



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 11 OF 2016

ROOT CAPITAL INCORPORATED.....PLAINTIFF/RESP.

VERSUS

TEKANGU FARMERS

CO-OPERATIVE SOCIETY LTD.....DEFENDANT/APPLICANT

CO-OPERATIVE BANK

OF KENYA LIMITED.....INTERESTED PARTY

RULING

The applicant seeks to have the plaintiff's suit dismissed for want of prosecution and to this end it has moved this court by a motion dated 16th January, 2018 filed under Order 17 Rule 2(3) of the Civil Procedure Rules; this rule provides that any party to a suit may apply for its dismissal as provided in sub-rule 1. Sub-rule 1 states:

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 basis of the applicant's motion is derived from this provision. It is simple and outright: that since the 19th August, 2016 when this court dismissed the respondent's application to freeze the applicant's bank accounts at Co-operative Bank of Kenya, at Karatina branch, no other application has been made or any step taken in this matter, more than a year later. In the face of this rather prolonged lull, so the applicant has contended, this suit is ripe for dismissal in accordance with this provision of the law.

The respondent, on the other hand, does not dispute that until the applicant filed the present application, almost one and a half years later, no action or step of any sort has hitherto been taken towards prosecution of this suit. I gather from the replying affidavit sworn on its behalf in response to the applicant's application that its inertia is attributable to partly its own ignorance of the tenor and import of my ruling of 19th August, 2016 and partly to the negligence of its previous counsel.

Mr Peter Onguka, the respondent's risk manager, has deposed in this affidavit that the respondent's decision-making organ is based in Massachusetts from where its various activities around the world are co-ordinated. As far as the fate of this suit is concerned, the co-ordination of the meetings between the corporation's representatives in Nairobi and the decision-making organ Massachusetts has been slow. The sudden departure of the corporation's legal counsel in July, 2016 did not help matters because the recruitment of a new counsel who only is in good stead to advise it on matters legal took some time; and even after she was recruited, she took time to acquaint herself with the docket of which she was now in charge of including studying several technical legal matters affecting the corporation or in which the corporation was involved and which, no doubt, included the present suit, which her predecessor handled prior to her departure.

Coupled with these administrative hiccups was the respondent's erroneously held belief that the net effect of the ruling delivered on 19th August, 2016 was to dismiss its suit in its entirety. The respondent only came to learn of the true meaning of the ruling when its present counsel took over this suit from the previous advocates.

In view of the explanations offered by the respondent, its counsel urged that the delay in prosecution of this suit is not deliberate and this court should exercise its discretion and entertain the suit rather than dismiss it.

According to the respondent, the applicant will not suffer any prejudice if this suit is heard and determined on merits. On the contrary, if the suit is dismissed, so it has been urged, the respondent will be prejudiced in large measure considering that it stands to lose a sum of Kshs. 36,357,819.75 which it loaned to the respondent.

The power with which this court can dismiss a suit for want of prosecution under Order 17 (2)(1) is discretionary and as such all that the court is concerned about in its decision to dismiss or not to dismiss a suit for want of prosecution is to be cautious that this power is exercised judiciously rather than at the judge's whims or caprice. In my humble opinion, the explanation offered for failure to make any application or to take any step within one year after the last action in a suit largely determines the direction the exercise of the discretion will take; if sufficient cause is shown why no application or action was taken within the limitation period, then the suit will be sustained. But if, on the other hand, no satisfactory reason is given for the undue delay, the suit ought to be dismissed. This then leads me to consider whether the explanation offered by the respondent for the delay is viable.

I am persuaded it is. As far as I gather, its previous counsel abandoned it at the hour of need. However, I must hasten to add that the lapse on part of its counsel is not, by itself, a sufficient reason for excusing the respondent's lethargy because if it is convinced that its counsel acted negligently, nothing stops it from proceeding against him for the damages it has suffered or may suffer in future as a result of this negligence. It is only that when this reason is considered amongst other reasons given for the delay, I am inclined to believe the respondent that were it not for these other intervening factors for which it had little or no control over it would not have delayed in prosecution of its case. I also believe it is honest in the explanations it has offered because if it would be illogical for it to fail to pursue a claim for which, in its view, it has sufficient evidence to sustain. Refusing the applicant's application also appeals to be the most appropriate step to take in the circumstances because the applicant will not suffer prejudice if the suit is heard on merits.

Before I conclude, I must acknowledge several decisions of this court which counsel for the respondent cited in support of his submissions; these include, **Utalii Transport Company Ltd versus NIC Bank Limited & Another (2014) eKLR**; **Bruce Mutie Mutuka T/A Diani Tour & Travel Centre versus Equity Bank Limited (2014) eKLR**; **Patrick Ayisi Ingoi & Another versus Madhav Bhalla T/A Taibjee & Bhalla Advocates & 2 Others (2014) eKLR** and; **Moses Otsyula versus Children of God Relief Institute (2014) eKLR**.

Most of these decisions, if not all, have gone to great lengths in discussing what amounts to delay or 'inordinate delay' for that matter. If I have to contribute anything to this debate, all I can say is that once the rules have, in express and specific terms, prescribed the limitation period within which an act ought to be done, there is automatic delay if the act is not done within that period. In the present case, time lapsed on the last day of the one year within which an application ought to have been filed or an action taken in this suit. In these circumstances, the applicant would perfectly be in order if its application had been filed on the first day after the elapse of one year. If my view is correct, the debate whether a delay is inordinate or not after the expiry of the limitation period is rendered unnecessary. Taking all the relevant factors into consideration, the Rules Committee must have advisedly settled on one year as the period within which a reasonable litigant ought to take some sort of action in his suit, failure of which it is open to court to dismiss it on the court's own motion or on an application by either of the parties to the suit. I would suppose that the longer one delays after the elapse of the one-year limitation period, the heavier the burden becomes for the recalcitrant litigant to explain why the suit should not be dismissed. Regardless of the decision the court may come upon considering any reasons given for the extended delay, I would think that such delay only makes it less likely that the discretion to dismiss or not to dismiss the suit for want of prosecution will be exercised in the litigant's favour.

In the final analysis I refuse the applicant's application dated 16th June, 2018. The applicant will however, have costs of the application.

In order to prevent the plaintiff or any other party to the suit from sliding back into lethargy again, I hereby order the parties to take immediate steps to comply with Order 11 of the Civil Procedure Rules within 60 days of the date of delivery of this ruling in readiness for the hearing and disposal of this suit.

Dated, signed and delivered in open court this 6th July, 2018

Ngaah Jairus

JUDGE