



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

-CIVIL CASE NO. 1067 OF 2002

BULLEYS TANNERIES LTD ..... PLAINTIFF

VERSUS

PELICAN INSUANCE BOKERS (K) LTD ..... DEFENDANT

**RULING**

This is an application by the Defendant seeking to dismiss the suit for want of prosecution. The application has been brought pursuant to the provisions of Order XVI rule 5 (a) of the Civil Procedure Rules.

The application, dated 5th November 2003 is supported by the affidavit of Mrs. Caroline Wanjiru Githae, advocate. It is a short affidavit which sets out the salient facts as follows;

- (1) The Defendant filed its Defence to this suit, on 9th August 2002.
- (2) The Plaintiff has not taken any steps to prosecute the suit since August 2002.

In response to the application, the Plaintiff filed a Replying Affidavit sworn by its advocate, Mrs. Jane Andhoga Staussi. By the said affidavit it is conceded that the Plaintiff has not taken any steps to prosecute the case. However, the Plaintiff's advocate proceeds to explain that the plaintiff had been sued in Mombasa HCCC No. R. 55 of 1997, Ms Bayusuf & Brothers V Bulleys Tanneries Ltd, (The Mombasa Case). I do also note that the existence of this suit had been first disclosed in paragraph 7 of the Plaintiff.

The Plaintiff further states in the Replying Affidavit that the Mombasa Case is part-heard before Hon. Lady Justice Khaminwa. The case was scheduled to be heard on 8th March 2004, when the Plaintiff hoped it would be finalized. Once the said case is finalized, the Plaintiff hoped to determine the special damages which it would claim against the Defendant. In these circumstances, the Plaintiff states that it cannot prosecute this case until "the Mombasa case" is finalized.

In his submissions, the Plaintiff's advocate, Mr. M.T. Adala says that the circumstances in this case are such that if the court applied strictly the rules pertaining to the non prosecution of the suit, injustice would follow. He says that the Plaintiff had disclosed to this court, through the plaintiff, that there was another case, at Mombasa. He also says that in the said Plaintiff, the Plaintiff had disclosed that its claim for special damages would have to abide the outcome of the Mombasa case.

It is therefore his contention that the Plaintiff has fully explained the delay in the prosecution of the suit. And as far as he is concerned the said explanation is meritorious, and therefore the suit should not be dismissed. Instead, he invites me to direct the Plaintiff to take action within a stipulated period of time. The Plaintiff has also offered to pay the Defendant's costs of the application.

In reply to the Plaintiff's submissions, the Defendant's advocate, Mrs. Githae, says that the reasons given by the Plaintiff are all the more reason why the suit must be dismissed. She says that as the Plaintiff is wholly dependant upon the finalisation of "the Mombasa suit," before it can prosecute this suit, that would imply that the Plaintiff would not be in a position to comply with the court's direction, if such direction were given, requiring the Plaintiff to set down the suit for hearing expeditiously. Mrs. Githae also points out that the Plaintiff cannot guarantee that "the Mombasa case" will be finalized on 8/3/04. The Defendant further submits that even if the case was so finalized, there would be no guarantee that one of the parties to that suit would not lodge an appeal against the Judgment.

I must say that I accept the sentiments expressed by the Defendant. The ability of the Plaintiff to prosecute this suit is tied down to the outcome of "the Mombasa case". At the moment, it is not known when the judgment in that case will be given, as the trial itself has not yet been concluded. And even if the judgment were to be delivered within the next couple of weeks, nobody can say with any certainty that one of the parties to "the Mombasa case" will not then decide to lodge an Appeal against the judgment. It would therefore imply that this suit may have to wait infinitely before the Plaintiff could be in a position to prosecute it.

Meanwhile, the Defendant had already waited patiently since August 2002, to have the suit prosecuted. I do not think that it would be in the interest of justice to continue having the suit hang over the Defendant's head indefinitely. In the circumstances prevailing in this case, the Orders that commend themselves to me are as follows:-

(i) That the Plaintiff should finalise the pre-trial procedures, including Discovery of documents, within the next 30 days.

(ii) That the Plaintiff is to take steps to have the suit set down for hearing within the next 90 days.

(iii) The costs of this application dated 5th November 2003 are awarded to the Defendant in any event.

(iv) That should the Plaintiff not comply with Orders (i) or (ii) above, within the period stipulated, the suit herein will stand dismissed with costs.

Dated at Nairobi this 16th day of March 2004.

**FRED A. OCHIENG**

**Ag. JUDGE**

Head Note

1. Dismissal for want of prosecution
2. Order XVI rule 5 of Civil Procedure Rules