



**REPUBLIC OF KENYA**

**HIGH COURT AT NYERI**

**CIVIL APPEAL 23 OF 2005**

**THIKA COFFEE MILLS.....APPELLANT/RESPONDENT**

*Versus*

**MUNGARIA FARMERS CO-OPERATIVE SOCIETY LTD...RESPONDENT/APPLICANT**

**RULING**

The Notice of Motion dated 19<sup>th</sup> April 2007 is brought by the Respondent in the appeal. The same is brought under *Section 3A* of the Civil Procedure Act. The Respondent seeks that the appeal be dismissed for want of prosecution. In support of that application the Chairman of the Respondent deponed that the present appeal was filed on 6<sup>th</sup> June 2005. That the Appellant contemporaneously with the Memorandum of Appeal filed an application seeking stay of the lower court's judgment pending appeal. That application for stay when it came up before court on 13<sup>th</sup> June 2005, it was adjourned generally. The parties were ordered to take a date of that application on priority basis. Subsequently on 14<sup>th</sup> June 2005 the Appellant settled the decretal amount in the lower court's decree by paying the Respondent to the appeal. In this appeal the court, by a letter dated 20<sup>th</sup> July 2006, notified the Appellant of the need to comply with *Order XLI Rule 8B*. To-date, one year and nine months later, the Appellant has neglected refused or failed to set down the appeal for hearing. The Respondent therefore sought that the orders will be granted as prayed. The Appellant although served with the application failed to attend court on the day of hearing.

I have considered the application before court and indeed it is correct to state that the Appellant has failed to prosecute the present appeal. Indeed from the dated when the application for stay of execution was adjourned the appellant has taken no action in this matter. As much as that is the position, the court is unable to grant the orders sought by the Respondent due to the provisions of *Order XLI Rule 31(1)* of the Civil Procedure Rules. This rule provides as follows:

***“Unless within three months after the giving of directions under Rule 8B the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.” (underlining mine)***

As it can be seen from this rule, for a party to apply for the dismissal of the appeal for want of prosecution, directions ought to have been given as per Rule 8B of this Order. In the absence of those directions being given the court cannot entertain the present application. However, in view of the fact that the court is of the view that there has been delay, the interest of justice demands that directions be given in this ruling. Further since the Appellant is guilty of delay it is only just that the costs of the

application be born by the Appellant. The court therefore grants the following orders:

1. That the notice of Motion dated 19<sup>th</sup> April 2007 is hereby struck out with costs being granted to the respondent.
2. The court grants directions in accordance with *Order XLI Rule 8B(3)* that the Appellant do file the record of appeal within 14 days from this date hereof and that this appeal be heard for half a day at Nyeri.
3. The Respondent shall extract this order and serve the same on the Appellant and if the Appellant fails to abide by this order within three (3) months from this date hereof the Respondent is hereby granted leave to seek dismissal of the appeal.

*Dated and delivered at Nyeri this 6<sup>th</sup> day of July 2007.*

**MARY KASANGO**

JUDGE