



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 109 OF 2001**

**THIKA COFFEE MILLS LIMITED.....PLAINTIFF**

**AND**

**GAKUYU FARMERS CO-OPERATIVE SOCIETY.....1<sup>ST</sup> DEFENDANT**

**COFFEE BOARD OF KENYA.....2<sup>ND</sup> DEFENDANT**

**CO-OPERATIVE BANK OF KENYA LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This Ruling is in relation to 2 applications, which were brought by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, respectively. Each of them seeks the dismissal of the suit for want of prosecution.
2. On the part of the 1<sup>st</sup> defendant it was indicated that their crucial witness had passed away on 13<sup>th</sup> May 2010. Therefore the 1<sup>st</sup> defendant reasoned that it was no longer in a position to defend the claim effectively.
3. The said witness is named **FRANCIS WANGERO MAKARU**, and at all material times, he used to be the Treasurer of **GAKUYU FARMERS CO-OPERATIVE SOCIETY**.
4. In that capacity Makaru was also said to have been the custodian of the documents and records of the 1<sup>st</sup> defendant.
5. The Management Committee of the 1<sup>st</sup> defendant is said to have mandated Makaru to liaise with their lawyers, to prepare both the Defence and the Counter-claim. Thereafter, he was to be the crucial witness for the 1<sup>st</sup> defendant.
6. His demise is said to have also made it difficult for the 1<sup>st</sup> defendant to maintain its Counter-claim against the plaintiff.
7. Meanwhile, the 2<sup>nd</sup> defendant faults the plaintiff for failing to comply with the orders which the court had made on 8<sup>th</sup> December 2014, allowing the said plaintiff time to file additional documents.

8. The inordinate delay, unexplained indolence/apathy/lethargy and inexcusable delay by the plaintiff, are said to be inconsistent with the Overriding Objectives of the judiciary.

9. According to the defendants, it is the plaintiff who has repeatedly sought adjournments for various reasons. But even when it sought and was given more time to file some documents in court, the plaintiff failed to comply.

10. The fact that the defendants were obliged to keep on footing the fees charged by their advocates, was described as being prejudicial and oppressive to them. It was the reasoning of the defendants that the interest of justice, as well as the overriding objectives of the court dictate that the litigation be brought to a close immediately.

11. The starting point in the determination of the applications is Order 17 rule 2 (1) and (3) of the Civil Procedure Rules. That provision may be invoked only when none of the parties to a suit had taken any steps in the case for a period of one year.

12. If there had been a step taken within 12 months preceding an application for the dismissal of the suit, the court would not dismiss the suit.

13. However, if a year or more had lapsed since the last action was taken in the case, the court has the discretion to determine whether or not the case should be dismissed for want of prosecution.

14. Both the defendants appreciate that they first have to demonstrate that there had been a delay on the plaintiff's part, in the prosecution of the case.

15. In this case, the delay is pegged on the applicants' contention, that the matter was last in court on 8<sup>th</sup> December 2014. Therefore, by 17<sup>th</sup> March 2016, when the 1<sup>st</sup> defendant filed its application for the dismissal of the suit, a total of 14 months had lapsed.

16. And by 12<sup>th</sup> April 2016, when the 2<sup>nd</sup> defendant filed its application, a total of 15 months had lapsed.

17. It is well settled that when the court was called upon to dismiss a suit for want of prosecution, the applicant must demonstrate, not only that there was inordinate delay, but also that;

**a) The inordinate delay was inexcusable; and**

**b) The defendants are likely to be seriously prejudiced by the delay.**

18. Both applicants submitted that the delay was inordinate, and also that the plaintiff had not offered any plausible explanation for the said delay.

19. The 1<sup>st</sup> defendant quoted the following words from the decision in **MWANGI S. KIMENYI Vs ATTORNEY GENERAL & ANOTHER [2014] eKLR**;

**“...There is no precise measure of what amounts to inordinate delay.**

....

**Caution is however advised for courts not to take the word “inordinate” in its dictionary meaning. Therefore, inordinate delay, for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases...”**

20. In this case, the plaintiff has not only delayed in prosecuting the case, it is also said to have disobeyed a peremptory order of the court. The plaintiff is said to have failed to amend its pleadings and to thereafter obtain a date from the registry.

21. Therefore, the over one year of inactivity, between 8<sup>th</sup> December 2014 and March 2016, was described as being indicative of the dilatory nature employed by the plaintiff in the prosecution of the suit.
22. On its part, the 2<sup>nd</sup> defendant submitted that;
- “nothing can be more inordinate than the conduct of the plaintiff who chose to slumber on its rights bearing in mind that the plaintiff has been in blatant disobedience of Court orders of 8/12/2014”.**
23. In my considered opinion, the applicants appear to be mixing up 2 distinct issues. They are talking about inordinate delay as contemplated by Order 17 Rule 2 of the Civil Procedure Rules, and the failure of the plaintiff to comply with some court orders.
24. If the plaintiff did not comply with court orders, that would not be the basis for the dismissal of a suit for want of prosecution.
25. And, in particular, if a party fails to effect an amendment to his pleading, after the court had granted him leave to do so, that would imply that the proposed amendment would never take effect. Pursuant to Order 8 Rule 6 of the Civil Procedure Rules, an order for leave to make an amendment would cease to have effect if it is not complied with within the period specified, or if no period is specified, within 14 days.
26. In this case, the 2<sup>nd</sup> defendant has demonstrated that it invited the parties to attend at the Court Registry on 30<sup>th</sup> June 2015; 22<sup>nd</sup> September 2015 and 10<sup>th</sup> December 2015, for the purposes of fixing a date for hearing.
27. The fixing of a date for trial is a step in the proceedings.
28. On its part, the plaintiff has also shown that on 28<sup>th</sup> July 2015, it attended at the Court Registry, for the purposes of fixing a date for trial. However, no trial date was fixed because the court diary for 2015 was already full.
29. In a letter dated 28<sup>th</sup> July 2015, the plaintiff asked the learned Deputy Registrar to inform it as soon as the diary for 2016 was opened, to enable the plaintiff fix the case for hearing.
30. In much the same way as the 2<sup>nd</sup> defendant did not succeed in getting a hearing date, the plaintiff too was unsuccessful.
31. The inability to get a hearing date when a party asks for it, cannot be the fault of the party.
32. If the court diary is full, the party cannot be given a hearing date, even if he was very keen to prosecute his case.
33. In this case, I find that the plaintiff and the 2<sup>nd</sup> defendant both took steps intended to secure a date for trial. Those steps were taken in June, July and September 2015. Therefore, by March 2016, when the application for dismissal of the suit was filed, a period of one year had not yet lapsed.
34. In the result, the applications by the defendants are not properly founded. They are therefore dismissed, with costs to the plaintiff.

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>th</sup> day of February 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Miss Oloo for Macharia for the Plaintiff

Miss Nyanchoka for Akhulia for the 1<sup>st</sup> Defendant

Odongo for Maweu for the 2<sup>nd</sup> Defendant

No appearance for the 3<sup>rd</sup> Defendant

Collins Odhiambo – Court clerk.