



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 533 of 2006**

**GENETICS TECHNOLOGIES INTL LTD ..... PLAINTIFF**

**VERSUS**

**PYRETHRUM BOAD OF KENYA ..... DEFENDANT**

**R U L I N G**

1. Before this Court is the Defendant's Notice of Motion dated 22 November 2012 which seeks an order to dismiss this suit for want of prosecution under the provisions of **Order 17 Rule 2 (1) (3)** and **Order 52** of the *Civil Procedure Rules*. The application is premised on the ground that the Plaintiff has failed, refused and/or neglected to set this suit down for hearing and it is now over a year since the matter was before Court. The Application is supported by the Affidavit of **Dr. Isaac Juma Wambulwa Mulago** who deponed to the fact that he was the Managing Director of the Defendant and that it was apparent that the Plaintiff had lost interest in its case whose continued pendency before this Court prejudiced the Defendant. The deponent noted that the Defendant had made a similar application to strike out the suit for want of prosecution in which he said that the Court had exercised its discretion and saved the Plaintiff but had been pleased to award the costs of the same to the Defendant. Dr. Mulago noted that on the occasions when the suit came for hearing, the Plaintiff had persistently applied for an adjournment the latest being on 2 July 2011 when the Plaintiff was condemned in costs in the amount of Shs. 10,000/-. He further noted that on 6 October 2011, the Plaintiff's advocates on record had applied to formally withdraw from acting on behalf on the Plaintiff, which application was allowed on 18 November 2011. Since the withdrawal of the said advocates from acting, it had been over one year and no effort had been made or action taken by the Plaintiff to set this suit down for hearing.

2. The Plaintiff responded to the Defendant's application by way of a Replying Affidavit sworn by its director one **Suryakantbhai Bhailalbhair Patel** on 23 January 2013. The deponent commenced his affidavit by saying that the Plaintiff was keen and had never lost interest in pursuing its claim against the Defendant. He noted that the claim was for the substantial amount of Shs. 80,992,000/- and if the suit was struck out, the Plaintiff would suffer a grave and substantial prejudice. He maintained that the delay in prosecuting the matter had been occasioned by factors beyond the control of the Plaintiff. Such factors included in the death of the Plaintiff's key witness Mr. Gerald Kingori who died on 30 April 2011. The deponent also stated that he had suffered ill-health and had been for treatment abroad for the most part of 2011. He went on to say that he had never been informed of the withdrawal of the Plaintiff's previous advocate from acting until 16 December 2012 when he had been personally served with the Defendant's current application. Although he regretted the delay, it had not been inordinate and in his opinion, was excusable. The Plaintiff sought the indulgence both of this Court and of the Defendant. He maintained that the Defendant would suffer no prejudice if its application was disallowed and, in any case, the balance tilted in favour of allowing the Plaintiff to proceed and prosecute its case. In this connection, the Plaintiff was willing to pay the Defendant's costs of this application.

3. In his submissions before court, Mr. Ouma for the Defendant detail that the amounts involved in the Amended Plaintiff was about Shs. 27 million and further, a claim for Shs. 53.6 million for special damages. The Application before court sought to throw out this suit of such magnitude. Counsel detailed that the Defendant is obliged to make an annual report on its financial activities year upon year. A suit of this magnitude must necessarily be detailed in the Defendant's Annual Report and such was very damaging to the Defendant. He noted that this was the third occasion that the Defendant had made an application to have this suit dismissed. He noted that the Plaintiff's former advocate had been allowed to withdraw from acting for the Plaintiff on 18 November 2011 and that was the last movement on the Court file. The Plaintiff was obviously disinterested in pursuing its suit. Counsel also noted that when the suit was listed for hearing, the Plaintiff had not procured the attendance of a single witness and he asked the Court to check its record on this point. Mr. Ouma also observed that he had been served with the Replying Affidavit only the day before the appearance before Court to prosecute the current Application. He invited the Court to review the mandatory terms of **Order 51 rule 14 (2)**, *Civil Procedure Rules, 2010* as to what the Plaintiff/ Respondent had done as regards the service of its response to the application. According to the Affidavit of Service, the hearing notice for the application was served on the Plaintiff on 31 December 2012. The Plaintiff had only responded thereto on 28 January 2013. This was an indicator of the lethargy of the Plaintiff in prosecuting this matter. In counsel's opinion the Replying Affidavit itself demonstrated the lethargy in which the Plaintiff has approached the whole matter of this suit. He noted that the Plaintiff's key witness had passed on and wondered that if this meant that the Plaintiff had no witness to come before Court to prove its case? He asked that this Court should bring this suit to an end in order that the yoke hanging over the Defendant's head could be finally removed.

4. In response, Mr. Kabugu for the Plaintiff relied upon the Replying Affidavit of Mr. Patel sworn on 25<sup>th</sup> of January 2013. He noted that the supporting Affidavit to the application and detailed that it was over a year since there had been any activity on the Court file. In truth, the application had been filed prematurely on 24 November 2012 less than one year from which there had been activity on the file. On 24 November 2011, an Order as issued by the court had been extracted and signed by the Deputy Registrar. Secondly, the Plaintiff conceded that there was a delay in prosecuting this matter for a little less than a year but it was for the good and excusable reason occasioned by factors beyond the Plaintiff's control. One good reason was the death of the Plaintiff's key witness. There had also been a problem with the Plaintiff's previous advocate who withdrew from acting for the Plaintiff without the Plaintiff's knowledge. He submitted that the Plaintiff had no way of knowing that it was unrepresented until it was served with the current application. Counsel maintained that it could not be said that there was any delay from the time of the service of the application and his firm coming on record as representing the Plaintiff. Counsel went on to say that the Plaintiff had not placed its witness statements on file before today but it would do so within the next few days. The dismissal of this case for such a material amount of money would seriously prejudice the Plaintiff. On the other hand, the Defendant stood to suffer no loss other than the costs of the application. Counsel assured the Court that the Plaintiff would abide by any condition given to the Plaintiff towards the prosecution of its suit.

5. In a brief reply, Mr. Ouma stated that in actual fact the last step taken on the Court file was on 18 November 2011. The administrative action of extracting an Order could not be considered as a step taken and could not be utilised for computation of time. The previous advocate for the Plaintiff could have chosen to extract the said Order at any time. Counsel concluded in urging the Court to carefully look at the interests of both parties.

6. I have had an opportunity of perusing the Court's record as well as the Ruling of my learned sister Koome J. (as she then was) delivered on 4 December 2009 in relation to the last application made by the Defendant to have the Plaintiff's suit dismissed for want of prosecution. I have noted that on 2 June 2011, the parties appeared before Apondi J. when the hearing of the suit was adjourned to 6 October 2011 with the Plaintiff being ordered to pay the Defendant's costs assessed at Shs. 10,000/-. That was the occasion in which the Court was informed of the death of the Plaintiff's key witness on 30 April 2011. On 6 October 2011, when the suit again came for hearing Judge Musinga (as he then was) noted that the advocate for the Plaintiff at the time, Mrs. Ondieki had been compelled to make an application to withdraw from acting and ordered that such application should be filed within 21 days. Indeed, the application to withdraw from acting was filed according to the Court's notes on 27 October 2011 and it

came for hearing before my learned brother Mabeya J. on 18th November 2011. On that day, Mabeya J. allowed the application as prayed and directed the firm of Jane Ondieki & Co to extract the Order and effect service thereof upon the Plaintiff as well as file a suitable Affidavit of service in respect thereof. It is to be noted that before he made his Order, counsel had detailed that the application had been served upon the Plaintiff. Certainly, there is on file, an Affidavit of Service sworn by George Mabonga Misiko detailing that service of the Application to withdraw was effected on the 28 October 2011 by personal service on the Managing Director of the Plaintiff company one Mr. Suresh Patel. Having searched through the Court file, I am unable to find any Affidavit of Service complying with the Order made by Mabeya J on 18 November 2011 that the Plaintiff should be served with the Order allowing the withdrawal of the advocate's firm from acting, although there is a certified copy of that Order on file.

7. As above, I have also looked at the Ruling of Lady Justice Koome dated 4 December 2009. The concluding paragraph thereof is worth repetition here:

**“As it was set out in the Court of Appeal Case of DT Dobbie & Co. Ltd. versus Muchina 1982 KLR as per Madan JA.**

**“The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injuncted with life by amendment, it should not be struck out”.**

**Taking the totality of the matters raised in this application, it is in the interest of justice that the Plaintiff's case be sustained on condition that the Plaintiff will pay the Defendant costs of this application assessed at Kshs.15,000/= within two (2) weeks and also fix this matter for hearing within six (6) months, failure to comply with the above condition the plaintiff's suit will stand dismissed for want of prosecution”.**

From the Court record, the Plaintiff reacted more or less immediately to the final direction of the learned Judge as this matter was then fixed for hearing at the Registry on 12 January 2010.

8. The Application for the firm of Jane Ondieki & Co., Advocates to seek acting for the Plaintiff herein was filed on 27 October 2011 as confirmed by Mabeya J. on 28 October 2011, when that matter was before his court. The current Application before court was filed not on 24 November 2012 as counsel for the Plaintiff indicated in his submissions but on 23 November 2012. That was more than a year from the date of the filing of the Ondieki application. Since the said Ruling of Koome J. delivered on 4 December 2009, the Civil Procedure Rules, 2010 have come into force. **Order 17 rule 2** reads as follows:

**“17. 2. (1) In any suit in which no application**

**has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**

**(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**

**(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

**(4) The court may dismiss the suit for non-compliance with any direction given under this Order.**

Unfortunately for the Plaintiff, it has fallen foul of this rule in that it is more than a year since there was an application filed on the Court file. The Plaintiff consequently needs to show to this Court's satisfaction as to why the suit should not be dismissed. In my view, it has not succeeded in so doing in my consideration of the contents of the Replying Affidavit. Its key witness died nearly 2 years ago. The Court was so notified as long ago as 2 June 2011. Further, although the firm of Jane Ondieki & Co., Advocates may have failed to serve the Order of this Court made by Mabeya J. on 18 November 2011, it did serve

the Plaintiff's Managing Director with notice that the Application was to be heard on that day. The Plaintiff never appeared on the 18 November 2011 and indeed did nothing further in relation to this matter until it was served with the current application to strike out for want of prosecution on 18 December 2012. To my mind, such delay is inordinate and the inaction to prosecute this suit by the Plaintiff is unforgivable. From the court record, the Plaintiff has already been given 2 chances to prosecute the suit but has failed to get on with it. Accordingly, I uphold the Defendant's Notice of Motion dated 22 November 2012 and order that this suit be dismissed for want of prosecution with costs to the Defendant.

**DATED and delivered at Nairobi this 23<sup>rd</sup> day of April 2013.**

**J. B. HAVELOCK  
JUDGE**