

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 562 of 1995

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KENYA COMMERCIAL BANK.....PLAINTIFF

VERSUS

HARUN KOMEN TUITOEKDEFENDANT

RULING

This is an application filed by the defendant under its Provisions of **Order XVI Rule 5** and **Order L Rule 1** of the **Civil Procedure Rules** seeking to have the plaintiff's suit dismissed for want of prosecution. The application is based on the grounds that the plaintiff had failed to fix this suit for hearing since the last time it was in court on the 26th of May 2003. The defendant states that it was apparent that the plaintiff had lost interest in the suit. He further states that its pendency in court prejudices his interests. The application is supported by the annexed affidavit of Harun Komen Tuitoek, the defendant herein. The application is opposed. Mr N.K. Githua, the advocate of the plaintiff has sworn an affidavit opposing the application. He asserts that it is not true that the plaintiff had lost interest in the suit. He deponed that the reason this case had not been fixed for hearing was because the diary of the court was full and therefore the plaintiff had been frustrated in having this case fixed for hearing. He further depones that it would not be in the interest of justice if the suit is dismissed for want of prosecution as it would not resolve the matters in controversy. He urged this court to dismiss the application with costs.

At the hearing of the application, I heard the submissions made by Mr Orege, learned Counsel for the defendant and Mr Githua, learned Counsel for the plaintiff. After carefully considering the said submissions made and also reading the pleadings filed by the parties to this application, the issue for determination by this court is whether the defendant has established a case to enable this court exercise its discretion and dismiss the plaintiff's suit for want of prosecution. The defendant argues that the plaintiff had stayed for more than two and a half years without taking any steps to fix this suit for hearing. In that regard, the defendant has submitted that the plaintiff's suit should be dismissed for want of prosecution. On the other hand, Mr Githua, learned Counsel for the plaintiff has submitted that the plaintiff is interested in having this case fixed for hearing but has been frustrated by the Civil Registry which has refused to avail any dates to the plaintiff.

Order XVI Rule 5 of the **Civil Procedure Rules** gives this court powers to dismiss a suit if the same is not listed for hearing within three months after the last time that the case was place before a Judge. In the present application it is clear that the plaintiff made no effort to list this case for hearing for over two and half years. The reasons advanced by the plaintiff that it was prevented from fixing this case for hearing by the Civil Registry of this court does not wash. If the argument advanced by the plaintiff were true, then it would imply that this court would not have had the opportunity to hear any suits filed after the year 2003. The true position of the matter is that the plaintiff has been indolent. It has not made any effort to have this suit fixed for hearing. The submission by the defendant that the plaintiff has lost interest in this suit is not therefore without merit. The plaintiff has made no effort to have this suit heard. It obviously has no interest in its prosecution.

This suit is therefore dismissed for want of prosecution. The defendant shall have the costs of this

application and that of the suit.

It is so ordered.

DATED at NAKURU this 25th day of November 2005.

L. KIMARU

JUDGE