

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

Civil Case 185 of 2002

NGOTHO WATHOME AND COMPANY LIMITED PLAINTIFF

VERSUS

AMERICAN LIFE INSURANCE COMPANY (K) LT..... DEFENDANT

R U L I N G

This is an application by the Defendant (amended notice of motion dated 31st October 2005) for dismissal of the Plaintiff's suit for want of prosecution under Order 16, rule 5 (d) of the Civil Procedure Rules. Under that rule, if within 3 months after the adjournment of the suit generally the plaintiff, or the court of 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.

The Plaintiff was duly served with the application and hearing notice. He did not file any grounds of opposition or replying affidavit. Nor was there appearance for him at the hearing of the application.

Mr. Imende, learned counsel for the Defendant, submitted that the suit was last before a Judge on 18th September 2002, when it was adjourned generally, and that the Plaintiff has since then not taken any steps to fix it for hearing. The court record shows that on 18th September 2002 what came up for hearing was chamber summons dated 25th June 2002 by which the Plaintiff's advocate sought leave to cease acting for the Plaintiff. Leave was granted as prayed. No order was entered adjourning the suit generally as the suit itself was not coming up for hearing on that date. It is therefore apparent that the present application is misconceived. I think what the Defendant should have sought is an order for dismissal under rule 6 of Order 16. That rule provides –

“In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed; and in such case the plaintiff may, subject to the law of limitation, bring a fresh suit.”

In the result I must refuse this application. It is hereby dismissed with no order as to costs. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 10TH DAY OF FEBRUARY, 2006.