



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 228 OF 2011

JAMES MWAURA NDUNGU.....APPELLANT

VERSUS

KENYA POWER AND LIGHTING COMPANY LTD.....RESPONDENT

RULING

1. Kenya Power & Lighting Company Ltd, the Respondent herein, took out the motion dated 31.8.2014 whereof it sought for this appeal to be dismissed for want of prosecution. The motion is supported by the affidavit of John Katiku learned advocate for the Respondent. James Mwaura Ndungu, the Appellant herein filed the replying affidavit of his learned advocate, Catherine Nyambura Njuguna to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submission.

2. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the motion. I have also taken into account the rival submissions. Before considering the substance of the motion, let me set out in brief, the history behind it. The Appellant herein filed a suit against the Respondent before the Chief Magistrate's court, at Milimani, Nairobi vide the plaint dated 27.07.2009 in which he prayed for judgement in the following terms:

a) An order of permanent injunction restraining the Defendant, its servants and/or agents from disconnecting power supply to the Plaintiffs residential premises on plot No. 324 Thome, Garden Estate Road in Nairobi.

b) An order that Kshs.396,366.14 debited on Plaintiffs Account Number 0089832-01 with Defendants is

illegal;

c) General damages;

d) Costs of this suit;

e) Interest on (c) and (d);

f) Any other order that this Honourable Court deems fit to grant.

3. The Respondent defended the suit and raised a preliminary objection on jurisdiction. By her ruling

delivered on 10th May 2011, Hon. Arika (Mrs), the suit was dismissed on the basis that the court lacked jurisdiction to entertain the same. The Appellant was aggrieved by the decision hence this appeal. The Appellant filed a memorandum of appeal dated 20.05.2011 in which he put forward a total of six grounds of appeal.

4. The respondent is now before this court seeking for the appeal to be dismissed for want of prosecution. It is the submission of the Respondent that more than one year has lapsed since the appeal was filed and the Appellant has not taken any step to have it set down for hearing despite having been directed by this court on 4th July 2012 to liaise with the Deputy Registrar and the executive officer to have the appeal ready for admission and hearing. It is said that the file was last listed in court for directions on 1st February 2013 and no steps have been taken to prosecute. In a lengthy and detailed replying affidavit, the Appellant admitted there was a delay because the trial's court's file went missing. Catherine Nyambura Njuguna, learned advocate for the Appellant averred that he made several visits to the court registry to trace the file with no avail prompting her to write to the Chief Magistrate to assist. The learned advocate also explained that on 5.10.2012 she did not attend court because she was indisposed and that Lady Justice Angawa did not sit on that date. The matter was then stood over to 1.2.2013 but on the aforesaid date the court did not also sit. It is further argued that it was difficult to get a hearing date.

5. After a careful consideration of the material before me, this court is left to provide an answer whether or not this appeal Catherine Nyambura Njuguna. She has explained in detail the reasons which prevented the Appellant from prosecuting

6. However, the file was available as of the year 2012 but nothing appeared to be moving. The Appellant's counsel was able to show that at some stage she was unwell and at times the court was not sitting. The learned advocate gave a history of her ailment throughout the years 2013 & 2014 arising from complications due to child birth. In my humble assessment I am convinced Catherine Nyambura Njuguna has acquitted herself. There is no evidence that her client was part of the delay. Consequently, I will exercise my discretion in favour of the Appellant, by declining to dismiss the appeal for want of prosecution. In the end I dismiss the motion dated 31.8.2014 with costs abiding the outcome of the appeal. In order to avoid the matter procrastinating further, I direct the Appellant to take necessary steps to have the appeal ready for hearing and determination within a period of 3 months in default the same shall stand automatically dismissed as prayed in the aforesaid motion.

Dated and delivered in open court this 19th day of June, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant