

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, NAIROBI

Civil Suit 5 of 2002

SAMUEL GITHEGI MBUGUA.....1ST PLAINTIFF

GRACE MUTHONI.....2ND PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

Delay in the preparation and delivery of this ruling has been occasioned by the last vacation of the court and my recent illness and hospitalization. The delay is regretted.

The Defendant, **THE CO-OPERATIVE BANK OF KENYA LIMITED**, has applied by chamber summons dated 23rd September, 2004 under Order 16, Rule 5(a) of the Civil Procedure Rules for dismissal of the Plaintiffs' case for want of prosecution. Under that paragraph, if within three (3) months after the close of the 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.

Defence was filed on 22nd September, 2004. Although Mr. Mukuria, learned counsel for the Defendant, said that the defence was served on the same date, Mr. Kibera, learned counsel for the Plaintiffs', asserts that defence has never been served on the Plaintiffs'. Mr. Mukuria had no evidence of service of the defence. I am obliged, in the absence of evidence of service, to take Mr. Kibera's word that the defence has never been served upon the Plaintiffs. That being the case the pleadings are not yet closed as pleadings in this case would have closed fourteen (14) days after service of the defence. See Order 6, Rule 11 of the Civil Procedure Rules.

The present application is predicated upon the ground that the Plaintiff did not set down the suit for hearing within three months after close of pleadings. As pleadings have not closed the application must fail. In the circumstances I need not consider all the other matters argued before me. The application is hereby dismissed with costs to the Plaintiffs. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF DECEMBER, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 16TH DAY OF DECEMBER, 2005.