

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1947 of 1999

CHIENI ENTERPRISE LIMITEDPLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL 1ST DEFENDANT

BIVAC INTERNATIONAL LIMITED 2ND DEFENDANT

RULING

By a notice of motion dated and filed on **8th October, 2007**, Bivac International who is the 2nd Defendant in the suit (*hereinafter referred to as the Applicant*), has moved this court for an order that the suit be dismissed with costs for want of prosecution. It is the applicant's contention that the pleadings in the suit closed on or about **17th March, 2000** and that the plaintiff did not set the suit for hearing until **29th September, 2005**.

The suit did not however proceed for hearing as the plaintiff did not have his main witness. It is the applicant's contention that since **29th September, 2006**, when the hearing of the suit was again stood over generally, the plaintiff has not taken any action to prosecute the suit. The applicant contends that the plaintiff has been guilty of indolence and is disinterested in the suit, notwithstanding previous indulgence granted to it by the court. The applicant therefore urges the court to dismiss the plaintiff's suit.

The plaintiff objects to the application contending that he is interested in the suit and that, indeed the suit was fully heard before Hon. Mbaluto, J but had to proceed afresh before another judge as Hon. Mbaluto J did not deliver the judgment. The plaintiff maintained that from **29th September, 2006**, when the matter was last in court, it was unable to trace the court file to fix a hearing date until **April, 2007** by which date the court diary had been closed.

Relying on **Victory Construction Company vs. A.N. Duggal [1962] EA 697** and **HCCC No.1465 of 2002 Alice Githae vs. National Hospital Insurance Fund**, the plaintiff urged the court not to dismiss the suit as the plaintiff was still interested in prosecuting it.

I have carefully perused the court record. Contrary to the implication being given by the applicant that the plaintiff took no action to prosecute this suit between 2000 and 2005, it is evident that the plaintiff did prosecute the suit but the efforts of the plaintiff were frustrated by the Attorney General (*1st Defendant*), who interrupted the hearing with an application to set aside the proceedings. The matter was further complicated by the fact that the trial judge not being available to proceed with the suit, the hearing of the suit was ordered to start *de novo*. The matter next came for hearing on **29th September, 2005**, but had to be adjourned because the plaintiff's witness who was said to be working in Liberia, was unable to attend court.

The matter was next fixed for hearing on **21st March, 2006**, but was taken out of the hearing list by the presiding judge due to shortage of judges. It was listed again on the plaintiff's advocate's request on **27th June, 2006**, but had again to be removed from the list due to shortage of judges. It was listed yet again,

for **29th September, 2006** at the request of the plaintiff's advocate on which date a preliminary objection which had been filed by the 1st Defendant was dismissed for non-attendance. The plaintiff appears to have taken no action between **29th September, 2006** and **8th October, 2007**. However, there are copies of letters in the court file dated **30th January, 2007** and **6th February, 2007** in which the plaintiff's advocate complains about his inability to trace the court file.

In light of the above, it cannot be said that the plaintiff has lost interest in prosecuting this matter. It is true that the prosecution of the suit has taken a long time, but the plaintiff is not entirely to blame. It would not therefore, be fair nor just to deny the plaintiff a right to prosecute his claim. Accordingly I refuse the application to dismiss the plaintiff's suit and order that the plaintiff shall take action to have the suit listed for hearing and heard on priority within three (3) months from the date hereof.

Orders accordingly.

Dated, signed and delivered this 3rd day of April, 2008.

H. M. OKWENGU

JUDGE