



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

The suit was filed in August 2004. The Plaintiff admits delay for a period of 10 months only.

The Applicant submits that no action has been taken to prosecute suit since 29/10/2008 and that the cause of action goes back to year 1995. The agreement for supply of electricity dates back year 2000. The submissions in support of application was filed on 29/6/2011. It is shown that plaintiff was filed on 25.08.2004. That Plaintiff applied for summary judgment by application dated 29/10/2004. This application was withdrawn by consent of parties on 30.10.2008. This application was filed on 28/9/2009 and was served September 2009. Until 28/9/09 no steps were taken to prosecute the suit.

The only steps taken to prosecute the suit is the application for summary judgment. The attempt to fix a hearing date was on 29.10.2009 when it was not successful. Two years since the last step was taken to fix hearing date.

The Defendant submits that it is 16 years ago and it will not be possible to have a fair trial. The file was available but there was no pre-trial compliances.

Order 17 Rule 2 (1) and 3 provides for dismissal after 1 year of inaction but old rules provide only for 3 months not one year.

The authority of **Mukisa Biscuits –vs- West End 1969 EA 696** shows that the court has inherent power to dismiss a suit for want of prosecution.

The case of **Kethman –vs- Hansel Properties Ltd [1988] 1 All ER 62** shows that court business must be expedited. Also the case of **Omwoyo –vs- African Highland Produce Co. Ltd (2002) 1 KLR 698** relates to transfer of suit from one court to another by High Court decision not relevant in this case.

The Defendant/Applicant seeks order for dismissal with costs.

For the Plaintiff/Respondent submissions were made. The Plaintiff opposes the application and relies on affidavit of Mr. Mahenia sworn on 17/11/2009. It is admitted when Plaintiff filed an application for summary judgment.

The court diary for hearing suits for the year 2008 was closed as at 26/10/2008. For 2009 the diary was opened in month of November that year. Efforts to fix a hearing date were fruitless the file being unavailable. This case is about fraudulent consumption of electricity valued 5 million. The applicant current application dated 28/10/2009 prevented any other action to be taken until the application was finalized.

It is submitted that the matter should be terminated on hearing the parties. Plaintiff cited the case of **Concorde Container Services –vs- Joseph Mukuka Kago 2004 e KLR** where Hon Visram noted that

“delay is a matter of fact and it is to be decided on the circumstances of each case”.

Where reason for delay is offered the court should be lenient and allow the Plaintiff the opportunity to have his case determined on merit. The defendant has not demonstrated that delay has prejudiced him. It was submitted that delay was not inordinate in the circumstances. The Plaintiff has offered to pay the costs of inconvenience to the Defendant.

Upon considering submissions of the two parties I am concerned that the Plaintiff has attempted to show that the delay was not inordinate and that he is ready to place his suit on hearing list. It is clear that the business of the court is run on a certain pattern and that delay is not always caused by the parties. This current application was filed on 28/10/2009 and it is only in year 2012 that it was fixed for hearing. I agree with the judgment of Visram J. As he then was and it is my finding that the explanation given by the Plaintiff is reasonable. However I order the plaintiff to place his case in cause list within 45 days from today.

The Plaintiff shall also pay the costs of this application to the Defendant.

Order accordingly.

Dated and delivered this 16th March, 2012

**J.N. KHAMINWA
JUDGE**