

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

Civil Case 823 of 2002

CORNELIUS OLOO PARASI.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

PEGGY ADHIAMBO PARASI.....2ND DEFENDANT

R U L I N G

This is an application by the 1st Defendant under Order 16 Rule 5 (a) of the Civil Procedure Rules for dismissal of the Plaintiff's suit for want of prosecution. Under the said rule, if within three (3) months after the close of pleadings 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 1st Defendant has elected the second option, as it was entitled to do. The Plaintiff opposes the application. In the replying affidavit sworn by his learned counsel, **BERNARD MWERESA EBOSO**, it is deponed that the Plaintiff could not set the suit down for hearing this year (2005) because the court diary for substantive hearings for the year 2005 had been closed early in the year and that at the time of swearing the replying affidavit the diary for the year 2006 had not been opened. This is a plea that is not seriously challenged by the 1st Defendant. The replying affidavit was sworn on 7th October, 2005. The present application was filed on 22nd August, 2005. It is also deponed in the replying affidavit that discovery has not been done and therefore the suit is not ready for hearing. Again this is a plea that is not challenged. Learned counsel for the Plaintiff has also deponed that he could not fix the case for hearing last year (2004) or early this year because the Plaintiff did not have some crucial documents which had been taken away by his estranged wife who happens to be the 2nd Defendant.

I have considered the submissions of the learned counsels appearing. It is common ground that the pleadings closed sometime about mid-2003. There has obviously been some delay on the part of the Plaintiff in preparing the suit for trial and in setting it down for hearing. But it is a general principle that the court will not lightly shut out a litigant from court. In other words the court will not lightly dismiss a plaintiff's suit without a hearing if it is possible to have a hearing. The court has an unfettered discretion in the matter. In the instant case I hold that it is in the interest of justice that the Plaintiff be given a chance to prosecute his suit. I will therefore refuse the application, but not without some penalty to the Plaintiff. The Plaintiff shall within thirty (30) days of delivery of this ruling take appropriate steps to set down the suit for hearing. The Plaintiff shall also, within the same period of time, pay the 1st Defendant's costs of this application which I hereby assess at Kshs.15,000/=. In default of any one of these two conditions the Plaintiff's suit shall stand dismissed. Orders accordingly. The matter shall be mentioned on theday of January, 2006 for appropriate orders.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 25TH DAY OF NOVEMBER, 2005.