

REPUBLIC OF KENYA

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

Civil Appeal Case 776 of 2000

GIDEON MOI..... PLAINTIFF

VERSUS

BRITISH AMERICAN TOBACCO..... RESPONDENT

R U L I N G

The Notice of Motion herein, dated 12/1/06, under Order 16 rule 5(d) of the Civil Procedure Rules, seeks dismissal of the suit for want of prosecution; then costs.

Supported by an Affidavit by Ruth Ngobi, filed on 13/4/06, but dated 13/4/06, the application is on the grounds that the suit which was filed on 22/9/99, and was last in court on 19/12/03, has not been prosecuted for over 3 years.

In opposition, the Plaintiff/Respondent avers that his relationship with his lawyers broke down in 2002, after the last general Elections, and since then, the then lawyers failed to keep the Respondent informed of what was happening. As a matter of fact, the previous Advocates refused to release the file to the Respondent – who did not know what was happening until 8/2/06 when he received a letter from the then Advocates informing him that they had ceased to act for him; and this was after this application for dismissal of the suit had been filed. Accordingly, the Respondent avers that he was blameless, and that the delay is explained.

After careful perusal of the pleadings herein, and consideration of the submissions by learned counsel for both sides, and reading of the authorities cited and relied up, especially by counsel for the Respondent, I have reached the following findings and conclusions.

Dismissal of a suit is a drastic action that should not be resorted to lightly. As held in SAGOO V. BHARIJ Civil Suit No. 657 of 1989 [1990] KLR, 459.

“It is not the practice of the courts to exercise the drastic power of dismissing a suit unless satisfied that there has been intentional, inordinate, or inexcusable delay on the part of the Plaintiff and that there is a risk that the delay would inhibit a fair trial or that would cause prejudice to the defendant.”

My perusal of the evidence before me does not in any way show that there was any intention on the part of the Respondent to delay prosecuting the suit herein. The evidence is that the Plaintiff/Respondent was not aware of what was happening about the case, which he had given to the lawyers, until he received the letter stating that the lawyers had ceased representing him. That was after this application for dismissal of the suit had been filed.

To dismiss the suit for want of prosecution, under the circumstances, would not only be victimizing the Respondent for the mistakes of his Advocates but also an unconscionable exercise of this court’s direction. The delay is explained to the satisfaction of this court.

Accordingly, I rule as under:

1. Dismiss the Notice of Motion herein, dated 12/1/06, with no order as to costs.

2. Order that the Plaintiff do move, with speed and fix the hearing of the suit herein, and at any rate within the next one month from today's date, failing which the suit shall stand dismissed for want of prosecution.

DATED and delivered in Nairobi this 27th day of March, 2007.

O.K. MUTUNGI

JUDGE