



**REPUBLIC OF KENYA**

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

**Civil Case 3016 of 1997**

**APRICOT APPLE PROMOTION & SYSTEMS LIMITED.....PLANTIFF**

**V E R S U S**

**STANBIC BANK LTD .....DEFENDANT**

**R U L I N G**

This is an application by the Defendant (notice of motion dated 16<sup>th</sup> May, 2005) for dismissal of the Plaintiff's suit for want of prosecution. It is brought under Order 16, rule 5 (a) and (c) of the Civil Procedure Rules. Those two rules prescribe respectively that if, within three months after the close of pleadings or the removal of the suit from the hearing list, the plaintiff, or the court on its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal. There is a supporting affidavit sworn by the Defendant's advocate, one COLLINS NAMACHANJA.

At the hearing of the application on 10<sup>th</sup> of May 2007 there was no appearance for the Plaintiff. I was then satisfied that both the application and hearing notice had been duly served upon the Plaintiff, and I permitted the application to be prosecuted. However, upon checking the record more closely when preparing this ruling, I have noted that service was effected on both occasions by registered post. This was substituted service, necessitated by the fact that the Plaintiff's advocates could not be traced. Being substituted service, leave of the court ought to have been sought first in order to validate the service. The record does not show that such leave was sought or obtained. In the circumstances there was no good service of both the application and hearing notice.

In the interests of justice, I will set aside the proceedings of 10<sup>th</sup> May 2007 to enable the application to be heard afresh upon proper service on the Plaintiff. This is necessary because dismissal of a litigant's suit unheard is a drastic step that should not be lightly taken. There will be no order as to costs.

Orders accordingly.

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JUNE 2007**

**H. P. G. WAWERU**

**JUDGE**