



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 126 of 2007

KENYA PIPELINE COMPANY LIMITED PLAINTIFF

VERSUS

RAIPLY WOOD (K) LIMITED DEFENDANT

RULING

This is an application by the Defendant under the provisions of Order XVI, Rules 5 (a) for inter alia, an Order that the Plaintiff's suit be dismissed for want of prosecution.

It is based on the following grounds:-

- (i) That pleadings in the suit closed way back in the month of September, 2007.
- (ii) That the last time the suit was in Court was on 14th May, 2008 when the Court delivered a ruling on the Plaintiff's application for injunction.
- (iii) That to date the Plaintiff has not taken any positive steps towards setting the suit down for hearing.
- (iv) That the Plaintiff has not even filed its list of documents despite being reminded to do so by the Defendant's Counsel.
- (v) That the Plaintiff's refusal to prepare the suit for hearing is highly prejudicial to the Defendant's interest as it cannot utilize its property thereby subjecting it to great loss.
- (vi) That it is apparent that having secured an injunction in its favour the Plaintiff is no longer interested in pursuing the suit.

The Application is supported by an affidavit sworn by one Philip Varghese, a Director of the Defendant Company.

Application is opposed by the Respondent/Plaintiff which filed an affidavit sworn by Mr. Paul Lilan of the law firm on record acting for the Plaintiff.

The pleadings closed in September, 2007. However, the ruling in respect of the interlocutory applications by the Plaintiff and Respondent was delivered on 14th May, 2008.

Subsequently, there was correspondence between Counsel for the parties. By a letter dated 10/12/08,

the Plaintiff's Advocates informed the Defendant's advocates that Counsel who had been handling the matter was on maternity leave and requesting for some time to enable another advocate to study the file and respond.

It is noted that the Plaintiff took time to consider enjoining the Former President H. E. Daniel T. Arap Moi as a party in these proceedings. It is also noted that the Kenya Ports Authority requested for the pleadings and subsequently instructed the Plaintiff's Counsel to represent them and enjoin them as a party in these proceedings.

The Plaintiffs have after the service of the present application filed two applications seeking orders to enjoin the Kenya Ports Authority, the Great Rift Transporters Kenya Limited, his Excellency Daniel Arap Moi and one Nirmal Singh Bassi as parties in this suit.

This Court has taken into account that the Plaintiff is serving a statutory function. The road which is on the subject matter of the suit is used by the Kenya Pipeline Company and the public. It is a permanent road.

If the suit is dismissed, and the injunction lifted the Defendant can possibly close the road. This definitely will affect the operations of the Plaintiff without determination of the contested issues in this suit.

It is noted that the Defendant had an option of setting down the suit for hearing as it also has a substantial counter-claim against the Plaintiff.

In the light of the foregoing, I am of the view that the Plaintiff's delay in setting down the suit for hearing is not excessive and the reasons given make it excusable.

This is a very complex, intricate and sensitive suit touching on public interest. It is not in the interest of justice and resolution of disputes for the suit to be dismissed on basis of omissions or technicalities. Any delay suffered by the Defendant is compensable in damages, costs and interest if they succeed in their counterclaim.

In all, I hold that it is fair and just that the suit and counter-claim are heard and determined on their merits. I therefore do hereby disallow the application dated 6.02.09. It is dismissed. Costs shall be in the cause.

The Plaintiff is directed to prosecute and conclude its interlocutory applications on record expeditiously and set down the suit for hearing as soon as is practicable.

DATED AND DELIVERED AT ELDORET ON THIS 18TH DAY OF MAY, 2009.

M.K. IBRAHIM

JUDGE

In the presence of:

Mr. Chemitei holding brief for Mrs. Masika for the Respondent

Mr. Yego for Mr. Kurgat for the Applicant