

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Civil Case 389 of 2003

BRITANA OILS LTD.....PLAINTIFF

VERSUS

B. P. KENYA LTD.....DEFENDANT

R U L I N G

Delay in the preparation and delivery of this ruling has been occasioned by my recent illness and hospitalization. The delay is regretted.

This is an application by the Defendant (by notice of motion dated 21st February, 2005) under Order 16, rule 5(a) of the Civil Procedure Rules (hereinafter called the “Rules”) for dismissal of the Plaintiff’s suit for want of prosecution. Under that rule, if within three

(3) months after the close of pleadings the Plaintiff, or the court of 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 advocate, MR. DAVID MAJANJA. In it the history of the matter is set out. That history is as follows. The suit was filed on 1st July, 2003. Together with the plaint was filed an application under certificate of urgency for temporary injunction. That application was heard inter parties on 21st July, 2003. It was dismissed with costs on 8th October, 2003. It is the view of the Defendant that since that dismissal the Plaintiff lost interest in the suit and therefore has not bothered to prosecute it.

The Plaintiff has opposed the application upon the grounds set out in the replying affidavit sworn by its advocate on 17th March, 2005, MR. LAZARUS MAX OGEMBO ODONGO, and filed on 21st March, 2005. In that replying affidavit reasons are given for the delay in prosecuting the suit.

Upon being served with this present application the Plaintiff’s advocates invited the Defendant’s advocates to take a date for hearing of the suit. A hearing date was taken *ex parte* by the Plaintiff for 24th November, 2005. The matter was not listed for hearing, though, as the file was with me for writing of this ruling.

At the hearing of this application there was no appearance for the Plaintiff. Its advocates had been duly served with hearing notice. The Defendant therefore proceeded *ex parte*. I have considered the submissions of its learned counsel. I have also considered all the matters set out in the supporting and the replying affidavits. The only primary pleadings filed herein are the plaint and the defence. The defence was served upon the Plaintiff on 13th October, 2003. Therefore pleadings closed on or about the 27th October, 2003; that is 14 days after service of the defence. See Order 6, rule 11 of the Rules. The Plaintiff did not set the suit down for hearing between that date and 3rd March, 2005 when the present application was filed, a period of over one year and four months. What is the explanation given for this inaction? It is to be found in paragraphs 2, 3 and 4 of the replying affidavit. That explanation is that the firm of advocates representing the Plaintiff, ROBSON HARRIS & COMPANY, underwent a transformation with the old partner and his associates leaving the firm in the month of December, 2003. It is explained further that the current partner together with new associates continued practicing in the name and style of Robson Harris & Company, Advocates, but that the matters formerly handled by the old Robson Harris & Company were not transferred to the new Robson Harris & Company. Consequently, the Plaintiff instructed the new firm after service of the present application. I have no reason to doubt that the firm of Robson Harris & Company, Advocates was reconstituted as stated, or that

the new firm did not automatically continue with the matters handled by the old firm. I will therefore accept the explanation given for failure to set the suit down for hearing. I also note that upon being served with the present application the Plaintiff took action by setting down the suit for hearing. This must be considered in its favour, notwithstanding that there was no appearance for it at the hearing of the application. Shutting out a litigant from court should be the last inclination of a court of justice. Parties should be accorded all due opportunity to be heard and their matters determined on merit, unless there are very good grounds to deny them this right.

In the circumstances therefore, I will refuse the application. It is hereby dismissed; but not without a penalty to the Plaintiff. The Plaintiff shall pay to the Defendant the costs of this application, hereby assessed at KShs.15,000/00, within thirty (30) days of delivery of this ruling. In default the Defendant may execute for the same without having to wait for conclusion of the suit. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 27TH DAY OF JANUARY, 2006.