



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 466 OF 2009**

**GENSON MICHENI MUNGATIA.....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA.....1<sup>ST</sup> DEFENDANT**

**MUNGANIA TEA GROWERS SACCO SOCIETY LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The suit was commenced by way of a Plaint, which was filed in court on 2<sup>nd</sup> July 2009. Thereafter, on Amended Plaint was filed in court on 7<sup>th</sup> November, 2011.
2. On 23<sup>rd</sup> April 2012, the 1<sup>st</sup> Defendant filed its Defence. The said Defence was filed under protest, because the 1<sup>st</sup> Defendant emphasised that it had never been served with either a Demand Notice prior to action, or by summons to enter appearance.
3. Mr. Ngaine, the learned advocate for the 1<sup>st</sup> defendant pointed out that the plaintiff had failed to take steps to prosecute his case over the last 4 years.
4. Therefore, the 1<sup>st</sup> defendant expressed the view that the plaintiff had lost interest in pursuing his claim.
5. According to the 1<sup>st</sup> defendant, the interests of justice would be served by the dismissal of the suit, as its continued existence was prejudicial to the defendant.
6. The defendant urged the court to bring this litigation to an end, so as to save the defendant from the burden of continuing to pay legal fees, whilst the case remained alive.
7. Mr. Mbuvi, the learned advocate for the Plaintiff described the application as being premature.
8. The application was filed on 17<sup>th</sup> February 2016, which was said to be a date falling well before the lapse of 12 months, from the date when the last steps were taken in the case.
9. A perusal of the court records revealed that on 27<sup>th</sup> October 2015, the plaintiff filed an application for an interlocutory preservative order, in respect to the suit property.

10. The defendant protested that the plaintiff had not served the application.

11. The plaintiff did not provide the court with proof of service of the Amended Plaintiff. Therefore, there is reason to believe that the defendant was yet to be served with the said Amended Plaintiff.

12. Meanwhile, it is common ground that the parties did engage in negotiations, with a view to finding an amicable settlement. However, the said negotiations had since stalled.

13. The defendant blamed the plaintiff for the failure to find a settlement.

14. Regardless of whoever may be blameworthy for the failed negotiations, the truth is that when parties were involved in negotiations, it was normal that the prosecution of the case be put on hold whilst parties were talking with each other. I therefore find that part of the delay in this case was attributable to a mutual desire to resolve the dispute.

15. Secondly, I find that the last step in the case, prior to filing of this application, was the filing of an application by the plaintiff, on 27<sup>th</sup> October 2015.

16. Whilst it is unfortunate that the plaintiff had not yet served that application upon the defendant, the fact that the said application was on the court file cannot be wished away.

17. Given the fact that on 27<sup>th</sup> October 2015 the plaintiff filed an application seeking an order to preserve the property which is the subject matter of the suit, I find that the defendant's application was premature. It was brought before 12 months had lapsed after the plaintiff had lodged his application dated 27<sup>th</sup> October 2015.

18. On that ground alone, the application cannot succeed. It is therefore dismissed.

19. But the 1<sup>st</sup> defendant cannot be faulted for filing the application. I so hold because the 1<sup>st</sup> defendant had not been made aware of the application which the plaintiff had filed.

20. In the circumstances, although the application dated 12<sup>th</sup> February 2016 is dismissed, I order each party to bear his own costs of the said application.

**DATED, SIGNED and DELIVERED at NAIROBI this 29 day of June 2016.**

**FRED A. OCHIENG**

**JUDGE**

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

Miss Achieng for Mbuvi for the Plaintiff

Balala for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

Collins Odhiambo – Court clerk.