



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 466 OF 1996**

**SYVIA EILEEN MC FARLANG ..... PLAINTIFF**

**- VERSUS -**

**ALBERTO LILLY ..... DEFENDANT**

**R U L I N G**

The Notice of Motion is brought under the provisions of order 16 Rule 5 of the Civil Procedure Rules and is supported by an Affidavit sworn by the Defence Counsel Francis Maina Njonjo. The Plaintiff did file a Notice of Preliminary objection and what is referred to as supporting Affidavit to the Preliminary Objection. And though the application was filed on 2nd August, 1999 it has taken this long to be prosecuted. At the start of the hearing, Mr. Waweru for the Defence raised an objection to the so called supporting Affidavit to the Preliminary objection. However the Court ruled that the objections raised by both sides were such that they could be adequately addressed within the main application. The main application seeks to have the entire suit dismissed for want of prosecution after the close of the pleadings. The suit was filed on 3.9.96 and defence therein on 7.10.96. There is no reply to defence nor a counter claim.

Mr. Busieka for the plaintiff attributed the failure to listed the suit for hearing on the filing of the application under consideration. However he did not elaborate as to how that was possible and the Provisions of the Law applicable. He also attempted to hide under the new amended rule that required the taking of Summons for Directions before the suit was listed for hearing. Even assuming this was so, at the time when the rule was in force, either party was at liberty to apply for the Summons for Directions. Yet after it was repealed no action was taken. The Provisions of order 16 rule 5 (a) are very clear in that the Defendant has to proof that pleadings were indeed closed and three months have lapsed. In this case the record is clear that from the time the suit was filed only one other application was finalized. After that no action was taken until the current application was filed which too has taken over 3 three years to prosecute.

Rule 11 of order 6 of the Civil Procedure Rules defines what close of Pleadings is. It provides as follows:

*“11. The pleading in a suit shall be closed fourteen days after service of the Reply to defence or defence to counter -claim, or if neither is served fourteen days after service of the defence. Notwithstanding that any order or request for particulars has been made but not complied with”.*

As I have said earlier, there is a defence on record but no reply or defence to Counter-claim. The plaintiff has conceded that the suit was to be set down for hearing but preferred to wait until the Defendant prosecuted this application. In the circumstances, I need not consider the matter further. There is no doubt the plaintiff after receiving the money went to sleep and perhaps did not consider the other orders worth pursuing. Consequently the suit is dismissed with costs.

Dated and delivered at Mombasa this 14th day of February, 2003.

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**