit.”

Rule 2(3) of Order 17 gives any party the liberty to apply for dismissed under Rule 2(1) aforementioned.

9. Clearly therefore since the last step taken herein by the Plaintiffs was on 24th January, 2014 there can be no denying that it is now “over one year” since. Nevertheless, as is the case in all cases involving the exercise of discretion, the Court is under obligation to exercise its discretion herein judiciously, based on a consideration established applicable legal principles.

10. In the case of **Utalii Transport Company Limited & 3 Others Vs NIC Bank Limited & Another [2014] eKLR** these principles were re-stated thus:

1. **Whether there has been inordinate delay on the part of the Plaintiff in prosecuting the case.**

2. **Whether the delay is intentional and therefore inexcusable.**

3. **Whether the delay is an abuse of the process of the Court.**

4. **Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant.**

5. **What prejudice the dismissal will occasion to the Plaintiff.**

6. **Whether the Plaintiff has offered a reasonable explanation for the delay.**

7. **Even if there has been delay, what does the interest of justice dictate"**

11. There being no dispute that the Plaintiff had taken no action for a period of over one year since 24th January, 2014 the Court is no doubt that the delay herein is inordinate. The only explanation proffered by the Plaintiff was that the parties were pursuing negotiations with a view of having the case settled out of Court. Even where such is the case, the parties are under obligation to keep at the fore the overriding objective set out in Sections 1A and 1B of the Civil Procedure Act, so as to circumscribe time limits for negotiations. It would in my view,

defeat that objective if parties were to be permitted to engage in open-ended negotiations that have the effect of keeping suits pending for years on end.

12. That the delay has been intentional and therefore inexcusable is evident in the fact that the Plaintiff has never complied with the requirements of Order 4 Rules 2 Civil Procedure Rules, which requires that a Plaint be accompanied by:

- a. A list of witnesses to be called at the trial.**
- b. Written Statements signed by the witnesses.**
- c. Copies of documents to be relied on at the trial.**

13. In the same vein, no efforts have been made by the Plaintiff to comply with the relevant Practice Directions granted the outcome of the proceedings of 24th January, 2014. The cumulative effect of the foregoing is that the delay has not only been inordinate but is also deliberate from the Plaintiff's stand point. The 1st Defendant would be in no position to file their response without knowing the nature of and details pertaining to the Plaintiff's claim. As for the 2nd Defendant, process is yet to be served on it.

14. The conclusion that I come to in the circumstances is that the delay is inexcusable and therefore amounts to an abuse of the Court process.

15. That the delay is prejudicial to the 1st Defendant cannot be gainsaid. This case was filed in 2010 whereupon the 1st Defendant engaged the services of a firm of lawyers to defend it. In the cause of **Nilan Versus Patel (1969) EA 341** the Court observed that:

“It is only too trite to say that, as in every civil suit, it is the Plaintiff who is in pursuit of a remedy, that should take all the necessary steps at his disposal to achieve an expeditious determination of his claim... Every year that passes prejudices the fair trial witnesses may have died, documents may have been mislaid, lost, destroyed and the memory may fade.”

16. In the premises, the Court is satisfied that the 1st Defendant has demonstrated that the Plaintiffs suit herein warrants dismissal for want of prosecution.

Accordingly, the Notice of Motion dated **27th July, 2015** is hereby allowed as prayed in paragraph 1 and 2 thereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2016.

OLGA SEWE

JUDGE



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