



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1268 of 2005**

**TOM JOSEPH OTUNGA.....PLAINTIFF/RESPONDENT**

**versus**

**C.F.C. BANK LIMITED.....DEFENDANT/APPLICANT**

**RULING**

This Notice of Motion dated 24<sup>th</sup> November 2009 was brought by the Defendant/Applicant under Order XVI Rule 5 (d) of the Civil Procedure Rules for orders seeking to have the suit herein by the Plaintiff against the Defendant dismissed for want of prosecution. The Defendant also wants costs of the suit and of the Application.

Grounds of the Notice of Motion as confirmed from its face are that the Plaintiff has failed to set the suit down for hearing or to prosecute the suit since the suit was last taken out of the hearing list for 19<sup>th</sup> and 20<sup>th</sup> May 2008 a period over one year from today, yet it is also over 3 ½ years since the pleadings closed, facts suggesting the Plaintiff has lost interest in the suit.

The Plaintiff in his reply says it is not true that Plaintiff has failed to set down suit for hearing because what happened is that Plaintiff could not fix hearing date on the ground that the case file went missing at the Registry. The Plaintiff added it is not true he has lost interest in the suit. Otherwise the Applicant should have opted to fix the case for hearing instead of filing this application. Discovery had been done.

The Plaintiff says the application is rash and aimed at frustrating his efforts to prosecute a legitimate claim against the Defendant. Says the application be dismissed.

I have carefully considered the matter and must point out that the Defendant/Applicant has a point when it complains of want of prosecution. However, the Applicant should have been more careful and ought to have realized that Order XVI Rule 5 (d) is about adjournment of hearing generally and that should not cover non confirmation of a hearing date.

I may also point out that under Order XVI Rule 5, once a party has chosen one of the two options i.e to apply for dismissal of suit or to fix it for hearing, that Applicant has exercised his right and cannot, in normal circumstances, be faulted for having made that choice.

Further, where a party relies on a ground, as the Respondent is doing in this application, that a court case file went missing, that party must adduce or produce reliable and sufficient evidence of that allegation as mere allegation without such evidence is not acceptable. That is what the Plaintiff has done in this application. No reliable and sufficient evidence as even claim to that effect from both parties without more is not reliable and sufficient evidence.

Having said the above, I am of the opinion that this is a case where justice can still be done even if this Notice of Motion is not

granted.

I do hope the Plaintiff in this suit has been made to wake up and to even note that the operation of Rule 5 of Order XVI of the Civil Procedure Rules does not depend on anything else apart from what that rule says. Doing discoveries and other preliminaries are there in the Civil Procedure Rules but Order XVI Rule 5 remains what it is today.

On the whole therefore, I do hereby dismiss this Notice of Motion dated 24<sup>th</sup> November 2009, but do order the Plaintiff/Respondent to pay to the Defendant/Applicant, costs of the Notice of Motion.

Dated this 19<sup>th</sup> day of March 2009.

**J.M. KHAMONI**

**JUDGE**

**Present:**

Hamilton Harrison & Mathews, Advocates for the Applicant.  
Karanja, Otunga & Associates, Advocates for the Respondent