

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 403 of 1996

PELICAN ENGINEERING & CONSTRUCTION

COMPANY LIMITED PLAINTIFF

VERSUS

NATION NEWSPAPERS LIMITED..... RESPONDENT

RULING

The Notice of Motion dated 9/9/05 seeks dismissal of the suit herein; then costs.

Supported by Kiragu Kimani's Affidavit, the application is on the grounds that since 3/12/03, when the Respondents Chamber Summons dated 1/3/00 was adjourned generally, no steps have been taken to prosecute the suit.

In opposition, the Respondent avers that the delay was caused by the withholding of the file by the previous counsel due to disputes over the fees over this matter and other matters, which dispute ended in HCCC No. 1574/01, hence the delay was neither intentional, nor negligent; that the Respondent instructed another firm of lawyers who came on record on 5/4/06; the Respondent should not be victimized for the mistakes of the counsel; that the new firm has tried to fix a hearing date of the suit but no date could be allocated due to the pendency of this application for dismissal. The disputeHCCC 1574/01 has not been finalized as yet.

Having carefully perused the pleadings herein, and considered the submissions by counsel for both sides, I have arrived at the following findings and conclusions.

In an application for dismissal of a suit for want of prosecution, it is not simply the longevity of the period within which the suit has not been prosecuted. The delay must be unexplained or inexcusable [see AGIP (K) LTD VS. HIGHLANDS TYRES LTD. HCCC No. 249 of 1997, [2001], KLR, 630 at p.635] and the delay must be prejudicial to the Defendant/Applicant, and thus to the interests of justice.

In the present application, the withholding of the file by the Respondent's previous Advocates over disputed fees for the suit herein and other legal matters, affords a good explanation for the delay. From the pleadings before me, that dispute, in HCCC 1574/0,1 is yet to be finalized. I therefore hold that the delay is explained and excusable under the circumstances of this case.

Further, there is no evidence that despite the delay, the Applicant/Defendant cannot get a fair and just trial of the suit or that any prejudice to the Defendant has been occasioned by the delay. Whereas it is the duty of the Plaintiff/Respondent, and his Advocate,]to prosecute the suit with speed and diligence. **See BERNARD OCHOLA NGANI & OTHERS VS. MATHAYO NDO & 2 OTHERS**, HCCC NO. 270/2001, where that duty cannot be speedily discharged due to factors beyond the control of the Plaintiff, this court will exercise its inherent power of dismissal and discrimination in favour of the Respondent/Plaintiff. The existence of the suit between the Plaintiff/Respondent and his previous Advocates over the issue of disputed legal fees is sufficient explanation of the delay in prosecuting the suit herein.

Accordingly, and for the foregoing reasons, I dismiss the application for dismissal for want of

prosecution, BUT do order that the Plaintiff/Respondent must fix a hearing date of the suit herein, within the next 30 days from today's date.

I make no order as to costs, given the circumstances that led to the application herein.

DATED and delivered in Nairobi, this 20th Day of February, 2007.

O.K. MUTUNGI

JUDGE