



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

Civil Case 77 of 2005

OL'BOLOSST CO-OPERATIVE

SAVINGS & CREDIT SOCIETY LIMITED PLAINTIFF

VERSUS

JOHN NJAGI RURIMA DEFENDANT

RULING

A notice to show cause why this suit should not be dismissed under order XVI rule 2(1) of the Civil Procedure Rules was issued by the court. On the day of the hearing of the notice, the plaintiff's counsel swore an affidavit showing why the suit should not be dismissed. Counsel has explained that the plaintiff is a cooperative society and it is currently embroiled in leadership wrangles over who are the officials. That dispute over who are the lawful officials of the plaintiff is pending determination before the Cooperative Tribunal. Counsel for the plaintiff has been unable to prosecute this matter because the officials purported to withdraw instructions from him. He urged the court not to dismiss the matter, so as to allow the cooperative society, the plaintiff herein, finalize the dispute before the Tribunal to determine the rightful officials.

The defendant also swore an affidavit in support of the notice to show cause and urged the suit be dismissed for want of prosecution. The defendant has detailed in the affidavit that pleadings in this case closed in May 2005, after that he filed an application seeking to strike out the suit in April 2005, which application was argued and a ruling delivered on 17th August 2007, where the court refused to grant the application. Since the 17th August 2007 the plaintiff has never taken any steps to prosecute this matter.

The plaintiff contends that the continued delay of prosecution of this matter is prejudicial to him because the claim by the plaintiff is based on an oral agreement allegedly entered into January 1999 more than ten years ago. The plaintiff is also seeking for a sum of Ksh.6.5 million together with costs and interest from January 1999. The delay in the prosecution of this matter has led to the interest claim going up substantially. Moreover the defendant is aging, he is suffering from ill health and there is likelihood he may not remember the details over a transaction which took place ten years ago.

Under the provisions of **Order XVI rule 2(1)** it is provided that:

“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”

The issue for determination is whether the plaintiff has demonstrated sufficient reasons why the suit should not be dismissed for want of prosecution. The record is clear since 17th August 2007; no steps have been taken to prosecute the matter. Even the affidavit by counsel for the plaintiff does not make a commitment for any steps to be taken in the near future until the dispute over the leadership wrangles within the plaintiff's Co-operative Society is determined. It is not clear when that will be, suffice it to state that it is the duty of the plaintiff to take the initiative to have the matter heard expeditiously, that is the law and also public policy, and also the legitimate expectation of the defendant that the business of the court should be conducted expeditiously.

The defendant has sworn an affidavit and stated that the continued pendency of this suit is causing him prejudice. He has to bear the burden of worrying about his defence which I agree is a like sword of Damocles hanging on his neck, it is in the interest of justice that the court should offer remedy to that burden by dismissing the suit for want of prosecution.

For the aforesaid reasons, no sufficient cause is shown why the suit should not be dismissed for want of prosecution; I order the suit be dismissed with costs to the defendant.

RULING READ AND SIGNED ON 13TH NOVEMBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE