

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 109 OF 2009

STEEL STRUCTURES LIMITED.....PLAINTIFF

V E R S U S

NATION MEDIA GROUP LIMITED.....DEFENDANT

R U L I N G

1. This is an application by the Defendant (**notice of motion dated 23rd January, 2014**) for dismissal of the Plaintiff's suit for want of prosecution. It is brought under **Order 17, rule 2** of the **Civil Procedure Rules, 2010** (the **Rules**). Under that rule, in any suit in which no application has been made or step taken by either party for one year, the defendant may apply for the case to be dismissed.

2. The Defendant's case is that there has been delay in prosecuting the case of two (2) years, the case having been last set down for hearing on 7th December, 2011. The present application was filed on 23rd January, 2014.

3. The Plaintiff has opposed the application by **grounds of opposition dated 7th April, 2014** and **replying affidavit filed on 15th April, 2014** sworn by its advocate. The main ground of opposition is that the application has no merit at all, particularly because the Defendant itself has not complied with pre-trial requirements under **Order 11** of the Rules. It is also deponed that the Plaintiff is truly desirous of prosecuting the suit.

4. I have considered the submissions of the learned counsels appearing. No authorities were cited. I have also perused the record of the Court.

5. I note that on 7th March, 2011 the Plaintiff fixed the case for hearing for 7th December, 2011. Apparently the case was not listed for hearing that day.

6. The record also discloses that on 4th June, 2010 the Plaintiff complied with the requirements of Order 11 aforesaid. The Defendant has not. By a letter dated 22nd January, 2013 (a copy of which was received by the Court on 7th February, 2013) the Plaintiff's advocates invited the Defendant's advocates to meet with them at the Civil Registry on 7th February, 2013 with a view to taking a mutually convenient hearing date. There is no record that the meeting at the registry took place. So, delay can only be reckoned from the date of the letter, 22nd January, 2013. The delay is therefore a year, the present application having been filed on 23rd January, 2014.

7. There is really no explanation by the Plaintiff for that one year delay. Nevertheless, I am satisfied that a fair trial of the action will still be possible. There will be no prejudice to the Defendant that cannot be assuaged by an award for costs. The Plaintiff cannot complain too loudly that the Defendant has not complied with pre-trial requirements. It is the Plaintiff's business to get on with his suit, and there are remedies available to a plaintiff where the only hindrance to trial is the defendant's non-compliance with Order 11 of the Rules.

8. In the event, I will refuse the application for dismissal for want of prosecution. But I will award

costs of the application assessed at Kshs, 10,000/00, to the Defendant. The same are payable within 30 days of delivery of this ruling. In default of payment the Defendant may execute for the same. At delivery of this ruling the Court shall give a date for pre-trial direction. Those will be the orders of the Court.

DATED AND SIGNED AT NAIROBI THIS 10th DAY OF JULY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 11TH DAY OF JULY 2014