



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 1154 OF 2006

JULIUS GATHEMIA KIHARA & 13 OTHERS.... PLAINTIFFS/RESPONDENTS

VS

KENYA PIPELINE COMPANY LTD.DEFENDANT/APPLICANT

RULING

Before me is an application filed by the defendant, Kenya Pipeline Company Limited by way of Notice of Motion. The motion was brought under Order XVI rules 5(c) and (d), Order L rule 1 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act. The application is supported by the affidavit of **John Muindi**.

The defendant seeks for orders dismissing the suit for want of prosecution and costs of the suit.

The gist of the Defendant's application is that since 3rd October, 2007, the last time the matter was in court, the Plaintiffs have not taken any steps to set the case for hearing.

The Plaintiffs have opposed the application. A Replying Affidavit was filed by **Edward Mbugua Kamau**. The said affidavit attempts to justify the cause for the delay, as being death of some of the Plaintiffs and the need to substitute them with their legal representatives.

There are 14 Plaintiffs in the matter. The averments in the said replying Affidavit filed general in nature and do not give specific and adequate information. From the bar, the court was informed that 4 of the 14 Plaintiffs' have died. A detail of the 4 has not been given. There is no indication either, why the other 10 have not proceeded with the matter. It is however clear to the court, that the counsel for the plaintiffs has not been diligent in the manner he has handled this matter.

The pleadings herein were closed by the 2nd May, 2007. None of the parties have done discovery of documents as required by Order X Rule 11 A. The issues have not been framed and/or exchanged. Which means, that the necessary pre-trial steps have not been taken, in order for the suit for proceed for hearing.

Having read the Replying Affidavit, the court takes cognizant of the fact that the surviving Plaintiffs may suffer due to the negligence their counsel, who has chosen to wait for the representatives of the 4 deceased plaintiffs to put their houses in order, a situation that may cost the surviving plaintiffs their case. The court is of the view that dismissal of suits ought to be the last resort of a court of justice and

only exercised where it is where it is the only justifiable cause, taking into account all the surrounding circumstances of a suit.

Having considered the submission by counsels for the parties, the affidavits filed and cases cited, the court is of the view that the plaintiffs ought not to be punished for the negligence of their counsel, Secondly; it would be premature to dismiss the suit. I disallow the application and order as follows:

1. That the parties herein do discovery and exchange documents within the next 14 days of the order.
2. That further the parties herein do frame and exchange issues within a period of 30 days of the order.
3. The matter be mentioned 22nd of June, 2009
4. Costs in the cause.

Dated and delivered this 2nd June, 2008.

ALI ARONI

JUDGE