



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 201 OF 2008

**MOHAMMED ABDULAH UNSHUR APPELLANT/
ORIGINAL PLAINTIFF**

VERSUS

**CHEYMEN TEA ESTATE CO. LTD 1ST RESPONDENT ORIGINAL
1ST DEFENDANT**

**JOEL KIPLAGAT 2ND DEFENDANT ORIGINAL
2ND DEFENDANT**

(Being an appeal from the Ruling and order of the D.K.Ole Keiwa Esq Resident Magistrate dated 19th March 2008 in CMCC No. 5659 of 1997 at Milimani Commercial Courts at Nairobi)

JUDGMENT

I. BACKGROUND

1. A motor vehicle collision is alleged to have occurred between motor vehicle registration No. KTL 640 and a tractor trailer KAB 401L/ ZA537 on the 23rd July 1994.
2. The original plaintiff Mohammed Abdulla Unshur filed suit in the subordinate courts at Nairobi claiming material loss damages. It transpired that he also filed suit in the High Court of Kenya at Nairobi central registry being case HCCC 1624/97.
3. The parties to the subordinate court case, by consent agreed to stay the suit pending the finalization of the High Court matter on the 29th April 2002.
4. Unfortunately the High Court still remained pending after six years. The original defendant one and two, M/s Cheymen Tea Estate Company Limited and Joel Kiplagat, filed an application dated 7th February 2008 seeking orders of the court to vacate the consent orders and thereby to dismiss the suit for want of prosecution.
5. The trial magistrate obliged and set aside the consent orders and thereafter proceeded to dismiss the suit.

6. The original plaintiff appealed.

II APPEAL

7. The grounds of appeal being:

7.1 “The Hon. Magistrate erred in dismissing the suit for want of prosecution while there [was] consent to stay the same.

7.2 The Hon. Learned Magistrate erred by not considering the affidavit sworn on 18th March 2008.

7.3 The Hon. Learned Magistrate erred in law and fact dismissing [the] suit, while a stay of consent was in force.”

8. The appellant argued that the inactivity of the file was not due to lack of prosecution. The file had been stayed pending the determination of the High Court suit filed.

9. In reply, the respondent was of the view 6 years was inordinate delay to have a stay in place.

III FINDINGS

10. Under the section 6 of the Civil Procedure Act that reads:-

“6. No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit so proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation -----

The pending of a suit in a foreign country shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”

11. The interpretation of this section means that a suit is stayed, if there is a similar suit already filed. The first suit is heard, completed, before proceedings with the second suit.

12. The parties were therefore correct in staying the subordinate court case according to Section 6 of the Act. This is a requirement of the law. You cannot have similar cases simultaneously being heard by different and or the same court.

13. The parties require to complete the High Court matter first.

14. The trial magistrate exceeded the powers when he set aside the consent orders. Consent orders once entered can only be set aside for grounds of fraud, mistake and or the same condition one would set aside a contract. You cannot set aside a consent on grounds that the case be dismissed for want of prosecution.

15. The Hon. Magistrate erred. The appeal is allowed. The orders dismissing the suit for lack of prosecution is set aside and the orders entered to read that the consent of 29th April 2002 be reinstated as ordered.

16. There will be costs to the appellant in this appeal and in the subordinate court case.

DATED THIS 3RD DAY OF OCTOBER 2011 AT NAIROBI

M. A. ANG'AWA

JUDGE

1. *Advocate:*

1) *Paul Chege instructed by M/s Amolo Gachoka & Co Advocates for the appellant/original plaintiff*

2) *J Tindi instructed by M/s Wakiaga & Co Advocates for respondent/original defendant*