



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL SUIT 50 OF 2005**

**VOLUNTEERS FOR LEGAL AND SERVICES (VOLASE).....PLAINTIFF**

**V E R S U S**

**EAST AFRICA BREWERIES LIMITED.....1<sup>ST</sup> DEFENDANT**

**BRITISH AMERICAN TOBACCO LIMITED.....2<sup>ND</sup> DEFENDANT**

**MASTERMIND TOBACCO (KENYA) LIMITED.....3<sup>RD</sup> DEFENDANT**

**KENYA BROADCASTING CORPORATION LIMITED.....4<sup>TH</sup> DEFENDANT**

**NATION MEDIA GROUP LIMITED.....5<sup>TH</sup> DEFENDANT**

**THE STANDARD GROUP LIMITED.....6<sup>TH</sup> DEFENDANT**

**ROYAL MEDIA LIMITED.....7<sup>TH</sup> DEFENDANT**

**REGIONAL REACH LIMITED.....8<sup>TH</sup> DEFENDANT**

**RADIO AFRICA LIMITED.....9<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL OF KENYA.....10<sup>TH</sup> DEFENDANT**

**THE NATIONAL COUNCIL FOR CHILDREN'S SERVICES.....11<sup>TH</sup> DEFENDANT**

**CIVIL PROCEDURE PRACTICE**

- *Dismissal of suit for want of prosecution Order XVI rule, 5(b)*
- *Whether negotiations upon adjournment of case generally – is good excuse for failure to fix a case for hearing.*
- *A suit involving two or more defendants may be dismissed for want of prosecution at the instance of any one or more such defendants.*

**R U L I N G**

## **Introduction**

### **1. The Suit**

By a Plaint dated 14<sup>th</sup> June 2005, and filed on 15<sup>th</sup> June 2005, the Plaintiff [(Volunteers for Legal Aid Services (VOLASE)] sought the following orders against the eleven (11) Respondents (presumably jointly and severally)-

- (a) A declaration that all the Television, Radio and Newspaper programmes and advertisements and all other activities meant to market and promote consumption of alcohol and tobacco products in Kenya such as Bill Boards, Posters, Handbills, Road Shows Paintings, clothing materials like caps and T. Shirts and songs are harmful to the children of Kenya and contravene provisions of Part II of the Children Act 2001 (No. 8 of 2001),
- (b) A declaration that the Government of Kenya is duty bound to protect the welfare of the Children of Kenya by banning all television, radio and newspaper programs and advertisements and all other activities meant to market and promote consumption of alcohol and tobacco products in Kenya.
- (c) A declaration that the Defendants jointly and severally are bound to compensate the children of Kenya for any medical complications arising from consumption of alcoholic and tobacco substances;
- (d) An order directing the 1<sup>st</sup> to 9<sup>th</sup> Defendants jointly and severally to remove and destroy all bill boards, posters hand bills, paintings or any other such materials presently advertising and promoting consumption of alcoholic and tobacco products in Kenya.
- (e) Permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally from marketing advertising and promoting consumption of alcoholic and tobacco products in Kenya through the television, radio, internet, newspapers, bill boards, posters handbills, road shows, paintings, clothing materials or at all,
- (f) Costs and interest.

### **2. The Defendants**

These were Defendants in this suit;

1. East African Breweries Ltd
2. British American Tobacco Ltd
3. Mastermind tobacco Kenya Ltd
4. Kenya Broadcasting corporation
5. Nation Media Group Limited
6. The Standard Group Limited
7. Royal Media Limited
8. Regional Reach Ltd
9. Radio Africa Ltd
10. Attorney General of Kenya

11. The National Council for Children's Services

### **3. The Applications for Dismissal**

By various applications several of the Defendants sought orders to have the Plaintiffs suit dismissed against them. These were the applications-

- (1) By a Chamber Summons dated 11<sup>th</sup> December 2006 by 4<sup>th</sup> Defendant sought the suit dismissed against it,
- (2) The 3<sup>rd</sup> Defendant (Mastermind Tobacco (Kenya) Ltd sought dismissal of the suit against it by a Notice of Motion dated 1<sup>st</sup> December 2006,
- (3) By a Notice of Motion dated 23.01.2009 the 1<sup>st</sup> Defendant sought dismissal of the suit for want of prosecution under the provisions of Order XVI rule 5(a) and (d) and Order L rules 1 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act,
- (4) By a similar Notice of Motion dated 9<sup>th</sup> March 2009 the 6<sup>th</sup> Defendant sought to have the suit dismissed for non prosecution under the same provisions as the 1<sup>st</sup> Defendant;

### **4. The compromises.**

Following these challenges for dismissal of the Plaintiff's suit for lack

of prosecutions the Plaintiff entered into consent orders to compromise their claim for various declarations with the following Defendants:-

1. A consent order was entered on 9<sup>th</sup> March 2009 marking the suit as withdrawn as against the 5<sup>th</sup> 8<sup>th</sup> and 9<sup>th</sup> Defendants, that is Nation Media Group Ltd, Regional Reach Ltd and Radio Africa Ltd respectively.
2. A consent letter dated 16<sup>th</sup> March, 2009 and filed on 17<sup>th</sup> March 2009 to mark the case as withdrawn against the 2<sup>nd</sup> Defendant, British American Tobacco Limited.
3. A consent letter dated 17<sup>th</sup> March 2009 and filed in court on 18<sup>th</sup> March 2009 to mark the case as withdrawn against 1<sup>st</sup> Defendant East African Breweries Ltd,.

