



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION – MILIMANI**

**CIVIL CASE NO. 332 OF 2003**

**SOUTHERN CREDIT CORPORATION LIMITED**

..... **PLAINTIFF**

**VERSUS**

**KIPKORIR, TITOO & KIARA ADVOCATES**

..... **DEFENDANT**

**RULING**

The application before the Court is brought by a Notice of Motion dated 28<sup>th</sup> July, 2010, and taken out under **Order XVI Rule 5** of the **Civil Procedure Rules**. The Defendant/Applicant thereby moves the Court to order that the suit herein be dismissed for want of prosecution, and that the costs of this application and the suit herein be borne by the Plaintiff. The application is supported by the annexed affidavit of Donald B. Kipkorir, Advocate, and is based on the grounds that –

- (a) The plaint herein was filed on 5<sup>th</sup> May, 2003; the Defendant’s defence filed on 10<sup>th</sup> March, 2004; the amended defence and counterclaim filed on 21<sup>st</sup> June, 2004; and the reply to amended defence and defence on counterclaim filed on 5<sup>th</sup> July, 2004.***
- (b) The Plaintiff has since not taken any steps or any material steps to prosecute the claim.***
- (c) The continued existence and uncertainty of this suit is prejudicial to the Defendant/Applicant.***

Opposing the application, the Plaintiff’s/Respondent’s Counsel, Mr.

Onguto filed a replying affidavit sworn on 8<sup>th</sup> September, 2010. He deposes in that affidavit that the Plaintiff is interested in prosecuting the suit and that after the close of proceedings it took steps towards prosecuting the suit.

At the hearing of the application, Ms. Mungae appeared for the Applicant while Mr. Onguto appeared for the Respondent. Ms. Mungae submitted that the Plaintiff had not taken any steps to prosecute the suit since August, 2005 and that this was prejudicial to the Defendant as there were interim orders made on 18<sup>th</sup> September, 2003 staying Taxation by the Defendant. Thereafter, the matter was stood over generally on 5<sup>th</sup> August, 2005 and the Plaintiff did not take any steps to prosecute the suit until June, 2010, when a letter of invitation to fix a hearing date was issued. Delay from 2005 to 2010 was substantial and unexplained. She therefore urged the Court to allow the application, and dismiss the suit, with costs.

Mr. Onguto relies on his affidavit in opposition to the application and pointed that the matter was last in Court in 2007, when both parties were ready to proceed but the matter could not be reached and it was stood over generally. The suit was then fixed for hearing on 1<sup>st</sup> October, 2008 which turned out to be Idd ul Fitr and therefore a Public Holiday. He then submitted that the Defendants themselves have a counterclaim and could have fixed the case for hearing but did not do so. In March this year, the Respondent attempted to take a hearing date but the Diary was full. Then in May and June, 2010, the Court file went missing and a date could not be taken. He therefore urged the Court to dismiss the application and grant the Plaintiff a chance to prosecute the case.

After considering the pleadings and the rival submissions of Counsel, I find that the main issue to be determined is whether this suit ought to be dismissed for want of prosecution. A scan of the Court file reveals that this suit last came for hearing on 17<sup>th</sup> May, 2007 and not in 2005 as suggested by learned Counsel for the Applicant. On that date, although both Counsel were ready to proceed, the matter could not be reached as the trial Court had a part-heard which was going to precede this one. It was accordingly stood over generally pending the taking of a fresh date at the Registry. On 11<sup>th</sup> December of the same year, the Plaintiff took a fresh date and the suit was fixed for hearing on 1<sup>st</sup> October, 2008. This date turned out to be Idd ul Fitr and therefore a Public Holiday on which the matter could not proceed.

In March this year, the Plaintiff attempted to fix the case for hearing but there were no dates available for hearing during this year. Thereafter, the file went missing in May and June, and the Plaintiff could not have fixed a hearing date. It was then that this application dated 28<sup>th</sup> July, 2010 was filed seeking the dismissal of the suit.

Against that background, I am persuaded that the Plaintiff made some reasonable efforts to fix the suit for hearing but that the odds weighed heavily against it. It is also notable that the Applicant itself has a counterclaim against the Plaintiff in the sum of Kshs.5,910,608.20. This is a substantial amount of money and the Applicant ought to have taken an interest in recovering it by fixing the case for hearing but did not do so.

On account of the foregoing, I find that the Plaintiff has not been outright indolent since the year 2005 as alleged; and that it has made some efforts to have the suit fixed for hearing, and that in the greater interest of justice, it should be given a chance to prosecute the suit. The application for dismissal of the suit accordingly fails, but costs will be in the Cause.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of November, 2010.**

**L. NJAGI**  
**JUDGE**