



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**

**CIVIL CASE 198 OF 1998**

**JOSEPH MUTAVUTA KINYUA ..... 1<sup>ST</sup> PLAINTIFF**

**ATTORNEY-GENERAL ..... 2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**PAUL K. CHEMWENO ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL BANK (K) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

This is an application by way of Notice of Motion dated 30<sup>th</sup> August 2004. It was purported to be brought under Order XVI rule 5 of the Civil Procedure Rules. It was filed by Messrs. Nyaundi Tuiyott and Company Advocates on behalf of the second defendant, National Bank of Kenya Limited (whom I shall hereafter refer to as the applicant).

The application seeks for two orders. Firstly that the suit be dismissed for want of prosecution. Secondly, that costs be in the cause. The application has grounds on its face and is supported by the affidavit of Jacqueline Manani sworn on 30<sup>th</sup> August 2004.

The grounds of the application are that the two plaintiffs have not made any effort to move the court for any orders. Secondly that the pendency of the suit is undue, prejudicial and grossly unjust. Thirdly, that it is unfair to subject the defendants to the prejudices of pending litigation that is not going to be resolved. Fourthly, that in the premises, it is only fair and just that this matter be dismissed for want of prosecution. The supporting affidavit depones that the matter has not been heard or a hearing date taken or further orders sought, therefore it would be fair that the matter be dismissed with costs.

Though the Attorney-General who appears for both the plaintiffs (hereinafter called the respondents) was served with hearing notice, he did not appear at the time of the hearing of the application.

At the hearing of the application Mr. Nyaundi for the applicant urged the court to allow the application. He emphasized that the fact that the respondents counsel did not appear in court, though he was served with the hearing notice, showed that the respondents did not have an interest in prosecuting the matter.

Mr. Ngigi Mbugua, who appeared for the first defendant supported the application for dismissal of the suit for want of prosecution.

I have considered the application and the submissions made before me. Under Order XVI rule 5 Civil

Procedure Rules, a defendant has an option, if the plaintiff or the court fails, within three months after close of pleadings or removal of the suit from the hearing list or adjournment of the suit generally to set the suit for hearing, either to set down the suit for hearing or to apply for its dismissal.

In an application for dismissal of suit for want of prosecution therefore the lapse of the period of three months is very important. It is upon the applicant to show this court when the last step was taken by either the plaintiffs or by the court, to persuade the court to grant the orders sought.

The application and supporting affidavit herein do not give any indication as to when the last step was taken by either the respondents or by the court. From the records in the file, a similar application for dismissal of suit for want of prosecution dated 9<sup>th</sup> April 2003 was withdrawn by the applicant following a ruling of my sister Justice Gacheche delivered on 17<sup>th</sup> May 2004.

In my view, the circumstances herein, and the fact that the applicant has not indicated when the court and the respondents (plaintiffs) took the last action in this matter, does not justify the granting of the orders requested.

In my view, the more logical thing would be for the applicant to fix the case for hearing and serve the other parties with a hearing notice. If they do not appear in court for the hearing, then the suit can be determined, their absence notwithstanding.

I therefore dismiss the application and decline to grant the orders sought. The applicant or any party herein is at liberty to fix the suit for hearing or progress the case as provided for under the law.

Costs will be in the cause.

Dated and delivered at Eldoret this 5<sup>th</sup> day of October 2005.

**George Dulu**

**Ag. Judge**

In the Presence of: