



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 110 OF 2008

DORCAS MBATHI.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LIMITED.....DEFENDANT

RULING

The Application

The application before the court for determination is a Notice of Motion dated 15th February 2016. The Applicant is seeking orders that this Court sets aside the orders made on 30th November 2015 dismissing the suit herein for want of prosecution, and to reinstate the suit for hearing on its merits. The application is premised on the grounds that Plaintiff/Applicant was not served with the Defendant's notice of hearing of the application dated 15/12/2014 and filed on 17/12/2014, which date for hearing was fixed *ex parte*.

The Plaintiff explained in a supporting affidavit she swore on 15th February 2016 that she got to know that the suit herein, which was on supply of electricity, had been dismissed when the Defendant disconnected the electricity supply to her residential area without giving her notice. She annexed copies of the Court record in support of her contention that a hearing date was fixed by consent of both parties on record for 11/06/2015, however that on that particular day the court was not sitting. However, that the Defendant's proceeded to fix a hearing date for 26/10/2015, *ex parte* and did not serve a hearing notice upon her or her advocate on record. Further, that no affidavit of service was filed and availed to this court to show that the Plaintiff had been duly notified of the hearing date of the Defendant's application.

The Plaintiff's Advocates, P.Mutuku & Co Advocates, reiterated the above contentions in submissions filed in Court dated 24th March 2016.

The Response

The Defendant opposed the Applicant's application in Grounds of Opposition filed in Court dated sworn on 29th February 2016, wherein he stated that the Plaintiff is guilty of laches as she never made an attempt to have the matter listed for over four years. Further, that no cause was shown to the court to warrant granting the Plaintiff an opportunity to prosecute their case, in reply to the Defendant application for dismissal for want of prosecution.

The Respondents' learned counsel, Anthony. M. Mulekyo Advocates, filed submissions dated 15th April 2016 wherein the above grounds were reiterated, and it was submitted that the Plaintiff obtained interlocutory orders on 25th July 2008 compelling the Defendant to restore electricity to her premises which she never sought to have extended, and lost interest in having this matter determined. Further, that

she has no defence to the application to have the suit dismissed.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. I find that the main issue for determination is whether reasonable grounds have been shown for this Court to set aside the orders dismissing the suit herein for want of prosecution. This Court is minded of the applicable law on the dismissal of a suit for want of prosecution as set out in Order 17 Rule 2 of the Civil Procedure Rules, which provides as follows:

“2. (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.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

I note from the court record that the last step taken before the filing of the Defendant’s application for dismissal of suit on 17th December 2014 was on 5th October 2009, when the matter was adjourned, and a hearing date of 18th November 2009 given for the application dated 15th September 2009. The hearing did not appear to have taken place. The threshold of one year’s delay in prosecuting the suit herein was therefore met, and the suit was amenable to dismissal.

For the order of dismissal to be set aside, the Applicants have to demonstrate that the grounds set out Order 45 Rule 1 (b) of the Civil Procedure Rules apply to their application. These grounds are as follows:

- i. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
- ii. mistake or error apparent on the face of the record,
- iii. any other sufficient reason,
- iv. the application must be made without unreasonable delay.

The Plaintiff has in this respect relied on lack of service of the hearing notice of the hearing date for the application to dismiss the suit for want of prosecution, which she alleges was taken *ex parte* by the Defendant. The Defendant did not dispute or respond to this averment. I have perused the Court record and note that indeed the hearing date of the application of 26th October 2015 when this suit was dismissed, was taken *ex parte* on 11th June 2015 by the Defendant’s Advocate. In addition there is no affidavit of service filed as to service of the hearing notice by the Defendant, neither did the Defendant provide any evidence of such service.

It is a requirement of natural justice, and also a legal and constitutional requirement that a party be given an opportunity to be heard in any matter that is likely to affect his or her interests. There is also now a constitutional obligation placed on this Court to dispense substantive justice under Article 159(2)(d) of the Constitution, and not to pay undue regard to procedural technicalities. In light of these legal imperatives and the findings in the foregoing as to lack of service of the hearing notice on the Plaintiff, I find that there is sufficient ground to set aside the orders of dismissal of this suit given on made on 26th October 2015.

In determining the issue whether the suit herein should be reinstated, I am also guided by the ruling of this Court in **Ivita vs Kyumbu (1984) KLR 441** that even if there are good reasons for the delay in prosecuting a suit, the court must also be satisfied that justice will still be done to the parties despite the delay. The Defendant has in this regard not demonstrated any prejudice they will suffer in having the suit herein reinstated.

The Plaintiff's Notice of Motion dated 15th February 2016 is therefore accordingly allowed, and the orders dismissing the suit herein for want of prosecution made on 26th October 2015 are hereby set aside. The suit herein is accordingly reinstated and shall proceed to full hearing. Each party shall bear their respective costs of the Notice of Motion dated 15th February 2016.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 20th day of July 2016.

P. NYAMWEYA

JUDGE