



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE Civil Suit 65 of 1997

KENYA SEED CO. LTD.....PLAINTIFF.

VERSUS

MARGARET SIRALI TENGE.....DEFENDANTS.

R U L I N G.

By a Notice of Motion dated 10th day of April, 2008, pursuant to the provisions of order XVI Rule 5 (d) and order L rule 1 of the Civil Procedure Rules the applicant seeks orders:-

1. **THAT**, the suit herein be dismissed for want of prosecution with costs to the defendant.
2. **THAT**, the costs of this application be provided for.

The application is based on the grounds:-

1. That it is now just over thirteen (13) years since the suit was filed.
2. That since 3/4/2006 when this matter was last mentioned the plaintiff has not set the suit for hearing neither has it taken any steps whatsoever to prosecute its claim.
3. That it is unfair to allow the suit to continue over my head indefinitely.

The application is predicated upon the affidavit of Margaret Tenge sworn on the 10th day of April, 2008.

The application was served on the firm of Yano & Co. Advocate who instead of filing grounds of opposition or replying affidavit filed an application on 4th August, 2008 to cease acting for the defendant.

On behalf of the applicant, it was argued that this suit was filed in 1997. That it came for hearing on 3rd April, 2006 when the same

was adjourned generally. Since then the plaintiff has failed to set down the suit for hearing. The delay is causing prejudice to the defendant hence this application.

Though Mr. Yano had not put grounds of opposition or replying affidavit, nevertheless, I allowed him to address the court.

On behalf of the respondent it was contended that the matter has been pending in court for the last 13 years. It was equally conceded that Yano & Co. Advocates have all along been seized of this matter.

I have scanned through the record of proceedings and have made the following findings:

- (1) The suit was filed on 3rd May, 1999.
- (2) The defence was filed on 22nd November, 1995.
- (3) Draft Agreed issues were filed on 15th August, 1996.
- (4) Amended defence and counterclaim was filed on 6th May, 1999.
- (5) Reply to counterclaim was filed on 17th May, 1999.
- (6) Amended plaint was filed on 17th May, 1999.
- (7) Discovery – Defendant’s documents were filed on 26th June, 2002.
- (8) Discovery – Plaintiff’s documents were filed on 29th November, 2004.

Order XVI Rule 5 of the Civil Procedure Rules provides:-

“5. If, within three months after:-

- (a) the close of pleadings; or**
- (b) deleted LN. 36 of 5/5/2000;**
- (c) the removal of the suit from the hearing list; or**
- (d) 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.”**

Against that background, I find and hold, in the premises, that the plaintiff is no longer interested in pursuing this matter. In an attempt to scuttle the motion brought by the defendant the plaintiff filed a notice to cease acting for the plaintiff to coincide with the

application to dismiss the suit for want of prosecution. This, in my view, is an abuse of the court process. I cannot in conscience countenance the mischief.

For the foregoing reasons, the only order which commends itself to me is to dismiss the suit for want of prosecution. Each party will bear his/its own costs.

Dated and delivered at Kitale this 15th day of December, 2009.

N.R.O. OMBIJA.

JUDGE.

Mr. Yano for plaintiff.

Mr. W. Wanyonyi for Machio for Defendant.