



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1293 of 2004

WACHIRA WARURUPLAINTIFF

VERSUS

1. THE STANDARD LIMITED

2. STANDARD NEWSPAPER

GROUP LIMITEDDEFENDANTS

R U L I N G

This is an application by the Defendants (by notice of motion dated 8th October, 2007) under Order 16, rule 5(a) of the Civil Procedure Rules (the Rules) for dismissal of the Plaintiff's suit for want of prosecution. Under that rule, if, within three months after the close of pleadings, the plaintiff, or the court on its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set down the suit for hearing or apply for its dismissal. There is a supporting affidavit sworn by one NELLY MATHEKA, the assistant director- legal, of the Defendants.

The Plaintiff has opposed the application as set out in replying affidavit filed on 6th February, 2008. It is sworn by one KIMAMO KURIA, the Plaintiff's advocate. The main grounds for the application emerging therefrom are –

1. That there is a good and acceptable explanation

for the delay.

2. That the Defendants will not be prejudiced in any way by refusal of the application and can be adequately compensated by an award of costs in any event.

I have considered the submissions of the learned counsels appearing, including the cases cited. Dismissal of a plaintiff's suit unheard is a drastic action; that power must therefore be exercised very sparingly by the court. Unless there is clear prejudice that will be occasioned to the defendant by maintenance of the suit, the court's inclination ought to be to give the plaintiff a chance to prosecute his suit. There will be such prejudice when it can no longer be feasible to have a fair trial of the action because, on account of the passage of time, witnesses are no longer available, or their memories must of necessity have so deteriorated that they will no longer be useful as witnesses, or documents are no longer available.

In the present case, it is common ground that pleadings closed in early 2005, and that since then the Plaintiff has not set down the suit for hearing. The explanation given in the replying affidavit is that in the course of taking over this and many other briefs from the previous advocates acting for the Plaintiff, the new advocates misfiled the brief such that it was thus left out of the periodic "bring-ups". This may not be an entirely satisfactory explanation. But there is no plea in the supporting affidavit that a fair trial of the action will no longer be possible on account of the delay, or that the Defendants have, or will, suffer some other prejudice that cannot be made good by an award of costs.

Each case will depend on its own particular circumstances. In the present case, I hold that the prejudice that the Defendants have suffered, or are likely to suffer, on account of the delay, will be made good by an appropriate award of costs.

For the above reasons I will refuse the application. It is hereby dismissed. However, the Defendants will have the costs of the application, hereby assessed at KShs. 20,000/00. The same must be paid within fourteen (14) days of delivery of this ruling. In default the Defendants may execute for the same. I further direct that the Plaintiff must, within thirty (30) days of delivery of this ruling, take demonstrable steps towards hearing of the suit. In default the suit shall stand dismissed with costs to the Defendants, and they may seek an order to that effect.

DATED AT NAIROBI THIS DAY OF MAY 2008

H.P.G. WAWARU

JUDGE

DELIVERED THIS 30TH DAY OF MAY 2008