



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**

**CIVIL CASE 1218 OF 2001**

**SOLOMON KIRAGU THANDE .....PLAINTIFF**

**V E R S U S**

**1. CO-OPERATIVE MERCHANT BANK LIMITED**

**2. JOSEPH GIKONYO (T/a Garam Investments) .....DEFENDANTS**

**R U L I N G**

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

This is an application by the 1<sup>st</sup> Defendant (by notice of motion dated 6<sup>th</sup> February, 2006). It seeks under Order 16, rule 5 (d) of the Civil Procedure Rules (the Rules) an order for dismissal of the Plaintiff's suit for want of prosecution. It is alleged that the Plaintiff has failed to prosecute the suit since 15<sup>th</sup> December, 2004 without any reasonable or just cause. The application is supported by an affidavit sworn by ICHAU MUTAHI, the 1<sup>st</sup> Defendant's learned counsel.

The Plaintiff was duly served with the application on 9<sup>th</sup> March 2006. He did not file any papers in response thereto. The application is therefore unopposed.

I have perused the record of court. The suit was last in court on 15<sup>th</sup> December, 2004 for hearing. It was stood over generally upon the Plaintiff's application. The Plaintiff was ordered to pay court adjournment fees. Since that date the Plaintiff has not set the suit down for hearing.

I am satisfied from the supporting affidavit that the 1<sup>st</sup> Defendant tried to set down the suit for hearing. Its efforts in that regard were frustrated by the Plaintiff's failure to pay the court adjournment fees ordered on 15<sup>th</sup> December, 2004. The 1<sup>st</sup> Defendant therefore elected to make the present application.

As already observed, the Plaintiff did not file any papers to the present application. Again, as already observed, the Plaintiff has not taken any step since 15<sup>th</sup> December 2004 to set down the suit for hearing. In the circumstances of this case, this delay is prolonged and inexcusable as there has not been any explanation for it. I am satisfied, in the circumstances, that the Plaintiff has lost interest in the suit. It should not be permitted to hang over the Defendant's head indefinitely.

In the result I will allow the application. The Plaintiff's suit be and is hereby dismissed with costs to the Defendants for want of prosecution. Orders accordingly.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF AUGUST 2007**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED THIS 31<sup>st</sup> DAY OF AUGUST, 2007**