

REPUBLIC OF KENYA

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

Civil Case 543 of 2005

JEREMIAH ITHALI M'NGAI (T/A MERU TRADERS).....PLAINTIFF

V E R S U S

ALS LIMITEDDEFENDANT

R U L I N G

This is an application (by notice of motion dated 28th March, 2007) by the Defendant under Order 16, rule 5(a) and (c) of the Civil Procedure Rules (the Rules) for dismissal of the Plaintiff's suit for want of prosecution. Under those rules, if within three months after the close of pleadings or the removal of the suit from the hearing list the plaintiff or the court on its own motion on notice to the parties does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal. There is a supporting affidavit sworn by the Defendant's learned advocate, EMMANUEL SIMIYU WETANG'ULA. It is deponed therein that the last pleading herein was the reply to defence dated and filed on 16th June, 2005 which was served on 30th June, 2005. On 26th September, 2005 the suit was removed from the hearing list of 26th September, 2005 when it was coming up for hearing of the Plaintiff's application dated 17th June, 2005.

The Plaintiff has opposed the application as set out in his replying affidavit filed on 16th April, 2007. He blames his former advocates, **M/s Akolo & Co.**, for the delay in prosecuting the suit. He has since appointed another firm of advocates to act for him.

At the hearing of the application learned counsel for the Defendant abandoned the application as brought under paragraph (c) of rule 5 aforesaid.

I have considered the submissions of the learned counsels, including the one case cited. It is not disputed that pleadings in this suit closed on 15th July, 2005, the reply to defence filed on 16th having been served on 30th June, 2005 (Order 6, rule 11). The present application was filed on 28th March, 2007; there has thus been a delay of about one year and eight months in setting the suit down for hearing. The Plaintiff has admitted this delay. In the circumstances of this case this delay is inordinate.

The only issue to be decided is whether there is any reasonable explanation by the Plaintiff for this delay, and whether the court should exercise its discretion to dismiss the suit for want of prosecution. The Plaintiff has blamed his former advocates for the delay. When it was apparent to him that the said advocates were not doing anything towards having the suit heard he filed notice to act in person. Subsequently he appointed another firm of advocates to act for him in the matter. But he did all this after the application at hand had been filed and served.

There does not seem to be any doubt at all that the Plaintiff's previous advocates are to blame for the delay in prosecuting this suit. It is not unreasonable for a litigant to depend on his advocates to move the case forward. The Plaintiff herein was let down by his former advocates. It is true that the Plaintiff would have a remedy in professional negligence against his former advocates should the suit be dismissed. But I do not think that justice would be best served should matters take that course. Dismissal of a suit unheard is a drastic thing to do. The court will very reluctantly make such an order; its inclination should always be to preserve a suit for disposal on merit. This is especially so where, as here, the Defendant has not demonstrated that due to the delay it will no longer be possible to have a fair trial

of the action, or that the Defendant would suffer thereby some serious prejudice in relation to hearing of the suit.

Having considered all matters placed before the court, I will refuse the application; it is hereby dismissed. However, the Defendant shall have the costs of the application, hereby assessed at KShs. 15,000/00. The same shall be paid within twenty-one (21) days of delivery of this ruling. In default the Defendant may execute for the same. Those shall be the orders of the court.

DATED AT NAIROBI THIS 4TH DAY OF DECEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 7th DAY OF DECEMBER, 2007