



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 646 of 2003

THOMAS NYANGERI MOGAKA.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED1ST DEFENDANT

JOSEPH MUNGAI GIKONYO T/A

GARAM INVESTMENTS2ND DEFENDANT

MT. ELGON ORCHARDS LIMITED3RD DEFENDANT

R U L I N G

This is a Notice of Motion dated 2nd October 2008 brought by the 1st and 2nd Defendants. It is expressed to be brought under order XVI rule 5 of the Civil Procedure Rules. It seeks the following orders:

- 1. That this suit be dismissed for want of prosecution.**
- 2. That cost of the suit and of this application be borne by the Plaintiff/Respondent.**

The application is grounded on the following facts.

- (a) That the Plaintiff brought this suit together with an application under Certificate of Urgency seeking interim relief in November, 2003.**
- (b) That the Plaintiff has enjoyed the interim orders to date thereby barring the Applicants from concluding the transfer of the title to the 3rd Defendant who is the purchaser.**
- (c) By this suit, the 1st Defendant/Applicant is unable to complete the sale and transfer of the suit property to the 3rd Defendant.**
- (d) That despite the orders of the court, the Plaintiff has taken no steps to prepare or list this suit for hearing.**
- (e) That the continuation of this suit will occasion a failure of justice to the Defendants.**
- (f) That in totality of the circumstances of this suit, it is just and proper to dismiss the same.**

The application is supported by an affidavit sworn on 2nd October, 2008 by Zipporah Mogaka.

I have considered the submissions by Mr. Ojiambo for the 1st and 2nd Defendants/Applicants. This suit was filed in 2003 simultaneously with an application for an injunction which was granted *ex parte* in 2003, and confirmed *inter partes* in 2005. Since the injunction was granted, no further steps have been taken in this suit. The Plaintiff has the onus of proving that there is an explanation for the delay in prosecuting the matter or that the delay is excusable. Despite being served with this application, the Plaintiff has filed no papers to oppose the same neither did the Plaintiff or his counsel attend during the hearing of the application.

The order of dismissal is discretionary and should only be issued where the delay is inordinate, is inexcusable and where it causes or is likely to cause prejudice to the parties. I find that a delay of five years going on to six is extremely inordinate. The Plaintiff has not bothered to come and explain the delay. There is therefore no excuse or explanation given to this court for the delay in prosecuting this suit. The Plaintiff has been sitting on an injunction since 2003 which stopped the 1st Defendant from transferring the suit property to the 3rd Defendant who was a purchaser of the same. I am satisfied that the Defendants are suffering prejudice and will continue to suffer prejudice if this matter is allowed to continue pending indefinitely.

I find merit in the application dated 2nd October, 2008. I will allow the same and dismiss the Plaintiff's suit for want of prosecution with costs to the Defendants.

Dated at Nairobi, this 30th day of January, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Ojiambo for the 1st and 2nd Defendants/Applicants

Mr. Njeru for 3rd Defendant

N/A for Plaintiff

LESIIT, J.

JUDGE