



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 536 of 1998**

**KAIZEN INVESTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**THE ECONOMIC REVIEW LIMITED.....DEFENDANT**

**R U L I N G**

On 8<sup>th</sup> June, 2004 the suit herein came up for hearing before Ibrahim, J. In applying for adjournment the Plaintiff's learned counsel, Mr. Akoto, told the court that he had learned that the Plaintiff had ceased to exist and that he wished to confirm if that was so. In granting adjournment, Ibrahim, J. ordered that the Plaintiff do decide within the next thirty (30) days if it was able to prosecute the suit. The suit was removed from the hearing list and stood over generally. The court record shows that on the 29<sup>th</sup> November, 2004, that is nearly five months after the order of Ibrahim, J., the Plaintiff's advocate fixed the case for hearing on 2<sup>nd</sup> May, 2005.

The Defendant has now come to court by notice of motion dated 1<sup>st</sup> September, 2005 under Order 16, Rule 5(d) of the Civil Procedure Rules seeking an order to dismiss the suit for want of prosecution. Under that rule, if, within three months after the adjournment of the suit generally, 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. At the hearing of this application there was no attendance for the Plaintiff. Its advocates had been duly served with

the application with hearing date endorsed thereon. A replying affidavit sworn by the Plaintiff's advocate on the 6<sup>th</sup> October, 2005 was filed on the 11<sup>th</sup> October, 2005. It is deponed in it that in compliance with the order of Ibrahim, J. of 8<sup>th</sup> June, 2004 the Plaintiff did by letter dated 24<sup>th</sup> November, 2004 invite the Defendant to attend the court registry on the 29<sup>th</sup> November, 2004 in order to fix a mutually convenient hearing date; that the Defendant did not attend and that the Plaintiff took a hearing date ex parte, being 2<sup>nd</sup> May, 2005; that hearing notice was served upon the Defendant on 11<sup>th</sup> February, 2005; and that, unfortunately, 2<sup>nd</sup> May, 2005 fell on a public holiday and that therefore the matter could not be heard. Indeed as 1<sup>st</sup> May (Labour Day) for this year (2005) fell on a Sunday, Monday 2<sup>nd</sup> May, 2005 became a public holiday. So the suit could not be heard on that day. However, from 2<sup>nd</sup> May, 2005 to 5<sup>th</sup> September, 2005 is a period of over four months without the Plaintiff taking any action to set the suit down for hearing. There is no explanation at all in the replying affidavit for this inaction. This, coupled with the fact that the Plaintiff did not bother to attend court at the hearing of this application, is an indication that the Plaintiff has lost interest in the suit. There is thus no reason for the same to hang over the head of the Defendant any longer.

In the circumstances I will allow the application. The Plaintiff's suit is hereby dismissed under Order 16, Rule 5(d) of the Civil Procedure Rules with costs to the Defendant. Order accordingly.

**DATED AND SIGNED AT NAIROBI THIS 14<sup>TH</sup> DAY OF DECEMBER, 2005.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 16<sup>TH</sup> DAY OF DECEMBER, 2005.**