

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 642 of 2005

STRATEGIC INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

SANA INDUSTRIES LIMITED.....DEFENDANT

ORDER

By a notice of motion filed on the 5th February, 2008 Sana Industries Ltd. The defendant herein, has moved this court under Order XVI rule 5 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, seeking to have the suit filed against it by Strategic Industries Ltd, the plaintiff herein, dismissed for want of prosecution. It is contended that the plaintiff has taken no steps to prosecute the suit since filing the suit in court on 10th November, 2005.

Relying on Harry Njuguna vs. Blue Shield Insurance Company Ltd. HCCC.No.737 of 2000 where a delay of two years was found to be inordinate, the court was urged to dismiss the application.

In response to the application Job Odhiambo Ochieng the advocate for the plaintiff swore a replying affidavit in which he contended that the failure by the plaintiff to prosecute the suit was neither intentional nor contumelious, as the plaintiff could not fix the suit for hearing, discovery not having been undertaken. Relying on HCCC.670 of 2001 Empress Dawdger Co. Ltd vs. Kenya Cultural Centre, Counsel for the plaintiff submitted that it was not the responsibility of the plaintiff alone to comply with the pretrial procedures or fix the suit for trial. Counsel for the plaintiff further submitted that the plaintiff's suit being one arising from the infringement of a trademark was a matter of public interest. Counsel for the plaintiff urged the court to reject the supporting affidavit sworn by the defendant's advocate as the advocate did not disclose the source of his authority. Counsel sought support for this submission from the case of Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another HCCC, Milimani No. 810 of 2001.

It is clear from the court record that the defence was filed on 26th January, 2006. No further pleadings having been filed, pleadings were closed 15 days thereafter. There is no indication that the plaintiff made any attempts to comply with the pre-trial procedures with regard to discovery, inspection or framing of issues. Counsel for the plaintiff attempted to blame the defendant for failing to furnish the plaintiff with his documents. The plaintiff cannot however avoid responsibility as Order X is very clear as to the steps that may be taken by any party desiring discovery. The plaintiff has not filed or served any interrogatories or request for discovery of documents nor has the defendant moved the court for an order to compel the defendant to make discovery. The reason given for failure to prosecute the suit is therefore not excusable at all. As was observed by Ochieng J. in the cited case of Harry Njuguna vs Blue Shield Insurance Company Ltd (Supra), Order XVI Rule 5 of the Civil Procedure Rules does not impose any obligation on the defendant to ensure that all or any of the pre-trial procedures are undertaken. The plaintiff's assertion that the defendant cannot invoke the provisions of Order XVI rule 5 of the Civil Procedure Rules as the defendant had not made discovery cannot hold.

In the case of Ivita vs. Kyumbu 1984 KLR 441Chesoni J. (as he then was) dealing with a similar

application for dismissal of a suit for want of prosecution held that the test to be applied is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay.

In this case, there has been a delay of about 2 years, the delay is inexcusable nevertheless as was pointed out by the plaintiff's advocate the suit involves infringement of a trademark which is a matter of public interest. There is further no evidence that the delay of two years will cause serious prejudice to the defendant as to obviate the possibility of having a fair trial. I think in the circumstances of this case it will be fair and just to give the plaintiff an opportunity to prosecute the suit.

I do therefore order that the plaintiff shall take appropriate action to prosecute this suit including pretrial procedures if necessary within 30 days from the date hereof. In default of plaintiff taking action, the suit shall stand dismissed. The defendant shall have costs of this application in any event.

Orders accordingly.

Dated this 28th day of April, 2008

H.M. OKWENGU

JUDGE

Delivered thisday of April, 2008

JUDGE

In the presence of: