



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 1218 OF 2001

SOLOMON KIRAGU.....PLAINTIFF

VERSUS

**CO-OPERATIVE BANK
OF KENYA LTD.....1ST RESPONDENT**

**JOSEPH GIKONYO
t/a GARAM INVESTMENTS2ND DEFENDANT**

RULING

This application is brought by a notice of motion dated 24th February, 2011, and taken out under Order 17 Rule 2 (3) and Order 51 Rule 1 of the Civil Procedure Rules. The applicant thereby seeks an order that the plaintiff's suit herein be dismissed with costs.

The application is supported by the annexed affidavit of Regina K Anyika, Advocate, and is based on the grounds that –

- (1) No application has been made or step taken for over one year.**
- (2) The plaintiff's delay or failure to set down the suit for hearing is inordinate and inexcusable or an abuse of the process of the court given the fact that this suit was filed in court in the year 2001;**
- (3) It is just and fair that the defendant should be relieved of the burden of this litigation in the circumstances as every case should be concluded one way or the other within a reasonable period of time;**
- (4) The plaintiff has apparently lost interest in this suit.**

When this matter came for hearing on 5th May, 2011, Mr Werimo appeared for the defendants but the plaintiff did not attend court. An affidavit of service on record shows that the plaintiff's advocates were served on 8th March, 2011. They filed neither grounds of opposition nor a replying affidavit. Technically, therefore, the application is not opposed. Moreover, being satisfied that the respondent's advocates were served in sufficient time to attend court, but that they did not do so, the court proceeded *ex parte*.

In his address to the court, Mr Werimo for the applicant argued that the suit herein was filed in 2001 with an application for injunction which was granted. For the period of more than one year, the plaintiff has not set down the suit for hearing and the defendant's right to move the court to dismiss the suit has crystallized. In keeping with the principle that litigation must come to an end, he urged the court to

dismiss the suit as no reason had been advanced for retaining it. He therefore asked for orders as prayed.

It is instructive that this application is brought, *inter alia*, under Order 17 Rule 2 (3) of the Civil Procedure Rules. That Rule provides that any party to the suit may apply for its dismissal as provided in sub-rule 1. The latter sub-rule provides as follows –

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

On the facts of this case, the court file shows that the last act done thereon was the delivering of a ruling by the Hon Justice Waweru on 31st August, 2007. Thereafter, nothing else was done except the filing of a notice of change of Advocates which was filed on 25th November, 2009. This lack of activity on the file is a clear manifestation that the plaintiff in this case is not interested in prosecuting it. It's little wonder that the plaintiff neither filed a replying affidavit nor grounds of opposition to the application for dismissal of the suit. He also failed to attend court for the hearing of the application. In the circumstances, since no application has been made or step taken for more than a year, it is pertinent that this suit be dismissed in conformity with the principle that litigation must come to an end.

The suit is accordingly dismissed with costs to the defendant. The plaintiff will also meet the costs of this application.

Order accordingly.

DATED and DELIVERED at NAIROBI this 28th day of July, 2011.

L NJAGI
JUDGE