The suit having been marked as withdrawn against the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants, it is still subsisting against the other six defendants. Of those remaining six Defendants, the 4<sup>th</sup> Defendant, (Kenya Broadcasting Corporation,) 3<sup>rd</sup> Defendant, (Mastermind Tobacco Kenya Ltd) and 6<sup>th</sup> Defendant, the Standard Group Ltd, had filed applications for striking out the Plaint in respect of the 4<sup>th</sup> Defendant, and in respect of the 3<sup>rd</sup> & 6<sup>th</sup> Defendants, for dismissal of suit for want of prosecution. It is the 3<sup>rd</sup> Defendant's application which is the subject of this Ruling.

### **5. The 3<sup>rd</sup> Defendant's Application**

By a Notice of Motion dated 1<sup>st</sup> December 2008, and filed on 5<sup>th</sup> December 2008, the 3<sup>rd</sup> Defendant sought two orders, namely-

1. The Plaintiff's suit be dismissed for want of prosecution, and
2. Costs of the Application and of the dismissed suit be borne by the Plaintiff.

The Motion was supported by the Affidavit of one J. N. Weru and the grounds that:

- (a) the Plaintiff has not taken any step to prosecute this matter since the 6<sup>th</sup> June 2007 when it was adjourned generally;
- (b) the delay is inordinate and inexcusable;
- (c) The delay in the prosecution of the suit is causing the Defendant undue prejudice and costs.

The record shows that the matter was adjourned generally on the 6<sup>th</sup> day of June 2007 because the court was not sitting on that date. The Motion herein was filed on 1<sup>st</sup> December 2008, that is to say some eighteen (18) months or so after the case was stood over generally. The Affidavit of J. N. Weru in support reiterates these grounds, and says that the suit herein was filed on 15<sup>th</sup> June 2005 under a certificate of urgency dated 14<sup>th</sup> June 2005, seeking interim orders, and that since the case was stood over generally on 6<sup>th</sup> June 2007 (as the trial judge was not sitting), the Plaintiff has neither invited the 3<sup>rd</sup> Defendant's Advocates to fix a hearing date for the application nor taken any steps to prosecute this matter in any way for well over one year, that the delay has caused the 3<sup>rd</sup> Defendant undue prejudice and anxiety and has denied the 3<sup>rd</sup> Defendant its right to an expeditious determination of the matter which cannot be compensated while costs of the action continue to accrue.

By virtue of those reasons, the 3<sup>rd</sup> Defendant pleads that the delay in taking steps to prosecute the suit is inordinate and excessive and that the Plaintiff has lost interest in prosecuting the suit.

In answer to the Notice of Motion for dismissal of the suit, the Plaintiff filed a Replying Affidavit sworn on 10<sup>th</sup> March 2009 through its Advocate, Martin Mugambi Mithega (of the firm of Mithega & Co Advocates) the firm seized of control over the conduct of this suit on behalf of the Plaintiff/Respondent, and thereby authorized and competent to swear the Affidavit.

The essence and gist of the Plaintiff/Respondent's counsel's Replying Affidavit is that they or the Plaintiff could not fix the case for hearing while negotiations for settlement were in progress and culminated in a letter dated 13<sup>th</sup> March 2008 (erroneously dated 13.03.2009) under which the Plaintiff's Advocate forwarded a letter for execution by counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants, consenting to the withdrawal of the suit against those defendants with no order as to costs. Counsel therefore deponed that the delay in either inviting the Defendants' counsel to fix a hearing date for the case, or setting down the case for hearing is explained, and excusable and that the case should not be dismissed for non prosecution. The issue is, should it be?

The Application for dismissal of the suit is premised upon the provisions of Order XVI, rule 5(d) of the Civil Procedure Rules which reads

5 **"If within three months after**

**(a)**

**(b) ....**

**(c) ...**

**(d) the adjournment of the suit generally, 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 of its dismissal".**

Rule 5 (d) of Order XVI is clear. It lays upon the Plaintiff and court (on its own motion), an obligation within three months upon the adjournment of a suit generally to set it down for hearing. If either the

Plaintiff or the court of its own motion fails within those three months to set down the suit for hearing then the defendant is at liberty to exercise one of two options, set down the suit for hearing or apply for its dismissal.

In the instant matter the 3<sup>rd</sup> Defendant has opted to have the suit dismissed for want of prosecution. The Plaintiff's counsel Mr. Carlpereters Mbaabu has argued forcefully and with quite persuasive authorities that the suit should not be dismissed for want of prosecution because the delay in fixing the case for hearing is excusable. The Plaintiff and the various Defendants Advocates were negotiating to have the case marked as withdrawn, with no order as to costs.

