REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 913 OF 2004

KENYA POWER & LIGHTING CO. LTD……PLAINTIFF

VERSUS

LONDON DISTILLERS (K) LTD…….DEFENDANT

RULING

1. Before me is the defendant's Notice of Motion dated 4th February, 2014 seeking to dismiss this suit for want of prosecution. The application is premised on the grounds on the face of the application and the supporting affidavit of Kennedy O. Ochieng' sworn on 7th February, 2014.

2. It is averred that this suit was filed on 25th August, 2004. On 30th October, 2008, an application by the plaintiff for summary judgment was withdrawn by consent of the parties. On 28th September, 2009, the defendant filed an application to dismiss this suit for want of prosecution. The said application was however dismissed and the plaintiff was granted fourty five (45) days within which to fix the suit for hearing. This suit was then set down for hearing on 22nd November, 2012 but it was not cause listed. The deponent averred that the plaintiff has not taken any steps to prosecute this suit since 16th January, 2013. He averred that it is unfair and unjust to have this suit hang over the defendant's head indefinitely and urged that it be dismissed for want of prosecution.

3. The plaintiff opposed the application vide Elsie K. Mworia's replying affidavit sworn on 1st August, 2014. She contended that on the 16th January, 2013, the court directed that a hearing date be fixed at the registry on priority basis. The plaintiff's advocates invited the defendant on 12th February, 2013 and 26th March, 2013 for fixing of a hearing date at the registry but the court file could not be traced on those two occasions. She averred that the plaintiff's advocates could thereafter not get a hearing date since fixing of dates was suspended to enable the courts to deal with election petitions. The defendant then filed this application when the diary was opened barring the plaintiff from fixing the suit for hearing.

4. Parties agreed to canvass this application by way of written submissions. It was the defendant's submissions that the delay in prosecuting this suit is prejudicial to the defendant since it has a turn-over of personnel and may lose evidence. It was argued that no evidence was tendered to demonstrate that the plaintiff was barred from fixing a hearing date during the year 2013. The defendant relied on the case of ***Municipal Council of Embu v. Postal Corporation of Kenya [2014] eKLR*** to demonstrate that the delay in prosecuting this case was inordinate, inexcusable and is an abuse of the court process. The court in ***Municipal Council*** case (supra) found that the delay of three (3) years was inordinate since the only form of activity from the plaintiff's end was the filing of an application to extend validity of summons; that the delay was intentional and inexcusable because the plaintiff offered no evidence to prove that he was keen to follow up and have the disappearance of the court file resolved; that the delay was an abuse of the court

process since the plaintiff failed to act to resolve the cause of delay; that the delay gave rise to substantial risk to fair trial because the memory of the defendant's witnesses faded with time and that the plaintiff failed to prove that it would suffer loss in the event the suit was dismissed.

5. The plaintiff reiterated the averments in the replying affidavit. Relying on the case of ***Hosbell Mbugua Njuguna v. Celtel Kenya Limited [2014] e KLR*** and ***Esther Wandia Njuguna & 2 Others v. James NganduMuthigani& 6 Others [2008] e KLR*** it was argued that it was upon an applicant to show the prejudice that it has suffered due to the delay in prosecution for the application to succeed. It was argued that Order 17 of the Civil Procedure Rules under which this application has been brought deals with a situation where no party has taken steps in prosecuting a suit rather than where the plaintiff has not taken any steps in prosecuting the suit. The plaintiff maintained that it demonstrated that it made attempts to have the matter fixed for hearing.

6. I have read and considered the depositions and the submissions by the parties herein. It is undisputed that there was delay in prosecuting this suit. The test to be applied by the courts in an application for dismissal for want of prosecution is whether the delay in prosecuting the suit is inordinate and inexcusable, and if it is, whether or not the applicant is likely to be prejudiced by such delay.

7. Order 17 Rule 2 stipulates 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, any 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."

8. The last action taken in this suit was on 16th January, 2013 when the matter was mentioned before Waweru J. It was therefore in the words of Order 17 Rule 2 ripe for dismissal by 16th January, 2014. That is to say there has been a delay of one year and some days. Can that delay be said to be inordinate and inexcusable? In this regard I associate myself with the sentiments of Gikonyo J, in ***Utalii Transport Company Limited & 3 Others v. NIC Bank Limited & Another [2014] eKLR***where he stated that:

"Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality. Therefore, inordinate delay for the purposes of dismissal for want of prosecution should be one which is beyond limits in the prosecution of cases. See the case of ALLEN v. ALFRED Mc ALPHINE & SONS [1968] 1 All ER 543: where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases of AGIP (KENYA) LIMITED v. HIGHLANDS TYRES LIMITED [2001] KLR 630 and SAGOO v. BHARI [1990] KLR 459, where delay of eight (8) months and five (5) months, respectively was considered not to be inordinate. And also NBI HC ELC CASE NO 2058 OF 2007 where delay of about 1½ years was considered not to be inordinate."

9. Considering the depositions above, I take judicial notice that there was significant disruption of normal court business in Kenya for a better part of the year 2013, especially in the High Court following their engagement in hearing election petitions. The delay is in my view excusable. The defendant has also

failed to establish the prejudice they stand to suffer. In the circumstances, I dismiss this application and make orders that the memorandum of appeal is deemed to be properly on record. Costs shall be borne in the appeal.

Dated, Signed and Delivered in open court this 18th day of December, 2014.

J. K. SERGON

JUDGE

In the presence of:

……..
…….for the Plaintiff

……..……..
…….for the Defendant