REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 109 OF 2001

THIKA COFFEE MILLS LIMITED.....PLAINTIFF

VERSUS

GAKUYU FARMERS CO-OPERATIVE SOCIETY.....1ST DEFENDANT

COFFEE BOARD OF KENYA.....2ND DEFENDANT

CO-OPERATIVE BANK LIMITED.....3RD DEFENDANT

R U L I N G

This suit was filed by the Plaintiff in 2001, now 19 years ago.

1. What is before Court is an application filed by the 1st Defendant dated 27th April 2018. It is for order that this suit be dismissed for want of prosecution.

2. The application is based on the ground that this matter was last in Court on 27th February 2017, that the Plaintiff has taken no steps to set this suit for hearing now for a period of over one year; that witnesses in this matter are now aged and a number of them have died; that it will not be possible to have a fair trial; and that the 1st Defendant stands to suffer prejudice.

3. The Plaintiffs by their replying affidavit opposed the application on several grounds. It was confirmed that this suit was instituted in January 2001. The proceeding/hearing commenced on 29th January 2001, before the now retired, Justice Mbaluto. That judge then received evidence of 3 witnesses in September 2001. The evidence of the Plaintiff's witness number 4 was received by Justice Ransley (now retired). When the matter was placed before Justice Waweru, on 5th May 2006, the judge ordered for the proceedings to be typed.

4. That between February to December 2014 further witness statements and other additional documents were filed until when the 1st and 2nd Defendants filed applications dated 17th March and 12 April 2016, for dismissal of this suit for want of prosecution.

5. Those applications were heard by Justice Fred Ochieng and the learned judge by his Ruling of 27th February 2017 dismissed the applications because the Plaintiff, by letter dated 28th July 2015 had requested to be informed when the diary for the year 2016 would be opened. This was because the Plaintiff had failed to obtain a date in the diary of 2015.

ANALYSIS AND DETERMINATION

6. Since the year 2009, when the Civil Procedure Act was amended to include Section 1A and 1B it is expected that the process of litigation would be re-energized or would have a new impetus. These are the sections that brought into being the overriding objective. Those sections are in the following terms:

> ***1A. Objective of Act.***
>
> ***1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***
>
> ***2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).***

3) A party to Civil proceedings or an Advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B Duty of Court

1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:

a) The just determination of the proceedings

b) The efficient disposal of the business of the Court;

c) The efficient use of the available judicial and administrative resources;

d) The timely disposal of the proceedings, and all other proceedings, at a cost affordable by the respective parties, and

e) The use of suitable technology.

7. The Court of Appeal in discussing the overriding objective, sometimes referred to as "double OO" principle, in the case.

HUNKER TRADING COMPANY LIMITED V ELF OIL KENYA LIMITED 2010) eKLR stated:

*"In the case of **MRADULA SURESH KANTARIA AND SURECH NANILLAL KAPTARIA CIVIL APPEAL NO.277 OF 2005** (unreported this Court observed :*

"In this regard we believe one of the principal purposes of the double OO principle" is to enable the Court to take case management principles to the centre of the Court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap."

8. The principles of "double OO" was encapsulated in Article 159 of the constitution more particular sub-Article (1) (b) justice shall not be delayed.

9. As stated before there were previous applications, by the Defendants, seeking dismissal of this suit for want of prosecution. The Ruling of those applications was on 27th February 2017.

10. From the date of the said Ruling the Plaintiff's Director deponed, through his replying affidavit, that the 2nd Defendant's Advocate invited other parties to meet at the Court registry and fix a hearing date of this case on 16th March 2017. The Director stated that on that date the Court file could not be traced. Thereafter the Plaintiff's Advocate invited the other parties to fix a hearing date on 13th September and 8th November 2017, that again on those dates the Court file could not be traced.

11. That the Plaintiff's Advocates made several visits to the Court registry and also wrote emails to the Deputy Registrar but the file could not be traced.

12. That the Plaintiff's Advocate invited the other parties to fix a hearing date on 18th June 2018 and again the Court file could not be traced.

13. The 1st Defendants by the affidavit of its chairman, which affidavit is in support of the application, deponed that failure to prosecute this suit had deeply prejudiced it since more than one hundred members of the 1st Defendant's society had passed away. That the Plaintiff had completely failed to progress with this case.

