

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

Civil Case 725 of 2002

WILLIAM BOMANI.....PLAINTIFF

VERSUS

ECOLAB EAST AFRICA (KENYA LTD).....DEFENDANT

RULING

Before me is a Notice of Motion dated 9th October 2006 and expressed to be brought under Order XVI Rule 5 of Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks orders that the Plaintiff's suit be dismissed for want of prosecution.

The application is based on the ground that the matter was last in court on 13th March 2006 for hearing when the same was not listed and that the Plaintiff has refused/or otherwise failed to take any steps to prosecute the said suit for a period of over 6 months since the matter was in court last and the Defendant continues to suffer unnecessary anxiety and uncertainty due to the delay in the prosecution of the suit and it should be dismissed with costs. The application is also supported by an affidavit sworn by counsel for the Defendant.

The Plaintiff when served with the Notice of Motion filed replying affidavit but though he was served with the hearing notice, he did not show up.

From the court record it is a clear testimony that this suit has been active. The same was set down for hearing on the following dates – on 3rd May 2003, 21st November 2003. On 23rd March 2004 the suit came up for hearing. It could not be reached as the judge who was seized with it had a constitutional panel that day. On 8th March 2005 Mr. Nyachoti counsel for the Defendant applied for an adjournment which was not opposed by Mr. Wanyama who appeared for the Plaintiff and the same was granted. Other dates were taken on 25th August 2005, 4th October 2006 and 19th January 2007.

This application is anchored on Order XVI Rule 5 which provides for dismissal of suit for want of prosecution. The Act to dismiss a suit for want of prosecution is draconian and should only be resorted to in undeserving cases only.

As was stated in Halsburys Laws of England 4th Ed. Vol. 37 par.

448:

“The power to dismiss an action for want of prosecution without giving the Plaintiff the opportunity to remedy his fault will not be exercised unless the court is satisfied that the default has been intentional and contumelious or that there has been prolonged or inordinate delay on the part of the Plaintiff or his lawyer and such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party.”

As I have stated earlier, this suit has been kept alive and does not attract dismissal for want of prosecution. Furthermore it cannot be said that it is a very old case.

The Defendant's Notice of Motion dated 9th October 2006 and filed on 11th October 2006 is dismissed with no order as to costs.

Dated and delivered at Nairobi this 7th May 2007.

J.L.A. OSIEMO

JUDGE