



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO.2612 OF 1996

KENYA TEA DEVELOPMENT AUTHORITY

GITHAMBO TE FACTORY COMPANY LTD.:PLAINTIFFS

V E R S U S

KIHORO CERERE:.....1ST DEFENDANT

STANLEY MACHARIA GATHU:.....2ND DEFENDANT

JOHN THUO MBOI :.....3RD DEFENDANT

WILLIAM KIMANI GITHU :.....4TH DEFENDANT

STEPHEN KARANJA MWANGI :.....5TH DEFENDANT

PATRICK KARIUKI KINYORI):.....6TH DEFENDANT

T/A EPISLON REGISTRARS)

R U L I N G

This is an application by way of Notice of Motion dated 29th June 1998 made under Order 16 Rule 5(a) and Order 50 Rule 1 of the Civil Procedure Rules asking for orders that the suit herein be dismissed for lack of prosecution. The supporting affidavits of

Kihoro Cerere sworn on 29th June 1998 and 5th April 2002 say that the suit was filed on 23rd October 1996 with an interlocutory application which was heard and determined on 20th January 1997 but since then there has been no follow up. The plaintiff through affidavits by G. J. Kahuthu dated 1st March 2002 and 5th November 1998 and grounds of objection opposed the application and Mr. Kahuthu has reiterated those reasons in his submission saying that Hon. Oguk J. had ordered that the Motion be stood over generally until the withdrawal of Notice of appeal dated 27th January 1997. So during the interim period there was a stay until the court of appeal struck off Notice of appeal on 9th May 2000. Mr. Kahuthu stated further that the issue of appeal is the one that caused the delay. He added that the plaintiff is ready to go on with the case as issues have already been agreed. He also said that the defendant could also set the case down for hearing. But in response Mr. Mwangi for the applicant submitted that Oguk J.'s order did not stop proceedings in the suit neither does filing of Notice of appeal stop proceedings without a stay order.

Rule 5 of Order 16 of the Civil Procedure Rules provides that:-

“If within three months:-

(a) after the close of pleadings or,

(b) removal of the suit from the hearing list; or

(c) 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 down the suit for hearing or apply for its dismissal. Rule 6 In any case not otherwise provided for in which no application is made or step taken for a period of 3 years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed, and in such case the plaintiff may subject to the law of limitation, bring a fresh suit.”

I have read the notes on this file and it is evident that the matter was filed on 23th October 1996 and within this time there have been several interlocutory proceedings which even proceeded to the court of appeal but all these seem to have ended on 25th November 1998 by Hon. Oguk J.`s order. I do not see that the plaintiff took any action since then.

I however agree with Mr. Kahuthu that even the defendant can take action and fix a lagging suit for hearing but that is alternative to proceeding to strike out and is not exclusive and further it depends on defendants` choice and therefore optional.

A period of over 3 years is a long period and militates towards injustice as it was said, when a case stays for so long unheard the witnesses are affected in that their memory fades and this deflates the cogency or worth of evidence. Even the witnesses themselves may actually change location.

Here the period is long as these matters actually ended in 1998. I do find that these proceedings suffer within terms under Order 16 Rule 2 of the Civil Procedure Rules and I dismiss the suit with costs to the defendant

Delivered this 6th day of June 2002

A.I. HAYANGA

J U D G E

Ruling Read to Mr. Kahuthu for plaintiff

Read to Mr. Cerere for defendant