



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 22 OF 2008**

**KENYA PIPELINE CO. LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA POWER & LIGHTING CO. LTD.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. The issues for determination before this Honourable Court emanate from the application by the Plaintiff dated 12<sup>th</sup> August, 2013. The motion, brought pursuant to the provisions of **Order 51 Rules 1, 2, 3 & 4** of the *Civil Procedure Rules, 2010* and **Section 3A** of the *Civil Procedure Act*, seeks the following prayers *inter alia*;

**“1. THAT the Court be pleased to extend time for hearing and determination of the suit herein;**

**2. THAT the Court do grant such orders as it may deem reasonable in the circumstances for the expeditious determination of this suit;**

**3. THAT the costs for this motion be provided for”.**

2. The application is predicated upon the grounds set out therein and further supported by the affidavit of **Ogoti Kenani** sworn on even date. It is the applicant’s contention that the failure to fix the matter for hearing as directed by the Court in its Ruling dated 15<sup>th</sup> December, 2011 was due to the missing Court file, whose loss should not be attributed to it. Further, the applicant contends that it would be put to great loss if the matter remains unheard and it would be in the interest of justice for the matter to be heard on its merit. In support of its application, the applicant relied on the authority of **Kahumbu v National Bank of Kenya E.A.L.R (2003) 2 E.A 475-484.**

3. In response to the application, the Defendant filed a Replying Affidavit sworn on 18<sup>th</sup> October, 2013. The deponent, **Owiti Awuor**, the Senior Legal Officer of the respondent, avers that no cogent reason has been shown by the applicant why it was unable to comply with the Court orders issued on 15<sup>th</sup> December, 2011 and that the applicant had been able to file its documents and witness statements on 13<sup>th</sup> January, 2012. Further, it reiterated that the applicant never took any steps to prosecute the suit after close of pleadings, tentatively on 8<sup>th</sup> April, 2008 and that the applicant has never had an interest in pursuing the matter. It is the respondent’s contention that there has been inordinate delay in complying with this

Court's orders and that the applicant has failed to give sufficient reasons as to the circumstances it now finds itself in.

4. In the submissions made on 30<sup>th</sup> October, 2013, counsel for the applicant, Mr. Begi, submitted that the instant suit was filed in 2008, before the advent of the present Civil Procedure Rules, more specifically Order 11. He submitted that the applicant had a hard time filing the required documents as ordered by the Court on 15<sup>th</sup> December, 2011 due to the court file missing from the registry. Further it was submitted that the applicant had invited the respondent on several occasions to fix a date for hearing, adducing documents marked "OK-4" dated 15<sup>th</sup> June, 2012 and 17<sup>th</sup> September, 2012. These summons, it was submitted, were not responded to by the respondent's advocates, thus making it difficult to set down the matter for hearing. He submitted that the applicant was desirous to prosecute the matter and have it determined, expeditiously and on its merits and allowing the application would not in any way prejudice the respondent.

5. Counsel for the respondent also made oral submissions on 30<sup>th</sup> October, 2013. It was submitted that the Ruling of Odunga, J delivered on 15<sup>th</sup> December, 2013 set out a specific time frame within which the applicant was to complete all the necessary pre-trial procedures and list the matter for hearing within 30 days of the Ruling. Further, it was submitted that the statement of issues was filed sometime in March, 2012 after the expiry of the 30 days period given by the Court. He submitted that there had been an inordinate and inexplicable delay by the applicant in complying with the Court orders and prosecuting the suit and that allowing the application would be in direct contravention of Odunga, J's ruling.

6. I have considered the application by the applicant, the affidavits, both in support and in reply to the application, the annexures, the submissions made by counsel for both parties and the ruling of Odunga, J dated 15<sup>th</sup> December, 2011. The learned judge directed his mind, with regard to the application for dismissal as follows;

**"Judicial notice, however, must be taken of the fact that a prolonged delay in prosecuting cases invariably causes unnecessary anxiety on the part of the persons who are to defend the suits hence the need to expeditiously get on with the suit."**

He goes further to reiterate thus;

**"I have therefore taken into account such factors as the claim herein which is by no means a meager sum, the fact that the plaintiff is a public company, the fact that no particular prejudice is alleged in the supporting affidavit and the fact that the mistake is placed squarely on the doorstep of the advocate rather than the client. In the circumstances of this case I adopt the wise words of Chesoni, J (as he then was) in the case of Ivita v Kyumbu (1984) 441, that the test to be applied by the Courts in an application for the dismissal of suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay and that even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time since it is a matter in the discretion of the court."**

In dismissing the application filed by the respondent (therein applicant), the learned Judge issued direction to the effect that the applicant was to complete all pre-trial procedures and the suit should be set down for hearing within 30 days, failure to which the suit would stand dismissed with costs to the defendant.

