



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL SUIT NO.1061 OF 2005**  
**AGRICULTURAL SYNDICATE**  
**LIMITED.....PLAINTIFF**

**VERSUS**

**PRIMAROSA FLOWERS LIMITED.....1<sup>ST</sup>**  
**DEFENDANT**  
**N.N. NJOROGE.....2<sup>ND</sup> DEFENDANT**  
**KENYA MEAT COMMISSION.....3<sup>RD</sup>**  
**DEFENDANT**

**RULING**

This is an application by the 1<sup>st</sup> defendant by way of Notice of Motion under Order XVI Rule 5(d), Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders:

- 1. That this suit be and is hereby dismissed for want of prosecution.**
- 2. That the costs of this application and of the entire suit be awarded to the 1<sup>st</sup> defendant/applicant.**

The application is based on the following grounds;

1. That the plaintiff instituted this suit against the 1<sup>st</sup> defendant/applicant by way of a plaint filed in court on 29<sup>th</sup> August, 2005 and served the same together with Chamber Summon application dated 29<sup>th</sup> August, 2005.
2. That the 1<sup>st</sup> defendant/applicant entered appearance on 28<sup>th</sup> September, 2005 and subsequently, filed a defence on 14<sup>th</sup> October, 2005.
3. That the matter was last in court on 7<sup>th</sup> May, 2009 for mention and the plaintiff and or its advocates failed to attend court on the said date.

4. That the plaintiff/respondent has failed and or refused to take any steps in the matter even to fix the suit for hearing for a period of over twelve months.
5. That the plaintiff/respondent has, without any justifiable reason ,failed and or neglected to prosecute the suit within the period prescribed by the law.
6. That the 1<sup>st</sup> defendant/applicant continues to suffer unnecessary anxiety and uncertainty due to the delay in the prosecution of the suit and the same suit, therefore, be dismissed with costs.

In support of the application there is an affidavit sworn by Philip Nyachoti, the learned counsel for the 1<sup>st</sup> defendant/applicant who more or less repeats the grounds set out herein above.

The application is opposed by the plaintiff and there is an affidavit in reply sworn by Mr. Kibe Mungai the learned counsel for the plaintiff herein. Order XVI Rule 5(d) reads as follows;

**“5. If, within three months after –**

**(a)–**

**(b)–**

**(c)–**

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

The 1<sup>st</sup> defendant herein has opted to take the last option that is, apply for the dismissal of the plaintiff’s suit. The failure to list the suit for hearing has been blamed on a pending application by the plaintiff dated 29<sup>th</sup> August, 2005 which is yet to be prosecuted. I note that there are interlocutory orders issued in respect of that pending application, which orders are in favour of the plaintiff herein. It is not the 1<sup>st</sup> defendant’s application and therefore the plaintiff cannot advance the said pending application as an excuse for not setting the suit down for hearing.

On the contrary, the plaintiff should have moved the court for purposes of disposing of the said application to facilitate the setting down the main suit for hearing.

There is no evidence on record that the said orders have been discharged; if anything, there is on record an order by Visram J. (as he then was) showing the said orders were extended on 10<sup>th</sup> November, 2005.

Several reasons have been advanced by the learned counsel for the plaintiff to justify the delay in the prosecution of the suit including the fact that, he did not receive sufficient material from the previous advocates dealing with this matter on behalf of the plaintiff. It is also the plaintiff’s position that the order sought by the 1<sup>st</sup> defendant is a drastic action which should be exercised very sparingly by the court. On the other hand, the 1<sup>st</sup> defendant has submitted that the subsistence of this suit continues to occasion anxiety, worry, inconvenience and uncertainty on the part of the 1<sup>st</sup> defendant.

I am alive to the principle that the court should endeavour to maintain the suits brought before it rather than dismissing the same but, at the same time, also consider the position of other parties to the suit whose interest must also be taken into account. I agree that the order sought by the 1<sup>st</sup> defendant is drastic, but in appropriate cases the court should never shy away from granting such orders where injustice may, or is likely to be visited upon the party applying.

The cited provisions of law provide for a suit to be dismissed if no action has been taken within three months from the last action on the record. In the present case, it is about one year from the time the case was last mentioned and even as at that time, the plaintiff’s counsel was absent. Section 1A of the Civil

Procedure Act, Cap 21 Laws of Kenya which has been introduced by Act No.6 of 2009 emphasizes the overriding objective of this Act and the rules made thereunder which is, to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

In *Venture Capital and Credit Ltd - vs – Consolidated Bank of Kenya Limited* Ochieng' J. cited the case of *Allen – vs - Sir Alfred Mc Alpine (1968) IALL ER 543 at 546* in the following terms;

**“the delay of justice is a denial of justice.....To no one will we deny or delay right or justice. All through the years men have protested at the law’s delay and counted it as a grievous wrong, hard to bear. Shakes spear ranks it among the whips and scorns of time (Hamlet, Act 3 SC 1). Dickens tells how it exhausts finances, patience, courage and hope, (Bleak House, C. 1)**

**To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure, but it is within the inherent jurisdiction of the court and rules of court expressly permits it. It is the only effect sanction that they contain.”**

My view of the plaintiff’s position is that it is guilty of inordinate delay the reasons advanced are not plausible or convincing. The delay is causing anxiety and uncertainty on the part of the 1<sup>st</sup> defendant/applicant and I believe the plaintiff is taking advantage of the interim orders that are still in place its favour. This position cannot be allowed to continue, and therefore, drastic as the order may be, I find it is the most appropriate and compelling in the circumstances of this case.

Accordingly, I find that the 1<sup>st</sup> defendant’s application must succeed and therefore the plaintiff’s suit is hereby dismissed for want of prosecution. The 1<sup>st</sup> defendant shall have the costs of this application and the entire suit.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of November, 2010.***

**A.MBOGHOLI MSAGHA**

**JUDGE**