REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC NO 199 OF 2007

RESTVILLA LIMITED …..…….....…….....PLAINTIFF

- VERSUS –

KENYA POWER & LIGHTING CO. LTD …….....…..….....… DEFENDANT

RULING

1. This is the defendant's notice of motion dated 28th February 2012. The defendant prays that the plaintiff's suit be dismissed for want of prosecution. In the alternative, the defendant implores the court to discharge the order of injunction granted on 28th February 2008. The application is expressed to be brought under order 17 of the Civil Procedure Rules 2010. There is annexed an affidavit sworn by Beatrice Meso on 28th February 2012.

2. The gist of it is that the suit was filed in 2007. On 28th February 2008, the plaintiff obtained an order of interlocutory injunction. The pleadings closed on or about 30th September 2008. There was a previous application for dismissal of the suit. The court, on 6th December 2010, disallowed the application but gave directions the plaintiff to set down the suit for discovery and hearing. It is now over a year. The defendant avers that the plaintiff has not taken those steps and is thus not keen on prosecuting the suit.

3. The motion is contested by the plaintiff. There is filed a replying affidavit of George Atetwe sworn on 23rd April 2012. In a synopsis, the plaintiff avers that its offices were housed by its sister company, Triton Limited. The latter went into receivership in December 2008. Pursuant to a court order issued in HCCC No 1 of 2009, documents of the plaintiff were taken by the Receiver. The plaintiff instructed its counsel P.W. Wena to retrieve the documents. They have been unsuccessful. The plaintiff thus says it is keen on the suit and the injunction granted should not be disturbed or the suit dismissed.

4. I take the following view of the matter. The High court is a court of record. That record shows that no step has been taken by the plaintiff to set down the suit for hearing since 6th December 2010. On that date, the court delivered a ruling in favour of the plaintiff. The plaintiff's suit was up for dismissal upon an application by the defendant. The court was very kind to the plaintiff. It dismissed that application but ordered parties to comply with discovery and inspection and that the matter be called out in 30 days. The plaintiff did not move. I would have thought that once bitten twice shy. So on 29th February 2012, the defendant filed the present motion for dismissal or for discharge of the injunction. At

the hearing on 25th April 2012, the plaintiff pleaded for more time to prosecute the suit and equally blamed the defendant for not setting down the suit for hearing. In *lieu* of discharge of the injunction, the plaintiff submitted that it is willing to offer a security. The security was not specified. It referred to an annexure, a letter dated 5th February 2010 from the receivers of Triton marked **"GDA 2"** in which the receivers explain why they are withholding documents. But that is a long time ago and in my view it does not answer why the plaintiff has not set down the suit for hearing.

5. Order 17 rule 2 (1) and (3) 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.

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

The plaintiff has not set down the suit for hearing for over 1 year. I have already stated that the suit was up for dismissal on an earlier occasion. The court, in the ruling of 6th December 2010 was sympathetic and maintained the plaintiff on the seat of justice. There is paucity of evidence in explaining those delays. The delay is too lengthy and inexcusable.

6. In the decision in *Fitz Patrick Vs. Batger & Co Ltd* [1967] 2 ALL ER 657 Lord Dennig delivered himself thus;

"It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. Just consider the times here. The accident was on 13th December 1961. If we allowed this case to be set down now, it would not come up for trial until the end of the year. That would be six years after the accident. It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution".

7. The decision in *Ivita Vs Kyumbu* [1984] KLR 441 is a good guide here. The real test is whether the delay is prolonged or inexcusable. If in the affirmative as in the present case, the court will remove the offending party from the seat of justice and dismiss the suit. Again the words of Salmon L J in *Allen Vs MC Alpine & Sons* [1968] ALL E.R 543 at 561 set out how to determine whether a delay that is inordinate is inexcusable;

"as a rule, when inordinate delay is established, until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying which will never wear out however often said that, justice delayed is justice denied".

8. Again, with the coming into force of sections 1A and 1B of the Civil Procedure Act as read together with articles 50 and 159 of the constitution, it is incumbent on the court to do substantial justice to the parties. The overriding objective therein enjoins this court to expedite its business and to utilize judicial resources in an efficient manner.

9. When there is such a lengthy and inordinate delay or lethargy to prosecute the suit, it prejudices the defendants from a fair trial by the inert grip or hold of the plaintiff. The court had rather strong language but which is apt in the circumstances in *Mugo Njogu Vs Mary Githinji* [2010] e KLR where it stated;

"With the overriding objective in place, it is no longer acceptable in my view for the court to automatically excuse the mistakes and lapses of counsel. Counsel have a role and duty to assist the court in realizing the overriding objective and incompetency or lapses of counsel derogate from the objective".

The court has inherent power in those circumstances to dismiss the suit in the interests of justice. See *Mukisa Biscuit Manufacturing Company Vs West End Distributors* [1969] E.A. 696.

10. Granted all of those circumstances, the order that commends itself to me to grant is to dismiss the suit. Having reached that conclusion, I need not consider the second limb of the motion to discharge the injunction. I would only observe in passing that order 40 rule 6 now requires that a suit in which an interlocutory injunction has been granted be determined within a year. In default, the injunction lapses. Rule 7 of that order also entitles a person affected by such an injunction to petition the court to vary or discharge the order. The plaintiff has enjoyed an interlocutory injunction for over 4 years since 28th February 2008. Even on that limb of the application, I would have been inclined to discharge the order of injunction. But that is now water under the bridge.

11. In the result, I order that the plaintiff's suit be and is hereby dismissed with costs to the defendant.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 31st day of May 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Ms Githuku for Mr. Wena for the Plaintiff.

Mr. Echuchi for the Defendant.