From annexures to the Replying Affidavit of Martin Mugambi Mithega, the negotiations crystallized with the conversation between Mr. M. P. Muriu Murage and Mr. Mithega along the court corridors on 15<sup>th</sup> February 2008 for on 21<sup>st</sup> February 2008, Mr. M. P. Muriu Murage wrote to Mithega & Co. Advocates confirming that conversation and requesting M/s Mithega & Co. Advocates to send them (Muriu Mungai & Co) Advocates for the 3<sup>rd</sup> Defendant) a letter marking the suit as withdrawn with no order as to costs.

By a letter dated 13<sup>th</sup> March 2008, the Plaintiff's Advocates (Mithega & Co. Advocates) acknowledged the 3<sup>rd</sup> Defendant's Advocates Letter of 21<sup>st</sup> February 2008 and forwarded to them nine (9) copies of the consent letter duly **executed on their part for your execution ”and requesting the 3<sup>rd</sup> Defendant's Counsel “to return the same to our Nairobi office for onward transmission to the rest of Counsel for execution on their part”**.

It is unclear what happened to Mithega & Co Advocates letters to Muriu Mungai & Co Advocates. This is because there is no reply to the Affidavit of Martin Mugambi Mithega, It is I think reasonable to assume that the firm of Muriu Mungai & Co Advocates did not either sign it or forward it to the Plaintiff's advocates Nairobi offices as requested. This is also clear from the subsequent separate consent letters signed between the Plaintiff's Advocates and the Advocates for the 5<sup>th</sup> 8<sup>th</sup> and 9<sup>th</sup> Defendants (23.01.2009) and 16.03.2009 17.03.2009 (with the Advocates of the 1<sup>st</sup> & 2<sup>nd</sup> Defendant).

Although it was inexcusable for the Advocates for the 3<sup>rd</sup> Defendant to fail both to reply to the Plaintiff's Advocates letter of 13<sup>th</sup> March 2008, and also fail to offer any explanation as to why they declined to execute the consent letters which they (i.e the firm of Muriu Mungai & Co Advocates had requested for per their letter of 21<sup>st</sup> February 2008), it was equally inexcusable for the firm of Mithega & Co. Advocates to fail to follow up their own letter for a whole period of 9 (nine) months (13.03.2008 to 1.12.2008) without even a reminder. I do not think that protracted negotiations without even reference to court every three months is sufficient excuse for failure, within three months after the adjournment generally to set down a suit for hearing. Consequently any defendant is at liberty to either set down a date for hearing of the suit or to have it dismissed for want of prosecution. I think a delay of nine months is both inordinate and inexcusable.

Mr. Carlpereters Mbaabu (instructed by the firm of Mithega & Co. advocates) on behalf of the Plaintiff argued that as there were more than one Defendant in the suit, the suit should not be dismissed against all the Defendants. I do not agree with this contention.

In as much as the suit may be prosecuted against all the Defendants and not just one party, unless first withdrawn or compromised against such a party, likewise any one of the Defendants may apply to have the entire suit dismissed on the principal ground of non prosecution under Order XVI rule 5 (b) aforesaid. If the suit is so dismissed the benefit of the dismissal does not only accrue to the particular Defendant/Applicant, but also to other Defendants as well.

In this case, there is an added reason for dismissal. The Plaintiff had by and large lost interest in the prosecution of the suit and had instructed its Advocates to enter into consents to have the suit withdrawn against the first nine (9) Defendants with no order as to costs. The Advocates had dutifully drawn and forwarded such a letter of consent to the Advocates for the 3<sup>rd</sup> Defendant with a clear request they

forward the same to the Plaintiff's Advocates Nairobi Office where they would arrange to secure signatures of the Advocates acting for other named Defendants. It so happened that compromises were reached with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and the 5<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants, the manufacturers of the major offending products and the major media houses. The only Defendants with whom compromises have not been reached, (and would have been reached if the 3<sup>rd</sup> Defendant's counsel had acted without undue and unexplained delay and eventual failure to forward the letter of consent to the Plaintiff's Advocates) are the 6<sup>th</sup> and 7<sup>th</sup> Defendants (other media houses), there seems to me to be no plausible reason why the suit should be maintained and prosecuted against these two defendants and the Government's National Council for Children's Service represented by the Attorney General and indeed the Attorney General.

For all those reasons I would allow the 3<sup>rd</sup> Defendant's application dated 1<sup>st</sup> December 2008, and dismiss the suit in terms of prayer one (1) thereof.

In view however, of the unexplained and therefore inexcusable refusal by the 3<sup>rd</sup> Defendant's Counsel to reply to the Plaintiff's letter of 13<sup>th</sup> March 2008 forwarding the consent letter withdrawing the suit with no order as to costs, I would direct that each of the Defendants (including the 3<sup>rd</sup> Defendant) in respect of whom this order of dismissal shall apply, shall bear their own respective costs.

There shall be orders accordingly.

**Dated, Delivered and Signed at Meru this 8<sup>th</sup> Day Of May 2009**

**M. J. ANYARA EMUKULE**

**JUDGE.**