7. **Order 11** of the *Civil Procedure Rules, 2010* gives the pre-trial procedures which the learned judge refers to in his Ruling. **Rules 3 (1) (b)** and **5 (2) (b)** set out the provisions on issues and statements that should accompany a claim. **Order 3 Rule 2 (a) - (d)** and **Order 7 Rule 5** gives a comprehensive list of the documents that should accompany a claim and a defence respectively. The applicant admits at paragraph 8 of its supporting affidavit that it had not prepared the statement of agreed issues, in

compliance with **Order 11 Rule 3 (1) (b)** and **5 (2) (b)**, despite having filed the witness statements and documents by 13<sup>th</sup> January, 2012. In the oral submission before the Court, the applicant submitted that the defendant had not filed its documents in order that the issues could be drafted and agreed. However, I note that on 15<sup>th</sup> March, 2012, the applicant sent the list of agreed issues to the respondent, which it redrafted and sent back to the applicant by 22<sup>nd</sup> March, 2012. The list of agreed issues was, thereafter filed on 3<sup>rd</sup> April, 2012. That compliance was outside the 30 days period granted by the Court, and the matter could, therefore, not be set down for hearing within the stipulated time allocated.

8. The parties contend that the deadline within which the applicant should have complied with the directions of Odunga, J was 15<sup>th</sup> January, 2012. However, in considering the provisions of **Order 50 Rule 4** of the *Civil Procedure Act*, the timeline for compliance would be on or about 20<sup>th</sup> February, 2012. This would still have given the applicant ample time to draft and file the list of agreed issues. Further, **Order 11 Rule 7(3)** of the *Civil Procedure Rules* provides that;

**“Any party or his advocate who wilfully fails or omits to comply with the provisions of this Order shall be deemed to have violated the overriding objective as stipulated in**

**Section 1A and 1B of the Act and the court may order costs against the defaulting party unless for reasons to be recorded, the court orders otherwise”.**

The applicant does not provide any tacit reasons as to why it was unable to complete all the pre-trial procedures as ordered by the Court. It nonetheless contended that the Court file went missing, thus the applicant was unable to file the list of agreed issues. It was, however, able to file its witness statements and documents by 13<sup>th</sup> January, 2012, having received all the relevant documents from the applicant on 7<sup>th</sup> January, 2012 as articulated in paragraph 6 of the supporting affidavit. It has not advanced any reasons why having received all the relevant documents, it could not draft a list of issues, which it eventually did but only on 15<sup>th</sup> March, 2012.

9. The respondent contends that it was only invited three times to fix the matter for hearing. The applicant adduced documents marked “OK-4” showing the dates it invited the respondent to fix the matter for hearing, the dates being in June, 2012, July, 2012 and September, 2012. These attempts were unsuccessful for dubious reasons, with the applicant not making any further attempts at fixing the matter for hearing until May, 2013 when the matter was set down for mention on 4<sup>th</sup> July, 2013 for directions. The applicant contends and submits that it was impossible to comply with the orders as first, the respondent failed to file its documents to enable it to prepare the list of issues and secondly, the Court file was missing from the Registry. At paragraphs 4-5 of the supporting affidavit, the applicant depones that the file was not readily available as at 5<sup>th</sup> January, 2012, having tried to have the same availed from 22<sup>nd</sup> December, 2011. The file seems to have been availed to the applicant, given that it was able to file their documents and witness statements, on 13<sup>th</sup> January, 2012.

10. From the foregoing, it is unclear why the applicant was unable to comply with the directions of Odunga, J issued on 15<sup>th</sup> December, 2011. The time given to the applicant, to my mind, was sufficient and ample, and the applicant should have been able to comply with the orders. In **Kahumba v National Bank of Kenya** (supra) referred to by the applicant, Njagi, J (as he then was) referred to the ruling of **Hytec Ltd v Coventry City Council [1977] 1 WLR 1666** in which Ward, LJ held;

**“An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party’s last chance to put his case in order. Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed.”**

In dismissing the application by the defendant in the suit, Njagi, J held *inter alia*;

**“A defaulter can only escape the consequences of judgment given against him if he can**

**demonstrate that there was no intention to flout or ignore a court order and that the failure to obey was due to extraneous circumstance.”**

In dismissing the application referred to above, the learned Judge reiterated that the extraneous circumstance that the defendant had found itself in was self-inflicted, and showed a wilful disregard of a court order. Such wilful disregard, the learned Judge further reiterated, merited the imposition of the penalty ordered by the Court.

11. In the present instance, the circumstances in which the applicant finds itself are self-imposed. The applicant failed to comply with strict provisions of the law, as stipulated and provided under **Order 11** of the *Civil Procedure Rules*. The applicant wilfully disregarded the provisions of the law, by filing only certain documents and leaving out others. Its claim that the suit was filed before the advent of the present Civil Procedure Rules doesn't hold water, given that it chose to comply with some provisions but leave out others. This is an old matter, having being filed early in 2008. It would have been in the best interest of all concerned parties to have the matter expeditiously heard and determined, given the magnanimity of the issues involved. The Court's discretion to enlarge time as provided under **Section 95** of the *Civil Procedure Act*, and in furtherance of the overriding objectives as provided under **Section 1A and 1B** of the same Act, cannot, in light of the foregoing circumstances, be exercised to extricate the applicant from its own failings.

12. The Orders as issued by Odunga, J were “unless” orders i.e. that unless the orders were complied with, sanctions would issue, the sanctions in this case being the dismissal of the suit. The applicant having failed to comply with the Court's directions and Orders of 15<sup>th</sup> December, 2011, would bring into operation the sanction prescribed by the Court, in this case being the dismissal of the suit. As a result the application is hereby dismissed, with costs to the respondent. The upshot is that the suit filed on 21<sup>st</sup> January, 2008 also stands dismissed.

**DATED and delivered at Nairobi this 24<sup>th</sup> day of March, 2014.**

**J. B. HAVELOCK**

**JUDGE**