



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**

**Civil Case 45 of 1995**

**FRANCIS MWANZA MULWA.....PLAINTIFF**

**VERSUS**

**STANDARD CHARTERED BANK (K) LTD.....DEFENDANT**

**RULING**

The defendant/applicant has applied for the dismissal of this suit by Notice of Motion application dated 31<sup>st</sup> October 2005. The application is brought under 0.XVI rule 5(d) of the C.P.R. and Section 3A of C.P.A. Before arguing his application, the defendants advocate applied to have the grounds of opposition filed by the respondent in contravention of 0.L rule 16 of C.P.R. struck out which I promptly did. Mr. Musyoka for the applicant submitted that the suit was old having been filed on 15<sup>th</sup> February, 1995. That the suit had not been set down for hearing ever and an attempt to have it heard in 1997 was thwarted by the action of the plaintiff on grounds that there was a suit pending. Mr. Musyoka submitted that the said pending suit was determined in December, 1997. That subsequently the applicant/defendant filed an application for dismissal of this suit for want of prosecution on 18<sup>th</sup> May 1999 but the same was withdrawn by consent on grounds the plaintiff set suit down for hearing and also paid throw away costs. Mr. Musyoka submitted that same was not done to-date.

That on 20<sup>th</sup> July, 2000 when the suit was to be heard, it was adjourned on the application of the plaintiff/respondent who were also condemned to pay costs which costs were outstanding to-date. That since 2000 the plaintiff has not set suit down for hearing. That consequently the defendant was suffering prejudice due to loss occasioned by the fact that no interest has been running as the charge the subject matter of the suit. Mr. Musyoka relied on the case of **NJUKI GACHUGU VRS GITHI** a **KLR** authority without a citation but which he supplied to the court.

As much as I agree that the case is old having been filed 11 years ago; there seems to be lots of activity in this file. There has been hearing dates set in this matter by the respondent. The hearings did not proceed. In the two instances cited by the applicant that is, in 1997 and 2090, the judgment, in exercise of discretion allowed applications for adjournments made by the plaintiff. The applicant cannot be heard to complain about these adjournments as the court allowed them having been satisfied that they were deserved.

The last time the suit was to be heard was on 20<sup>th</sup> July, 2000. That means as opposed to Mr. Musyoka's submission the plaintiff complied with the conditions set between them on 18<sup>th</sup> may, 1999 when a similar application was withdrawn. As of 20<sup>th</sup> July, 2000 why the hearing did not take off was because the plaintiff/respondent overlooked to serve a hearing notice on the defendant/applicant. There is nothing to suggest that the plaintiff deliberately failed to serve the hearing notice. On 15<sup>th</sup> January, 2003, a similar application to the instant one was to be heard but the applicant herein, despite taking hearing dates and serving the plaintiff, did not appear for the hearing. The plaintiff/respondent was present and that is when the application was dismissed for lack of prosecution with costs to the plaintiff.

It is quite apparent to me that the plaintiff has demonstrated that he has been desirous to have the suit heard in the past. It is not therefore true that he has lost interest in this suit.

I find that the defendant has exaggerated the issues to make it appear as if the plaintiff has not wished to prosecute his case.

Further, having been in this court this month, it creates a bit of uneasiness on my part to accept an allegation that a party has failed to take hearing dates. I have seen that no dates seem to be available due to the hearing pressure of work in this station.

I find conditions set under 0.XVI rule 5 (d) of C.P.R. are not met given all the circumstances as outlined herein above. I decline to grant the application and instead I dismiss it with costs in the cause.

Dated and delivered at Machakos this 31<sup>st</sup> day of May, 2006.

J. Lesiit

JUDGE