

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 16 OF 2002

NDAKA MUTINDA.....
.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA
& ANOTHER.....DEFENDANTS

R U L I N G

This is an application by the 1st Defendant, **NATIONAL BANK OF KENYA LTD.**, for dismissal of the Plaintiff's suit for want of prosecution. It is brought by notice of motion dated 26th October, 2004 under Order 16, Rule 5(a) of the Civil Procedure Rules. Under that provision, if within three months after the close of pleadings the Plaintiff, or the court on its own motion on notice to the parties, does not set the suit down for hearing, the Defendant may either set the suit down for hearing or apply for its dismissal. The 1st Defendant herein has elected the latter option. The 2nd Defendant neither entered appearance nor filed defence, and so is not involved in this application.

The application is supported by the affidavit of one **JAMES IRUNGU**, a manager-recoveries, of the 1st Defendant. In it are set out the essential facts. These are that the 1st Defendant's defence and counterclaim was filed on 24th October, 2003; that after due service of the same upon the Plaintiff, the Plaintiff failed to file a reply to defence or defence to the counterclaim and interlocutory judgment was entered for the 1st Defendant upon the counterclaim on 8th September, 2004; and that in any event pleadings closed in late 2003, and since then the Plaintiff has not set down his case for hearing.

At the hearing of the application on 25th February, 2005 there was no appearance for the Plaintiff despite due service upon his advocates. However, a replying affidavit sworn by the Plaintiff's advocate, one **FRANCIS M. MUTUA**, was filed on 23rd November, 2004 in opposition to the application. Mr. Mutua has deponed that since the matter was in court in April, 2002 he has tried to get instructions from the Plaintiff so as to set it down for hearing but in vain. He has further deponed that without his client's instructions his hands are tied, and he wanted one week to file an application for leave to cease acting for the Plaintiff. So far no such application has been filed.

The Plaintiff did not set down his suit for hearing within three months since the close of pleadings. Nor did the court. More than one year has passed since close of pleadings. No reason for the inaction has been forthcoming from the Plaintiff. In the circumstances therefore the Plaintiff's suit is hereby dismissed with costs to the 1st Defendant. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF APRIL, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS.....DAY OF APRIL, 2005.