14. In my view this is a case where justice has been delayed. The Plaintiff instituted this suit in 2001. The last time this matter was in Court for substantial hearing as deponed by the Plaintiff, was in May 2006. From that date further witness statement were filed until the Defendants application dated 17th March and 12th April 2016 were filed, for dismissal of the suit for want of prosecution. There is obviously a gap of between 2006 and 2016 when the Plaintiff took no steps to fix a hearing date. I am aware that this period was considered in the ruling of 27th February 2017, but I think justice demands that as I consider the fresh application that I consider all the period this case has been on record, collectively.

Even as I consider the period from 27th February 2017 to the date when the present application was filed I am of the view there is no satisfactory explanation has been given why this case was not fixed for hearing. Indeed one would have expected having survived the previous application to dismiss this suit the Plaintiff would have sprang into real action to fix this case for hearing. I say this because the email of the deputy registrar dated 2nd November 2017 clearly stated that this file was available at the Court registry. The Plaintiff's Director, through his affidavit, without stating who made a follow up, stated that the file still could not be traced. This is what the Plaintiff's Director deponed.

"The Plaintiff's Advocated through their staff continuously made several visits to the Court registry to try and trace the Court

file but they still could not trace it."

In my view the above explanation is unsatisfactory. Who were those members of staff and to whom did they make their inquiry. After all the Deputy Registrar had confirmed through her email that the Court file was available at the registry.

15. As I consider the entire conduct of the Plaintiff in this matter, I do wonder whether the Plaintiff is waiting for the strategic witnesses of the Defendants to pass away. So far the 1st Defendant has lost more than 100 of its members. The Defendants stand to be prejudiced if their crucial witnesses pass away. The Plaintiff, who has had four of its witnesses testify does not seem to be prejudiced by the delay in the case. Delay of 19 years in my view is prejudicial and it is more prejudicial to parties whose witnesses have not testified.

16. The delay occasioned in the prosecution of this case is similar to that which was considered in the case **BEVERAGE BOTTLERS (SA) LTD (IN LIQUIDATION) & ARVO – V- ABODE ENTERPRISES PTY LET (2009) SASC 272** a case of South Australia, which case I find persuasive, where the judges stated:

> ***"There must come a time when the party has so conducted the litigation that it would be appropriate to shut that party out of that party's litigation even if the point is arguable. Justice delayed can be justice denied. Both the Plaintiff and the Defendant are entitled to justice.***
>
> ***If the Plaintiff has conducted his or her case so that the Defendant has suffered prejudice or will suffer injustice in defending the case then the Defendant is entitled to justice, and justice can only be achieved by shutting the Plaintiff out of his or her case."***
>
> ***There comes a time when (the Defendant) is entitled to have some piece of mind and to regard the incident as closed.***
>
> ***The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose."***

17. I am of the view that the time has come for this Court to say to the Plaintiff, you have dilly-dallied long enough with the conclusion of this case. It is also apt to tell the Plaintiff that its inactivity and seeming lack of interest to conclude this case is prejudicial to the other parties. I make these comments in view of the overriding objective in the civil Procedure Act which requires that proceedings be just, expeditious, proportionate and affordable. Every party in Civil actions, is under and duty to assist the Court attain that overriding objective. The Plaintiff has not so assisted the Court. It does seem that the Plaintiff and its Advocates proceed with this case remotely, that is without a close follow up. How else can one explain that when a file is confirmed to be available by the Deputy Registrar, the party allegedly making the enquiry fails to follow up that assurance of the availability of the file.

18. I find and hold that the 1st Defendant has made a case for this case to be dismissed for want of prosecution. In the same vein, the 1st Defendant has failed to prosecute its counter-claim. It is just for all the parties to be shut out of their litigation.

19. In the end I grant the following orders:

> **a) The Plaintiff's suit and the Defendants' counter-claim are hereby dismissed with no order as to costs for want of prosecution.**
>
> **b) Each party shall bear their own costs of the Notice of Motion dated 27th April 2018.**

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **30TH** day of **MAY,** 2019.

MARY KASANGO

JUDGE

Ruling Read *and* ***Delivered*** *in* ***Open Court*** *in the presence of:*

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE 1ST DEFENDANT**

..... **FOR THE 2ND DEFENDANT**

..... **FOR THE 3RD DEFENDANT**