



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 1995 OF 2001**

**MOSES MBUGUA MWANGI ..... APPLICANT**

**VERSUS**

**BRITISH AMERICAN TOBACCO LTD.....RESPONDENT**

**RULING**

By an application – notice of motion dated 28<sup>th</sup> March, 2013, the applicant/defendant seeks from this Court orders for dismissal of the plaintiff/respondent’s suit for want of prosecution. The same is brought under Order 17 rule 2 (3) and Order 51 Rule 1 of the Civil Procedure Rules Sections 1A, 1B and 3A of the Civil Procedure Act. It is supported by an affidavit sworn by Rowlands Nadida on 2<sup>nd</sup> March, 2012.

When the application came up for hearing on 18<sup>th</sup> September 2014, there was no appearance on behalf of the plaintiff/respondent although there was evidence by way of affidavit of service filed in Court on 16<sup>th</sup> July 2014 that the advocates for the plaintiff were served on 8<sup>th</sup> July 2014 for the hearing of the application on 18<sup>th</sup> September 2014.

I therefore granted the defendant/applicant leave to proceed and submit on their application abovementioned.

According to Mr Njeru advocate for the defendant/applicant, the suit herein has not been activated since 2010 and it is now 4 years. In his view, the plaintiff is not diligent and or interested in the cause of action. The continued pendance of the suit in Court, he argued had created an injustice to the defendant as they may not procure the attendance of their witnesses to support their defence which denies the plaintiff’s claim against the defendant. He submitted that the cause of action arose more than 19 years ago – to be specific, in 1997 and that it was in the interest of justice that the matter be dismissed. He relied heavily on the grounds on the face of the application and the supporting affidavit by Rowlands Nadida.

I have carefully perused the record herein, the pleadings, application, affidavit and considered the submissions by counsel for the defendant/applicant. The plaint dated 19<sup>th</sup> September 2001 was filed on 20<sup>th</sup> November, 2001 by the plaintiff Moses Mbugua Mwangi against the defendant British American Tobacco (K) Ltd. It is a claim for special damages, general damages, costs of the suit and interest at Court rates. The same was filed by the firm of R.N. Sitati & Co Advocates.

The defence was filed on 17<sup>th</sup> January 2002 denying the plaintiff’s claim. The same was amended in

2005. Later in December 2009 - the plaintiff's counsel sought to have the plaintiff substituted by Isaac Gicha Mbugua his legal representative after the demise of the original plaintiff to the suit on 14<sup>th</sup> December 2008.

By a letter dated 14<sup>th</sup> December 2013, the defendant's counsel wrote to the Deputy Registrar of the High Court asking for the file to be availed to enable them file an application dismissing the suit for want of prosecution.

On 27<sup>th</sup> March 2013, they did file such an application which is dated 2<sup>nd</sup> March 2012. The said application was served upon the firm of B. Mbai & Associates for the plaintiff, for hearing on 30<sup>th</sup> July 2013.

The fate of the above application is unknown. However, on 28<sup>th</sup> March 2013 another application dated 28<sup>th</sup> March 2013 was lodged in Court, seeking for dismissal of the plaintiff's suit for want of prosecution. This is the application which came before me for hearing on 18<sup>th</sup> September 2014.

The record further shows that on 22<sup>nd</sup> January 2002, the plaintiff attempted to obtain interlocutory judgment against the defendant but the same was not endorsed by the Deputy Registrar as required. The matter came up for hearing on 19<sup>th</sup> May 2003 but was adjourned by consent.

Subsequently, parties fixed hearing dates by consent including 5<sup>th</sup> June 2003, 9<sup>th</sup> June 2004. On 1<sup>st</sup> December 2004 parties appeared and recorded a consent which granted the defendant leave to file and serve its amended defence within 14 days.

The defence was filed on 17<sup>th</sup> January 2008 denying the plaintiff's claim. The plaintiff filed list of authorities in 2003 and in 2004, the defendant sought leave to amend the defence. The plaintiff was at liberty to file and serve his reply to amended defence within 14 days of service.

On 3<sup>rd</sup> December 2004, the amended defence was filed followed by a reply to amended defence on 17<sup>th</sup> December 2004.

On 24<sup>th</sup> January 2005 parties fixed a hearing date by consent and this was replicated on 4<sup>th</sup> August 2005, 14<sup>th</sup> August 2007 and 10<sup>th</sup> April 2008.

On 4<sup>th</sup> November 2008, the matter was due for hearing but the plaintiff was not ready. It was reported that he had travelled to India for a heart operation and his advocate only learnt of the development the day before the hearing. On 25<sup>th</sup> November 2008, the defendant fixed a hearing date for 27<sup>th</sup> – 28<sup>th</sup> April 2009.

