



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 2342 of 1998

ANTHONY G. MUNENE.....PLAINTIFF

VERSUS

BRITISH AMERICAN TOBACCO (K) LTD.....RESPONDENT

RULING

This Notice of Motion, under Order 16 rule 5 of Civil Procedure Rules seeks:

- 1. Dismissal with costs of the suit herein for want of prosecution.**
- 2. Costs of this application to the 2nd Defendant.**

The application, dated 24/2/05 is supported by an affidavit by Alison Kariuki, and on the grounds that the Plaintiff has for a period exceeding 3 years failed to set down the suit for hearing.

In opposition, the Plaintiff/Respondent avers that it is not true that the suit has not been set down for hearing for a period of 3 years, and that the Respondent intends to transfer the suit to Milimani commercial Courts which has the inherent jurisdiction of disposing this matter.

Upon perusal of the pleadings herein, and consideration of the submissions by Ms Waitende and Mr. Adera, learned counsels for the 2nd Defendant/Applicant, and the Plaintiff/Respondent respectively, it is common ground that 1998 is a very long time for a Plaintiff not to have set down the case for formal hearing; unless there is a compelling reason explaining of the delay.

From the records, the Plaint is dated 30/9/1998 and filed on 23/10/1998. The 2nd Defendant's amended Defence, dated 14/12/1998, was filed on 24/1/00. Accordingly, pleadings closed around the 8/2/00.

From the closure of the pleadings, it is the duty of the Plaintiff to take steps to set down the suit for hearing expeditiously. However, despite the matter being fixed for hearing on 28/3/01, it was stood over generally. The next thing that happened with respect to the suit herein happened on 8/4/03 when the Deputy Registrar wrote to the Plaintiff's advocate that the court file was in the Registry. No explanation is on the record as to what was happening between 28/3/01 to 8/4/03.

It is the Plaintiff's contention that the delay was attributable to non-availability of the court file. That explanation is not supported by any evidence on record. But assuming it is, which it is not, no steps have been taken since the plaintiff was advised of the availability of the court file on 8/4/03.

The Plaintiff, in response to this application, avers that it intends to apply for the suit to be transferred to Milimani Commercial Courts. Unfortunately, as at the time of the hearing of this application for dismissal, such intentions exist only in the mind of the Plaintiff. There is not evidence of any step or measure towards that direction of transfer of the case to Milimani. This leaves me with no option but to conclude that that is just another delaying tactic and an excuse for the suit not to be dismissed.

All in all, no reason, good or otherwise, has been given to warrant continued existence in the judicial shelves of a suit whose plaintiff has shown no interest in its prosecution.

Counsel for the Plaintiff submitted that dismissal of the suit would prejudice the Plaintiff's claim for K.Shs.925,005/85. Such submission totally ignores the mental torture and stress a Defendant goes through when the Plaintiff does not prosecute his/its case speedily and without any reason for such delay. Courts have unfortunately not come up with any monetary assessment of such mental torture, and the sooner such claim is refined the sooner the issue of delays in prosecution of suits will take its proper perspective.

All in all, therefore, the application herein succeeds and I grant the following orders:

- 1. Dismiss, with costs, the suit herein for want of prosecution, in terms of the provisions of Order 16 rule 5 of the Civil Procedure Rules.**
- 2. Order that the Plaintiff do pay costs for both this application and the suit herein.**

DATED and delivered in Nairobi, this 14th Day of June, 2005.

O.K. MUTUNGI

JUDGE