

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 174 OF 2011

WILSON NJOGU KARIMONI.....PLAINTIFF

VERSUS

EMBU FARMERS SACCO

MWANGI AUCTIONEERS

GITHUMBU NJERU::::::::::: DEFENDANTS

RULING

Through their motion dated 27th June, 2015, counsel for the 1st and 2nd defendants have applied for dismissal of this suit for want of prosecution. In their grounds in support of the motion they have stated that the suit has been pending in court for over four years since it was filed on 21st December, 2011. Furthermore, the plaintiff has not taken any step to prosecute the matter. According to them, the plaintiff has lost interest in his case which in their view has also caused unnecessary backlog in this court. They have also stated that the pendency of this suit has caused unnecessary anxiety and accumulation of costs to the 1st and 2nd defendants. Annexed to the notice of motion is a supporting affidavit dated 26th June, 2015. In that affidavit, counsel for the 1st and 2nd defendant has repeated the same grounds in the notice of motion except that he has stated that it is in the interest of justice that the orders sought be granted.

The plaintiff has opposed the dismissal of his suit for want of prosecution. He has in that regard relied on a replying affidavit dated 5th October, 2015. According to him, he had borrowed Kshs 600,000/- from the 1st defendant. Furthermore, he has stated that the 1st defendant in breach of the contract between them dispatched only Kshs 400,000/-. In paragraph 7 of his affidavit, he has stated that Thambana Farmers Co-operative Society wrote to the 1st defendant Nawiri Sacco informing it that he owed them no money. He has finally stated amongst other matters that he is not to blame for the delay because the 1st and 2nd defendant had on 27th February, 2012 filed a notice of preliminary objection on the ground that this court has no jurisdiction to entertain and determine the matter.

Furthermore, the plaintiff has stated that it was the duty of the 1st and 2nd defendant to prosecute the preliminary objection before he could fix his case for hearing. As long as the preliminary objection was pending, he could not do so. He has also stated that the whole time was taken by negotiations which resulted in the defendant admitting liability that he owed nothing to the plaintiff as liability was fully settled by the government. **He has also taken that the time taken resulted in saving the court and the parties time and costs.** Finally, the plaintiff has stated that a suit is liable to be dismissed if it lies idle for over 1 year but not where active negotiations, discoveries and preliminary objections are pending in court. It is for those reasons amongst others that he opposes the dismissal of his case for want of prosecution.

From the affidavit evidence, I find that this suit has been lying in court un-prosecuted for over 4 years. I find that there is no evidence that negotiations were ongoing between the parties in order to reach an amicable settlement. I also find that the defendants filed a preliminary objection in which they challenged the jurisdiction of the court to entertain this matter. According to the plaintiff, he could not set down his case for hearing because of this preliminary objection. I do not find that this was a ground that prevented him from prosecuting his suit. It was also open to him to have the preliminary objection dismissed for

want of prosecution. In other words, the pendency of the preliminary objection does not exonerate him from the delay of over 4 years.

Counsel for the 3rd defendant did not oppose the application for dismissal of the suit for want of prosecution. Additionally, she also did not file any replying affidavit.

In the light of the foregoing matters, I find that the application of the 1st and 2nd defendant in seeking the dismissal of this suit for want of prosecution is justified. I therefore dismiss this suit for want of prosecution with costs to the 1st and 2nd defendants.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this.. **2nd** .. day of **NOVEMBER .2015**.

In the presence of

Court clerk Mr Njue.

J. M. BWONWONGA

JUDGE

02.11.15.