



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

**Civil Case 89 of 2004**

**KOFEXCO LIMITED .....PLAINTIFF**

**VERSUS**

**CETCO LIMITED .....DEFENDANT**

**R U L I N G**

The defendant herein, Cetco Limited, has beseeched this court to exercise its discretion under XVI rule 5 of the Civil Procedure Rules to dismiss this suit for want of prosecution. The affidavit of Philip Nyachoti he swore on 7<sup>th</sup> March 2006 is filed in support of the motion. The plaintiff Kefexco Ltd. has resisted the motion by filing the replying affidavit of Vincent Omollo sworn on 25<sup>th</sup> April 2006.

The main ground argued by the defendant is that the plaintiff has failed to list the matter for hearing for six months since the matter was last in court for no apparent reason at all. It is the argument of Mr. Nyachoti advocate for the defendant that the continued pendency of the suit has caused unnecessary anxiety on the defendant.

On the part of the plaintiff, Mr. Omollo advocate urged this court not to dismiss the suit because it is difficult to get a hearing at the Mombasa registry because law firms are allocated quarters over hearing dates.

A cursory look at the provisions of order XVI rule 5 of the Civil Procedure rules will show that the defendant is at liberty to apply for the dismissal of a suit if within 3 months after the close pleadings or of the removal of the suit from the hearing list or the adjournment of the suit generally, the plaintiff does not set down the suit for hearing.

In this matter, it is not denied that this suit was last in court on 25.8.2005. The record shows that the matter was again mentioned in court before Justice Maraga on 16.11.2005. It is not clear how the matter was placed before that court. On that date Justice Maraga adjourned the matter generally. Whichever way one looked at the matter, what is clear is that more than three months have lapsed since the suit was last in court. That is when the provisions of order XVI rule 5 of the Civil Procedure rules come into play. In deciding the matter in favour of an applicant, the court must be satisfied that the prolonged delay has not been justified by the plaintiff. In other words, sufficient reasons must be given. I have considered the grounds argued in favour of the motion. I have also considered the reasons advanced the plaintiff to justify the delay. It is a fact that cases are allocated hearing dates on quarterly basis to law firms in Mombasa. This fact may not have been within the knowledge of the defendant and its counsel. I find that there was a delay but the same is not so inordinate hence it is excusable in view of the reasons given.

In the end I dismiss the motion but direct that the defendant be paid costs of the motion in any event.

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

J.K. SERGON

**J U D G E**

In open court in the absence of the parties.

SERGON, J N