On 14<sup>th</sup> December 2009, the plaintiff's advocates fixed a hearing date for an application dated 11<sup>th</sup> December 2009 on 3<sup>rd</sup> March 2010 to substitute the plaintiff who is said to have died on 14<sup>th</sup> December 2008. The application for substitution was allowed on 3<sup>rd</sup> March 2010 by **Hon. Justice Mwera**. Since then, there is no evidence that the new plaintiff who was substituted in the place of the deceased has shown any interest in the matter. No steps have been taken on their part to prosecute the suit which had been active during the lifetime of the deceased who appeared quite ill and succumbed to a heart operation in 2008 December.

When the defendant's application dated 2<sup>nd</sup> March 2013 came up for hearing on 30<sup>th</sup> July 2013, Mr Wambua appearing for the plaintiff informed the Court that they had called the plaintiff who had not responded. They had even sent someone to their home to get their telephone contacts but there was no response. He prayed for an adjournment and leave to file a replying affidavit within 14 days.

The Court granted an adjournment on the notice of motion dated 2<sup>nd</sup> March 2012 and fixed the same for

hearing on 16<sup>th</sup> December 2013. Leave to file replying affidavit was granted and the plaintiff was to file the same within 14 days from 30<sup>th</sup> July 2013.

To date, no replying affidavit has been filed. The defendant took this date 18<sup>th</sup> September 2014 for the hearing of notice of motion dated 28<sup>th</sup> March 2013 on 11<sup>th</sup> March 2014.

There is no indication as to why the application dated 2<sup>nd</sup> March 2012 has been silently abandoned this time round. There is also no reason why the said application could not be fixed for hearing, and why the defendants filed another application dated 28<sup>th</sup> March 2013 which seeks the same prayers as the one dated 2<sup>nd</sup> March 2012.

As both applications seek to determine the same cause and have the effect of determining this suit finally and fully, I am inclined, on my own motion pursuant to Section 1B 3, 3A of the Civil Procedure Act to consolidate the two applications and deem the submissions made by counsel for the defendant/applicant in respect of the application dated 28<sup>th</sup> March 2013 applicable to the notice of motion dated 2<sup>nd</sup> March 2013.

From the above analysis, it is clear that the plaintiff herein last moved the court on 30<sup>th</sup> July 2010 for substitution of parties. The substitute, in my considered view, has no interest in the subject matter of this suit. His advocate as recorded on 30<sup>th</sup> July 2013 had gone to great lengths to seek to trace him personally at his home but no response has been forthcoming.

The advocate appears to have done what they could in the circumstances, and cannot be faulted for not doing anything for the plaintiff.

The defendant's application is not opposed.

Under Order 17 rule 2 of the Civil Procedure Rules, the Court ought to have given notice in writing to the parties to show cause why the suit should not be dismissed and if no cause is shown to the satisfaction of the Court, it may dismiss the suit.

Be as it may, the order does not mandate the Court. Rule (2) says "*may*" not "*shall*" therefore the Court did not abdicate its duty at all. The defendant has exercised their right under Order 17 Rule 2(3) and sought dismissal of the suit herein for want of prosecution as there has been no action taken by the plaintiff since 30<sup>th</sup> July 2010.

In deciding whether or not to dismiss the plaintiff's suit herein for want of prosecution, I am fortified by some persuasive decisions previously made by this Court. In **Meelin Design Services – Vs – Nairobi City Council NRB HCC 1118/01**, the Court held that there has to be an end to litigation and that the delay in prosecuting a suit defeats equity.

In **NRB HCC 300/2002 Simon Wayiti Kimani – Vs – James Kimari Kimani & 2 Others**, the Court held that:

***"If the Court were to exercise its discretion in favour of the plaintiff, it would be offending the principle of equity which does not aid the indolent but aids the vigilant."***

In the instant case, as the plaintiff has not demonstrated any interest or diligence in setting down his case for hearing and determination. I find that he has been indolent. The failure to take steps to have the case heard on merits is not explained and therefore inexcusable in the circumstances. This, in my view, is conduct that defeats equity.

It is the duty of the plaintiff to bring his case to an early trial and he cannot absolve himself on this duty. It matters not that the defendant being a party to the suit did nothing to have the case heard as they had no

counter-claim against the plaintiff.

I therefore do not think that in the circumstances the plaintiff who for whatever reason delays the trial of his own suit can expect any sympathy from the Court.

I find it unjust to allow litigation to hang over the defendant's head for an indefinite period as it is not clear when the plaintiff as substituted will wake up and have an interest in this suit. It is for these reasons that I believe the Order 17 Civil Procedure Rules was crafted and the Court empowered to dismiss a suit where no action is taken in a matter for a period of more than one year.

The suit herein meets the test set in Order 17 rules 1, 2 & 3 of the Civil Procedure Rules as no explanation has been offered why the suit should not be dismissed for want of prosecution.

Accordingly, I order the suit herein filed against the defendant on 20<sup>th</sup> November 2001 be and is hereby dismissed for want of prosecution.

Each party to bear their own costs.

**Dated, signed and delivered at Nairobi this 19<sup>th</sup> Day of September, 2014.**

**R.E. ABURILI**

**JUDGE**