



**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 MULTIPURPOSE**

**CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFFS**

**V E R S U S**

**1. THE STANDARD LIMITED**

**2. MUNENE KAMAU .....DEFENDANTS**

**R U L I N G**

This is an application (by notice of motion dated 5<sup>th</sup> May, 2004) by the Defendants under Order 16, rule 5(a) of the Civil Procedure Rules (the Rules) for dismissal of the Plaintiffs' suit for want of prosecution. Under that rule, if, within three 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.

It is the Defendants' case that pleadings in this case closed on 13<sup>th</sup> June, 2001, the last pleading filed (being a reply to defence) having been served on 30<sup>th</sup> May, 2001. This present application having been filed on 10<sup>th</sup> May, 2004, there was thus a delay of nearly three years in prosecuting the case. It is the Defendants' further case that this delay is inordinate and has not been properly explained by the Plaintiffs. The Defendants will be prejudiced by the delay as their witnesses may no longer be available to testify, or may not have a proper recollection of the facts of the case. The cause of action arose in July, 2000.

The Plaintiffs have opposed the application. The 1<sup>st</sup> Plaintiff filed a replying affidavit on 10<sup>th</sup> June, 2004 while the 2<sup>nd</sup> Plaintiff filed one on 17<sup>th</sup> April, 2008. The 1<sup>st</sup> Plaintiff concedes only to a "small delay". He says the rest of the time was taken up by pre-trial matters which have now been attended to and only hearing of the suit remains. He blames the "small delay" upon the 2<sup>nd</sup> Plaintiff for failure to give instructions. He pleads that he is desirous of and prepared to prosecute his suit, and should be allowed to do so.

The 2<sup>nd</sup> Plaintiff's replying affidavit is sworn by its general manager, one MUNENE MURIITHI. He blames any delay upon the 2<sup>nd</sup> Plaintiff's former lawyers (who were also, and still are, acting for the 1<sup>st</sup> Plaintiff). He says that differences between the 2<sup>nd</sup> Plaintiff and its former lawyers became acrimonious and proceeded to courts of law; they had "a very negative impact on their client/advocate relationship". He pleads for the 2<sup>nd</sup> Plaintiff to be permitted to prosecute its case.

At the hearing of this application on 29<sup>th</sup> September, 2008, notwithstanding that it appears that the date had been taken by consent on 5<sup>th</sup> June, 2008 at the registry, there was no appearance for the Plaintiffs. It will be noted that the application for dismissal had initially been allowed *ex parte* on 1<sup>st</sup> December, 2004 when the Plaintiffs failed to attend court to defend the application. The order of dismissal of the suit was set aside on 28<sup>th</sup> March, 2006 to enable the application to be heard *inter partes*.

I have considered the submissions of the learned counsel for the Defendants. No cases were cited. As already noted, there was, at the time the present application was filed, a delay of nearly three years in prosecuting the suit. That delay is inordinate. Further delay of about four more years has since occurred. In his replying affidavit, which was sworn on 9<sup>th</sup> June, 2004 the 1<sup>st</sup> Plaintiff stated that all the pre-trial procedures had been dealt with; yet the Plaintiffs have not bothered to set the suit down for hearing since 28<sup>th</sup> March, 2006 when the order dismissing their suit was set aside.

I find no proper or sufficient explanation in the replying affidavits for the inordinate delay in prosecuting this suit. It is apparent that the Plaintiffs have lost interest in the suit. There is no reason why it should be allowed to continue hanging over the Defendants' heads. I find that a fair trial of the action may no longer be possible on account of the long passage of time.

For the above reasons, I will allow the application by notice of motion dated 5<sup>th</sup> May, 2004. The Plaintiffs' suit is hereby dismissed with costs (including costs of this application) to the Defendants for want of prosecution. It is so ordered.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF OCTOBER, 2008**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 17<sup>TH</sup> DATE OF OCTOBE**