



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NUMBER 306 OF 2012

MICHAEL MBURU KIGO.....PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....DEFENDANT

RULING

The Applicants motion dated the 18th February 2014 is brought under the provisions of **Order 17 Rule 2(3) and Order 51 Rule 1** of the **Civil Procedure Rules** – and seeks an order of dismissal of the suit for want of prosecution on the grounds that since the filing of the suit by a Plaintiff dated 14th August 2012 and Amended Plaintiff dated 10th September 2012, no action has been taken towards its prosecution and as such the plaintiff has lost interest in the same.

The applicant in its grounds in support of the application states that by an order of the court issued on the 25th July 2014, the plaintiff's application for an injunction to restrain the applicant, Co-operative Bank of Kenya from repossessing, selling or auctioning the plaintiff's farm and equipment pending the hearing and determination of the suit was dismissed and since then, no other action has since been taken. It is its contention through submissions by its Advocate Mr. Kisila that the main objective of the suit was to obtain the injunction order and since the said orders were denied on the 25th July 2014, then there appear to have no further interest in the suit.

The application is opposed by a replying affidavit sworn by the plaintiff on the 8th June 2015. The main ground of objection is that one year had not lapsed at the time of filing the application as envisaged under **Order 17 Rule 2(1)** where it is stated that upon expiry of one year without the plaintiff taking any action to prosecute the suit, the court may dismiss the suit for want of prosecution. The court has considered the application, and the grounds in support together with the replying affidavit and arguments by both counsel.

The courts notes that the application is brought under **Order 17 Rule 2(3)**. I reads:

“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 take 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.”

I have noted that since the order of the court issued on the 25th July 2014 to the time of filing of the application under consideration, only seven(7)months had lapsed. This is not to say that there has been no inordinate delay.

If the plaintiff has any interest in the suit, various steps ought to have been taken towards its prosecution. I have perused the court file. I am satisfied that no action has been taken by the plaintiff for seven (7) months upto the date of the application.

The plaintiff avers that he wishes to prosecute his case and prays for a chance to do so.

The court is minded that parties to a suit ought to be given an opportunity to prosecute their case and be heard. The court is also alive to the fact that if a party is not interested in the prosecution of its case, it ought to issue an order of its dismissal by virtue of the provisions of **Order 17 of the Civil Procedure Rules**.

I have considered the plaintiff's plea. A statement of defence was filed to the plaintiffs claim on the 4th October 2012. There are no good or satisfactory reasons advanced as to why the plaintiff has not taken steps to fix the case and for hearing three years down the line.

To be fair to the plaintiff and at the same time considering the defendant's interest in the suit as stated, the court shall make the following orders:

1. That the plaintiff shall within a period of 60 days from the date of this ruling take all the necessary steps towards prosecution of the suit, that is to say, to comply with the provisions of **Order II of the Civil Procedure Code** and to take a hearing date of the suit.
2. That if the plaintiff fails to comply with the said order, the suit shall stand automatically dismissed, on the 61st day from the date of this order.
3. The defendant/respondent shall bear the costs of the Application.

Dated, signed and delivered in open court this 9th day of November 2015

JANET MULWA

JUDGE