

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1335 of 2000

1. HON. ALFRED NDERITU
2. MWEA RICE GROWERS MULTI-PURPOSE
CO-OPERATIVE SOCIETY LIMITEDPLAINTIFFS

V E R S U S

1. THE STANDARD LIMITED
2. MUNENE KAMAUDEFENDANTS

R U L I N G

On 17th October, 2008, after hearing *ex parte* an application under **Order 16, rule 5(a)** of the **Civil Procedure Rules** (the Rules), the court (Waweru, J) dismissed the Plaintiffs' suit herein for want of prosecution. It was a reserved and considered ruling. The application was heard *ex parte* because there was no appearance for the Plaintiffs at the hearing, notwithstanding that the hearing date had been taken by consent. The court however fully considered their replying affidavits sworn in opposition to the application.

The 1st Plaintiff has now applied by **chamber summons dated 16th March, 2009** for review of the order of dismissal under **Order 44, rule 1** of the Rules. Under that rule, any person aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or by a decree or order from which no appeal is allowed, may apply for a review upon the following grounds:-

- (i) that there is discovery of new and important matter or evidence which, after exercise of due diligence, was not within the applicant's knowledge, or could not be produced by him at the time when the decree was passed or order made; or
- (ii) that there is some mistake or error apparent on the face of the record; or
- (iii) for any other sufficient reason.

I have read the supporting and replying affidavits. I have also given due consideration to the submissions of the learned counsels appearing. As already seen, the suit was dismissed because it had not been set down for hearing since pleadings closed and the inordinate delay was not satisfactorily explained. The 1st supporting affidavit is sworn by the 1st Plaintiff. At paragraph 7 thereof it is deponed that the suit had on two occasions been set down for hearing but that the same was not confirmed. The 2nd supporting affidavit is sworn by the 1st Plaintiff's learned counsel, **JOSEPH KIANGOI**. At paragraphs 18 and 20 thereof it is deponed that the suit was fixed for hearing for 5th and 6th December, 2006 and again for 3rd and 4th July, 2007.

Indeed the record of the court bears this out. But what is conveniently ignored by the learned counsel is that this was long after the Defendants' application for dismissal dated 5th May, 2004 had been filed! Between close of pleadings on 13th June, 2001 and the filing of the application for dismissal on 10th May, 2004 was a period of nearly three years, during which time the suit was not set down for hearing. There is thus no mistake or error apparent on the face of the record.

I also do not find any discovery of new and important matter or evidence, or any other sufficient reason as would entitle the 1st Plaintiff to an order of review. The application has no merit and is hereby dismissed with costs to the Defendants. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MAY, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 22ND DAY OF MAY, 2009