



**REPUBLIC OF KENYA**

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

**MISC CIV APPLI 1089 OF 2005**

**KAMUNYORI & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**CANNON ASSURANCE (KENYA) LIMITED.....RESPONDENT**

**RULING**

The Advocate in this miscellaneous application is the Applicant in the application dated 22<sup>nd</sup> March, 2007. The application is brought under Order L rule 1 of Civil Procedure Rules, Order XVI rules 5 of Civil Procedure Rules and Section 3A of Civil Procedure Rules.

In this application, the Advocate seeks to have the Respondent/Client's application dated 23<sup>rd</sup> February, 2006 dismissed for want of prosecution and for costs.

The grounds for the application are cited on the face of the application and are that the Respondent has failed to set down his application for hearing and that over three months had passed since the matter was adjourned generally. The Advocate has also sworn an affidavit in support of the application. The application is opposed. The Respondent's Financial Controller has sworn a replying affidavit dated 11<sup>th</sup> October, 2007. There is also filed a Notice of Preliminary Objection in which the Client/Respondent's Advocate raises only one ground:

***“That the application herein is bad in law as the matter is settled hence the matter is res judicata”***

Mr. Kamunyori argued the application in its support while Mr. Thuo opposed it. The application proved to be very contentious. However having listened to the various submissions advanced I made the following observation. Mr. Kamunyori did not argue his application for the dismissal of the Respondent's pending application as sought in this application. Instead the Advocate tried to justify two things, one that he had incurred extra costs preparing for the instant application and the Respondent's pending one; two that the matter the subject of the Respondent's pending application was not **res**

***judicata*** as argued by the Respondent's Advocate.

The Advocate seemed to be justifying the costs taxed, and which the Respondent was challenging in its pending application.

Mr. Thuo on his part seems to have been carried away and tried to show how the Applicant Advocate had filed several suits and miscellaneous application to recover costs more than once.

The issue before me is whether the application dated 23<sup>rd</sup> February, 2006 should be dismissed for want of prosecution.

No attempt was made to bring the application within the ambit of Order XVI rule 5 of Civil Procedure Rules as invoked on the face of the motion.

I have no alternative but to find no merit in this application and to dismiss it with costs to the Respondent.

**Dated at Nairobi this 9<sup>th</sup> November, 2007.**

**LESIT, J.**

JUDGE

Read, signed and delivered in the presence of:

Mr. Kamunyori for Applicant

No appearance for Respondent

**LESIT, J.**

JUDGE