**REPUBLIC OF KENYA**

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

**CIVIL CASE 776 OF 2001**

**MAGERAZA STAFF CO-OPERATIVE SAVINGS & CREDIT SOCIETY… PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA LIMITED.……..................……….DEFENDANT**

**R U L I N G**

This is an application made by the defendant under the provisions of **Order XVI Rule 5 (d)** and **Order L Rule 1** of the **Civil Procedure Rules** seeking the orders of this court for "*the plaintiff's suit herein be struck out with costs to the defendant*". As is evident from the supporting affidavit sworn by Mercy W. Buku, a senior legal officer of the defendant, the defendant was actually making an application for this court to dismiss the plaintiff's suit for want of prosecution. Simon Kimondo Mubea, the advocate for the plaintiff, swore a further affidavit in support of the plaintiff's application. The application is opposed. Jane Ombongi, the deputy general manager of the plaintiff and Sophie Cherono, the advocate for the plaintiff filed affidavits in opposition to the said application.

At the hearing of the application, Mr. Kimondo, counsel for the defendant submitted that the plaintiff had taken no action to prosecute the case since 17$^{th}$ September, 2002 when the case was last in court for hearing. He submitted that the plaintiff had failed to give satisfactory explanation for its failure to prosecute the case. In his opinion, the delay was inordinate and therefore was not excusable. He maintained that the explanation given by the plaintiff to the effect that it had been let down by its advocates who were previously on record did not hold since it was the duty of the plaintiff to make necessary inquiries from its advocates and pursue the prosecution of its case. He submitted that the defendant would be prejudiced if the order of dismissal is not made since, at one time, the plaintiff had made an offer to withdraw the suit subject to no orders regarding costs being made. He explained that the plaintiff had been indolent and had been moved to take a hearing date once it became aware that the defendant had fixed the present application for hearing. Mr. Kimondo maintained that it would serve the interest of justice if the suit is dismissed for want of prosecution since the reasons advanced by the plaintiff for the delay in prosecuting the case were untenable

Miss Cherono, counsel for the plaintiff opposed the application. She conceded that the plaintiff had indeed not fixed the suit for hearing since 17$^{th}$ December, 2002 when the case was last in court. She submitted that the failure by the plaintiff to fix the suit for hearing was occasioned by mistake of counsels who were previously on record. She maintained that the two advocates who were previously on record on behalf of the plaintiff, let down the plaintiff by not fixing the case for hearing. She objected to the contention by the defendant that the plaintiff had communicated to the defendant its intention to withdraw the suit provided that no order regarding costs was made. She maintained that the said communication to the defendant was made on "*without prejudice*" basis and was therefore not subject to production as evidence in court. She submitted that the plaintiff is willing to prosecute its case. She urged the court to give the plaintiff an opportunity to prosecute the same. As a sign of its seriousness, the plaintiff had already fixed the case for hearing and the same is scheduled to be heard on 2$^{nd}$ December, 2008. She maintained that the defendant would suffer no prejudice if the plaintiff is allowed to prosecute its case. Any prejudice that the defendant would suffer would be adequately compensated by costs. She urged the court to dismiss the application with costs.

I have carefully considered the rival submissions made by counsel for the defendant and counsel for the plaintiff. I have also read the pleadings filed by the parties to this application in support of their opposing

positions. I have also read the proceedings of the court since the plaintiff filed the present suit. The issue for determination by this court is whether the defendant made a case to enable this court dismiss the plaintiff's suit for want of prosecution. This court is aware that it has inherent power to dismiss a suit for want of prosecution if it is satisfied that the plaintiff has been indolent or has not been diligent in the prosecution of its case. The power given to the court to dismiss a suit for want of prosecution by **Order XVI Rule 5 (d)** of the **Civil Procedure Rules** is meant to clear backlog especially where it appears the plaintiff is no longer interested in the prosecution of his case. It is also meant to relieve the defendant of the anxiety of having a suit hanging on his head. In **Ivita vs. Kyumbu [1984] KLR 441 at page 449**, Chesoni J *(as he was then)* held as follows:

"*So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.*"

In the present application, it is conceded on behalf of the plaintiff that it took no step to set down this case for hearing since 18th December, 2002 when the case was last before court. The plaintiff gave an explanation for its delay. It stated that it was let down by the two advocates that it had previously engaged to act on its behalf. The plaintiff pleaded with the court not to visit the mistakes of its previous counsel on it. On the other hand, the defendant submitted that it has been prejudiced by the prolonged delay by the plaintiff in not taking any steps to fix the suit for hearing. It was further submitted on behalf of the defendant that it was apparent that the plaintiff was no longer interested in the prosecution of the case since it had made proposal for the suit to be withdrawn provided that each party was to bear its costs.

I have carefully considered the reasons put forward by the plaintiff for its failure to take appropriate steps to fix this case for hearing. I think it is now accepted that a litigant is responsible for his case. Such responsibility cannot be transferred to his advocate. It is his duty to pursue his advocate so as he is made aware of what has transpired in his case. If the advocate fails to take appropriate steps to prepare the case for hearing despite instructions from his client, such a client has recourse to pursue such an advocate for remedy either by filing suit for professional negligence or by registering a complaint with the Advocates' Complaints Commission. In some exceptional circumstances, this court will allow a party to proceed with his case where allegation of indolence or lethargy on the part of the advocate is made.

Having considered the facts of this case, I am satisfied that the plaintiff's explanation falls within the exception. Upon discovering that its previous advocates had taken no steps to fix this case for hearing, the plaintiff instructed the present advocate who has already taken a hearing date. I will disregard the assertion by the defendant to effect that the plaintiff made an offer to withdraw the suit. The correspondence which the defendant sought to rely in support of its contention that such an offer of withdrawal had been made, was written on "without prejudice" basis. The said correspondence was therefore not admissible in evidence. From the spirited submission by the plaintiff, it is clear that the plaintiff is interested in the prosecution of its case.

I therefore hold that the reasons put forward by the plaintiff for delay in failing to take steps in prosecution of this case are excusable. I will disallow the application for dismissal of the plaintiff's suit for want of prosecution. The plaintiff shall however pay the defendant the costs of this application.

**DATED** at **NAIROBI** this **16th** day of **APRIL, 2008.**

**L. KIMARU**

**JUDGE**