



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI
CIVIL CASE NO. 350 OF 2003

STEPHEN MUGO MUTOTHORIS & 3 OTHERS

..... **PLAINTIFFS**

VERSUS

NATIONAL BANK OF KENYA & 2 OTHERS

..... **DEFENDANTS**

R U L I N G

This application is brought by a Notice of Motion dated 13th January, 2010, and is made under **Order XVI Rule 5 (a), (c) and (d); Order L Rule 1** of the **Civil Procedure Rules; Section 3A** of the **Civil Procedure Act** and all other enabling provisions of the law. By the application, the 1st and 3rd Defendants seek the following orders –

1. *That this suit be dismissed for want of prosecution.*
2. *That the order for injunction issued by the Court on 13th June, 2003 be lifted, and*
3. *That the costs of this application be awarded to the Applicants.*

The application is supported by the annexed affidavit of Robert Paul Onyango, an Advocate practising as such in the firm of Rachuonyo & Rachuonyo which has the conduct of this matter on behalf of the Applicants. It is based on the grounds that –

- (a) *There has been inordinate and inexcusable delay on the Plaintiffs' part in prosecuting their claim.*
- (b) *The delay is prejudicial to the Applicants.*
- (c) *The Plaintiffs are not interested in prosecuting their claim and they have not taken any steps to fix this matter for hearing since 13th June, 2003; and*
- (d) *That it is in the interests of justice that the suit be dismissed for want of prosecution.*

Opposing the application, John Mburu Karega, a Director of Kiambu Dandora Farmers' Company Ltd., swore and filed a replying affidavit in which he deposed that he would like to make an application for

substitution of new Trustees in place of the 1st and 2nd Plaintiffs. For that reason, he urged the Court not to dismiss the suit but to allow the Plaintiffs an extension of time to file an application for substitution.

On the date of the hearing of the application, Mr. Onyango appeared for the Applicants but the Plaintiffs did not attend Court. An affidavit on record sworn by one Haggai Ochieng Akello on 25th June, 2010, deposes that the 3rd party, as well as the Respondents, were served with a hearing notice on 16th June and 17th June, 2010, respectively. Their Counsel also acknowledge receipt on the service copy on the aforementioned dates, which copy is duly attached to the affidavit of service. The service is further evidenced by the fact that a replying affidavit was filed on 23rd July, 2010. For these reasons, the Court was satisfied that the application was duly served and thereupon elected to proceed *ex parte*.

After considering the pleadings and the submissions of Mr. Onyango, I find that there are only two issues for determination in this matter. These are whether this suit ought to be dismissed for want of prosecution, and whether the order for injunction issued by the Court on 13th June, 2003 ought to be lifted. For that purpose, I note that **Order XVI Rule 5 (a), (c) and (d)** of the **Civil Procedure Rules** on which the application is anchored is worded as follows –

“5. If, within three months after –

(a) the close of pleadings

(b) (deleted)

(c) the removal of the suit from the hearing list; or

(d) the adjournment of the suit generally, the Plaintiff or the Court on its own motion on notice to the parties, does not set down a suit for hearing, the Defendant may either set the suit down for hearing or apply for its dismissal.”

Against that background, the short history of this matter is that upon the institution of the suit, the Plaintiffs also filed, contemporaneously with the suit, an application by Chamber Summons dated 13th June, 2003, under Certificate of Urgency. By that application, the Plaintiffs sought injunctive orders against the Defendants herein. The application was heard on the same dates and the Court duly granted an *ex parte* order restraining the Defendants from conducting any dealings with the suit property until the main suit was heard and determined. The Defendants and the 3rd party then proceeded to enter appearance and duly filed their respective statements of defence.

Thereafter, the Plaintiffs went to sleep and did not take any steps to initiate discovery of documents in obedience to the pre-trial procedures, or to fix the suit for hearing. Subsequent correspondence addressed to the Plaintiffs’ Advocates urging them to do the needful to prepare the suit for trial drew a blank. The Defendants thereupon fixed the suit for hearing on 12th May, 2009, when the Court noted that there was delay caused by inactivity of the Plaintiffs. In consequence thereof, the Court ordered that discovery be undertaken within 14 days. That period came and went, and the Plaintiffs did not comply with the Court order. As a consequence, they have not taken any steps towards prosecuting this suit to the present date, and their conduct is in blatant breach of the requirements of **Order XVI Rule 5** of the **Civil Procedure Rules**. It is not lost on this Court that this suit is now in its 7th year without any steps being taken for its hearing and determination.

For the above reasons, I am persuaded that there has been some inordinate delay on the Plaintiffs’ part in prosecuting their claim, and such delay suggests that they have lost interest in the suit. The replying affidavit does not respond to the application as it does not address the issues raised in that application. It merely suggests that the Plaintiffs need time to apply for substitution. It is noteworthy that they have had all the time to file an appropriate application but they have not done so. Their failure to attend Court for the hearing of the application at which forum they would have urged their case is a

further illustration of their lack of interest in this matter. It seems that their sole interest was mainly in enjoying the interim injunctive orders which were granted under a Certificate of Urgency in June, 2003. After obtaining those orders, it would further seem that the urgency of the matter came to an end.

For these reasons, I am reminded that delay defeats equity. I therefore find it in the interests of justice to dismiss the suit for want of prosecution under **Order XVI Rule 5** of the **Civil Procedure Rules** as prayed. I accordingly make the following orders –

- (i) *That this suit be and is hereby dismissed for want of prosecution.*
- (ii) *The order of injunction issued by this Court on 13th June, 2003 be and is hereby lifted.*
- (iii) *The Applicants shall have the costs of this application as well as those of the main suit.*

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 7th day of October, 2010.

L. NJAGI
JUDGE