

REPUBLIC OF KENYA



IN THE CO-OPERATIVE TRIBUNAL AT NAIROBI

CTC N0.41 OF 2013

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RONNIE MUSANGA.....CLAIMANT

VERSUS

MARIA LIGAGA.....RESPONDENT

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**RULING**

1. This is a ruling to the application dated 5/7/2016. The same is expressed to be brought under Order 17 Rule 2, Subrule 3 of the Civil Procedure Rules, Section 3A and 63 ( e) of the Civil Procedure Act and all other enabling provisions of the law.
2. The 2<sup>nd</sup> respondent, hereinafter referred to as the applicant is seeking orders:-
  1. That this tribunal be pleased to dismiss the suit against the 2<sup>nd</sup> respondent for want of prosecution.
  2. That the costs of this application and of the suit be borne by the claimants.

3. The application is based on 3 grounds listed on the body thereof and on the affidavit of David N. Njoroge, advocate. In response Michael Muriuki Mwangi, advocate, swore a replying affidavit. This was on behalf of the claimants.
4. On 23.8.16 directions were taken that the matter proceeds by way of written submissions. Both sides filed their submissions and Mr. Muriuki for the respondents sought time to highlight on his written submissions. He was able to address the tribunal briefly on 1.12.16.
5. We have considered the application, affidavits and submissions filed. We have also taken time to go through the other pleadings filed and the entire record. It is important for us to point out that the consent, which is subject of this suit was recorded before the previous bench. We have seen and understood the same.
6. To appreciate this case and get to the issues for determination it is necessary to set out the chronology of events that led to the claimant application.
7. The claimants filed a statement of claim which is undated but received in our registry on 6.2.2013. They sought orders against two respondents for;
  - (a) Full restitution of shares deducted in recovery of the loan to the 1<sup>st</sup> respondent.
  - (b) Interest on the amount deducted above from the date of such deductions till repayment in full.
  - (c) Lost bonuses calculated at the rate of total shares at the rate of total shares inclusive of the sums deducted.
  - (d) In the alternative, the respondent to pay the liquidated sum of the aggregate of a, b and c above.

- (e) Costs of this claim.
8. The two respondents filed separate statement of defence. They denied the claim asking for its dismissal. On 13.9.13 the 3<sup>rd</sup> claimant withdrew his entire claim against the respondents.
9. The claimants subsequently, filed an application dated 30.9.13. They sought orders *inter alia*, that the tribunal strikes out the defence dated 10.5.13 and enter judgment against the respondents for the sum of Kshs. 1,200,000/=.
10. The respondents filed grounds of opposition to the application and on 4.9.2014 the following orders were recorded by consent;

**“ 1. Judgment be and is hereby entered for the claimants against the 1<sup>st</sup> respondent in the sum of Kshs. 1,673,000/= made up as follows;**

**(a) The principal sum of Kshs. 1,200,000/=,**

**(b) Interest in the sum of Kshs.363,000/=,**

**(c) Costs of the suit in the sum of Kshs.110,000/=.**

**2. That the 1<sup>st</sup> installment of Kshs. 560,000/= be paid on or before 30.9.14.**

**3. That the balance be paid in equal monthly installments of Kshs. 250,000/= on or before the 30<sup>th</sup> day of each month commencing on 31.10.2014 and thereafter on the 30<sup>th</sup> day of each succeeding month until payment in full.**

