



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 67 OF 2010
KENYA POWER & LIGHTING COMPANY.....PLAINTIFF
VERSUS
GITHONGO & ASSOCIATES LIMITEDDEFENDANT
RULING

1. The applications dated 15th June, 2016 seeks orders that the Honourable Court be pleased to set aside its orders of the 14th June 2016 dismissing the Suit for want of prosecution and reinstate the same for hearing.

2. It is stated in the supporting affidavits that delay in prosecuting this case is due to misplacement of the court file in the registry. It is further stated that the notice of dismissal was not sent to the Applicant.

3. The application is opposed vide the grounds of opposition dated 24th March 2017. It is stated that the delay is inordinate and inexcusable; that there is no evidence to confirm that the file was missing; that the suit has never been prepared for hearing and that the notice of dismissal of suit was published on the judiciary website.

4. During the hearing of the application the counsels for the respective parties opted to file written submissions. I have considered the said submissions.

5. Order 17 rule 2 of the Civil Procedure Rules provides for dismissal of suits as follows:

“(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.”

6. The principles governing the dismissal of a suit for want of prosecution are that delay must be inordinate, the inordinate delay is in-excusable and the Defendant is likely to be prejudiced. In the case of **Ivita vs Kyumbu [1984] KLR 441**; the court stated that:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

7. The Applicant filed this suit on 11th February, 2010 claiming rent arrears of Ksh.4,782,877.52 from the Respondent. Prior to the suit being dismissed for want of prosecution, there were no steps taken in the case since the year 2011. Although the Applicant has averred that the file was misplaced, there is not even a single letter that has been exhibited herein requesting for the file from the registry. The last letter received by the Registry from the Applicant was received on 30th January, 2013 inviting the counsel for the Respondent to avail themselves in the registry for the fixing of a hearing date. The delay is inordinate and has not been satisfactorily explained.

8. A perusal of the court file has not yielded any notice of dismissal that was sent to the Respondent. Although it is stated in the Respondent’s submissions that the notice of dismissal was published in the judiciary’s website, submissions are not evidence. The Respondent ought to have filed a replying affidavit in order to pursue that line of argument. Be as it may, the file had been dormant for long.

9. The application herein is dated 15th June, 2016 yet it was not filed in court until 3rd March, 2017. Thus the Applicant had taken seven (7) years without taking any step in this matter then took over eight (8) months to file the application. This does not demonstrate any diligence on the Applicant’s side. The delay herein is inordinate, inexcusable and prejudicial to the Respondent’s case.

10. With the foregoing, I find no merits in the application and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 15th day of Nov., 2017

B. THURANIRA JADEN

JUDGE