REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 208 of 2000

1. **JACOB MWONGO**
2. **RAPHAEL MARETE**
3. **CHARLES KIBAYA**
4. **JULIUS KIBUTHA**
5. **JOSEPH K. MAINGI**
6. **SALESIO MUGAMBI NGEERA**
7. **LAWRENCE M'IKIAO (Suing on their own behalf and on behalf of all other active small-holder tea growers delivering green tea leaf for collection at Thanantu Tea Buying Centre No.TN 09).....PLAINTIFFS**

V E R S U S

1. **KENYA TEA DEVELOPMENT AUTHORITY**
2. **MICHIMUKURU TEA FACTORY CO. LTD.....…DEFENDANTS**

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

The Defendants have applied (by notice of motion dated 12th May, 2006) for dismissal of the Plaintiffs' suit for want of prosecution under Order 16, rule 5(a) of the Civil Procedure Rules (the Rules). 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 do so or apply for its dismissal. The grounds for the application stated on the face thereof are:-

1. That it is now almost four years since the suit was last fixed for hearing.

2. That the Plaintiffs have never taken any steps to set down the suit for hearing since the last time the matter was in court, which was the year 2002.

3. That the Plaintiffs have demonstrated a lack of interest in the suit, and it is only fair and just that the suit be dismissed.

There is a supporting affidavit sworn by the Defendants' advocate, NJUGUNA MURI.

The Plaintiffs have opposed the application as set out in the replying affidavit dated 19th and filed on 20th June, 2006. It is sworn by the 1st Plaintiff. The grounds of opposition emerging therefrom are, *inter alia*:-

1. That failure to take any steps towards hearing of the suit was occasioned by factors beyond the Plaintiffs' control.

2. That it is just and equitable that the Plaintiffs be given an opportunity to prosecute their case.

I have considered the submissions of the learned counsels appearing, including the cases cited. I have also perused the court record. Rule 5 of Order 16 aforesaid sets out distinct and separate instances when a suit may be dismissed for want of prosecution. The plaintiff must be clearly told what case he is facing in the application. The present application is said to be brought under paragraph (a) of rule 5; that is that the Plaintiffs have not set down the suit for hearing within three months of close of pleadings. But the grounds set out on the face of the application and as elaborated in the supporting affidavit are that the Plaintiffs have not set down the suit for hearing within three months since the matter was in court on 10th July 2002 when an application for leave to amend the statement of claim was heard and allowed. That is not one of the three grounds set out in rule 5 of Order 16 for dismissal of a suit for want of prosecution.

Be that as it may, it has been conceded by the Plaintiffs that there has been delay in prosecuting this suit. It is common ground that the suit has never been set down for hearing. It is also common ground that the pleadings closed on or about 7th October 2002, the last pleading (being defence filed on 11th September, 2002) having been served on 23rd September, 2002. See Order 6, rule 11 of the Rules. The present application was filed on 31st May, 2006. There has been delay of some three (3) years and eight (8) months. In the circumstances of this case the delay is inordinate.

Is the delay excusable? The explanation for it is contained in paragraphs 4, 5, 6, 7, 8, 9, 14, 15 and 16 of the replying affidavit. That explanation briefly, is that the Plaintiffs, who are poor rural folks, have not been able to engage counsel and have so far relied on *pro bono* representation; that about February 2005 the counsel who rendered the *pro bono* representation resigned from the firm concerned, and the continuing partner does not undertake litigation practice, and could therefore not offer *pro bono* representation; that it has been difficult and prohibitively expensive to obtain necessary information and gather documentation on account of the fact that the head offices of the 1st Defendant, which manages the 2nd Defendant, are in Nairobi ; and that the Plaintiffs have now raised about 60% of the funds necessary to engage an advocate to prosecute and conclude the case.

It is said that he who pays the piper calls the tune. But who calls the tune where the piper plays unpaid? Naturally, the piper himself! Some delay is sometimes to be expected in a case where the counsel is conducting a matter *pro bono* as he is likely to pay more attention to matters where he has been paid for his services. This is not to say that such delay is to be condoned; but it is understandable when it occurs. The Plaintiffs have now stated that they are in the process of raising the necessary funds in order to hire an advocate to prosecute and conclude the case. They have raised 60% of the required funds. I think this is an indication of their desire to prosecute their case.

The principles to guide the court in applications of this nature are now well–established in our jurisdiction. See the Court of Appeal case of **SALKAS CONTRACTORS LIMITED –vs- KENYA PETROLEUM REFINERIES LIMITED**, **Civil Appeal No. 250 of 2003** (unreported). Those

principles are:-

1. There must be inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case.

2. The inordinate must be inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that any long delay is inexcusable.

3. The Defendant must be likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between the defendant and the plaintiff or between the defendant and a third party. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

These principles have been expressed in other ways by our courts. See, for instance, the case of **IVITA – vs- KYUMBU,** [1984] KLR 441, where this court (Chesoni, J as he then was) stated, *inter alia*:-

"….**..the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay?… The defendant must … satisfy the court that he will be prejudiced by the delay…… Thus, even if (the) delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time…"**

It has also been said that dismissing a suit unheard should be the court's last inclination; it should always lean towards preserving the suit for hearing and disposal on merit.

I have borne all the above principles in mind. I have already found that there has been inordinate delay. But I am satisfied with the Plaintiffs' explanation for the delay for the reason I have already given. I will therefore not dismiss the suit unheard. The justice of this matter demands that the Plaintiffs be accorded one more opportunity to prosecute the suit.

In the result I will refuse the application by notice of motion dated 12th May, 2006. However, I will award the costs thereof to the Defendants. Those costs are hereby assessed at KShs. 10,000/00; it must be paid within 30 days of delivery of this ruling. In default, the Defendants may execute for the same. In addition, the Plaintiffs must, within those 30 days, take a demonstrable step towards setting down the suit for hearing. In default the suit may be dismissed for want of prosecution without the necessity of another application in that regard. Those shall be the orders of the court.

DATED AT NAIROBI THIS 10TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 14TH DAY OF SEPTEMBER, 2007