**4. In default of payment of any one installment execution to issue.**

- 5. That the suit be marked settled as between the claimants and the 1<sup>st</sup> respondent upon payment of the last installment”**
11. It is noteworthy that the 2<sup>nd</sup> respondent’s advocates did not attend court on the above date and were not party to the consent. The consent as recorded did not say anything about their case.
12. We note that on the same day, and as an addendum to the consent, the tribunal further ordered:-
- 1. That the suit by the claimants against the 2<sup>nd</sup> respondents proceeds for hearing,**
  - 2. That the hearing be on 8.10.14 and counsel for the 2<sup>nd</sup> respondent be served with a hearing notice,**
  - 3. That counsel for the claimants do pay further court fees for the sum of Kshs. 1,200,000/= within the next 30 days.**
13. Nothing seems to have happened since the date of the consent. The inactivity on the part of the claimants appear to have provoked the application dated 5.7.16.
14. Having set out the facts as above the following issues come up for determination:-
- (i) Whether the suit against the 2<sup>nd</sup> respondent was concluded by way of consent,
  - (ii) Whether, if not so, the same should be dismissed for want of prosecution,
  - (iii) Which party should bear the costs of the suit and application herein.
15. To determine the first issue we only need to look at the consent recorded on 4.9.14. The 2<sup>nd</sup> respondent was not represented. The 1<sup>st</sup> respondent agreed to pay the claim in

installments. The matter was to be marked as settled between the claimants and the 1<sup>st</sup> respondent upon payment of the last installment. It is not clear to date whether the last installment has been paid but the parties to the consent are not complaining.

16. It is manifestly clear that the 2<sup>nd</sup> respondent were not bound by that consent. On this realization the tribunal ordered that the suit against the 2<sup>nd</sup> respondent proceeds for hearing. A date was given. The claimants were to serve. It is noteworthy that the 2<sup>nd</sup> respondent had filed a separate defence. They had denied the averments in the claim. The claimants have submitted that according to them the matter was concluded. That they had no further claim. If that was the position then they would have withdrawn their claim against the 2<sup>nd</sup> respondents. The matter is still pending. It was not concluded as against the 2<sup>nd</sup> respondent.
17. Having found that the suit is still pending the next question is whether the same should be dismissed for want of prosecution. The 2<sup>nd</sup> respondent relies on the provisions of Order 17 Rule 2(1) of the Civil Procedure Rules. Under that Rule it is provided;  
“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 to why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit”
18. This suit has not been prosecuted for almost two years. The claimants who brought the 2<sup>nd</sup> respondent to the tribunal have not taken any action to have it move forward. The argument that they were the successful party in the consent is correct. It affects only the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent was not ordered to bear any liability. The case

remains not proved against it. To submit that dismissal of the case against the 2<sup>nd</sup> respondent will amount to dismissal of the consent judgment is ingenious but with respect, not correct. There was simply no consent judgment against the 2<sup>nd</sup> respondents. The matter has remained pending all this time.

19. In the replying affidavit the claimants have indicated that they do not wish to ever proceed with their case. They referred to “without prejudice” correspondence between them and the 2<sup>nd</sup> respondent where they were of the view that the issue of costs should be abandoned. It has been indicated by Mr. Muriuki advocate that the claimants do not wish to pursue their costs. That is their choice. We have said enough to show that the suit is ripe for dismissal for want of prosecution. It is so ordered.
20. There is the last issue of costs. The claimant in their consent with the 1<sup>st</sup> respondent were silent on costs. In submissions before the tribunal counsel for the claimants stated that they are not interested in costs. The 2<sup>nd</sup> respondents are asking for costs. They were brought to court on the claim they still deny. They incurred costs in defending this suit. They are entitled to be paid by the party who brought the suit and is not interested in prosecuting the same; the 2<sup>nd</sup> respondent has not in any way contributed to delay of this case. This is a proper case to order that the claimants pay the costs of the suit and the instant application. It is so ordered.

Signed  
**A. ITHUKU**  
**CHAIRMAN**

Signed

**F. F. ODHIAMBO**  
**MEMBER**

Signed

**R. MWAMBURA**  
**MEMBER**

**Order:**

Ruling delivered in open court. Mr. Omago holding brief for Njoroge for 2<sup>nd</sup> defendant. M.M.

Muriuki advocates absent.

Signed

A. Ithuku

**Chairman**

**31.1.17**