

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Suit 59 of 2005

GRACE NYANCHAMA MIRUKA PLAINTIFF

VERSUS

NATIONAL BANK OF (K) LTD DEFENDANT

RULING

The defendant filed an application by way of a Notice of Motion

brought under **Order XVI rule 5** of the **Civil Procedure Rules**. The application seeks dismissal of the plaintiff's suit for want of prosecution. The application was supported by an affidavit sworn by Damaris Gitonga, the defendant's Manager in charge of Legal services. She stated that the plaintiff filed this suit on 13/5/2005 and obtained interlocutory order on 28/9/2005. Since 28/9/2005 the plaintiff had not taken any step towards disposal of the suit.

The plaintiff swore a replying affidavit and stated that on 31st May, 2006 she filed her list of documents and on 17th July 2006 her advocate sent a letter to the defendant's advocate requesting him to file his list of documents but he defendant's advocate had failed to do so.

Mr. Nyamurongi for the defendant denied that any letter had been sent to the defendant's advocate. He challenged Mr. Mbunde for the plaintiff to provide evidence that the letter had been sent by registered post as alleged but he plaintiff's advocate did not have such evidence. Mr. Nyamurongi added that filing a list of documents was not a step towards prosecution of a suit.

Mr. Mbunde urged the court not to allow he defendant's application, adding that even the defendant could have set down the suit for hearing

Upon perusal of this file I realized that since 28th September, 2005 when the plaintiff obtained some interim orders against the defendant, no effort was made to set down the suit for hearing. Even after service of the defendant's application, the plaintiff never bothered to request the registry to grant her a hearing date. She cannot argue that since September, 2005 no hearing date was available.

Even if the defendant could have also taken the initiative to set down the suit for hearing, the law allows a defendant to apply for dismissal of a suit for want of prosecution. In an adversarial system of justice, a party is allowed to employ any lawful method as would finalize litigation to his advantage. The defendant cannot therefore be faulted.

The plaintiff has demonstrated no interest in her suit since 28th September, 2005. Consequently I dismiss the same with costs to the defendant.

DATED, SIGNED and DELIVERED at KISII this 20th day of May, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Anyona for the plaintiff

N/A for the defendant.

D. MUSINGA

JUDGE