



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS**  
**CIVIL CASE 3372 OF 1992**

**SCORPIO ELEGANTS LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA POWER & LIGHTING COMPANY.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. The application before me is the Notice of Motion dated 24/07/2008 filed by the Plaintiff/Applicant asking me to review vary and/or set aside my order of 23/06/2008 by which I dismissed the Plaintiff's suit under Order IXB Rule 4(1) of the Civil Procedure Rules. The Plaintiff/Applicant also prays that the suit be reinstated. The application which is brought under Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya, Order IXB Rule 8, Order XLIV Rules 1, 2 and 3 and Order L Rule 1 of the Civil Procedure Rules is premised on 5 grounds appearing on the face thereof. It is also supported by the sworn affidavit of Margaret Wanjiru Ragui dated 24/07/2008.
2. The gist of the Applicants' argument is that new and important matters which were not within the knowledge of the Applicant have now emerged. The Applicant also says that there is an error apparent on the face of the record, necessitating this application. The Supporting Affidavit of Margaret Wanjiru Ragui alleges that the Plaintiff's inability to proceed with the hearing of the case on the 23/06/2008 was due to factors far beyond the control of the Plaintiffs.
3. The application is opposed. By an order dated 3/04/2009, Khamoni J granted leave to the Respondent to file a Replying Affidavit in opposition to the instant application. The Replying Affidavit is sworn by Owiti Awuor dated 22/10/2008.
4. The application proceeded by way of written submissions. Before I deal with the submissions, a brief history of the instant application will suffice. On the 23/06/2008, the parties appeared in court for the hearing of the main suit which was fixed for two days. On that day, Mr. Henia held brief for Mr. Mburu for the Plaintiff while Mr. Gitonga Murugara was present for the Defendant. Mr. Henia applied for adjournment of the case on grounds that the Plaintiff's key witness one Peter Grayson was then out of the country on an emergency trip and was due to return on 25/06/2008. Though counsel for the Defendant had received prior notification of the Plaintiff's intention to apply for adjournment, he opposed Mr. Henia's application and gave the following reasons in support of the objection:-
  - (a) That this was one of the oldest cases pending in court and that the Plaintiff had made a similar application on 8/02/2007.

(b) That on 8/2/2007, the court granted a last adjournment to the Plaintiff and that the Plaintiff's attempt to seek another adjournment on 23/06/2008 had no place in light of the order of 8/02/2007

(c) That the emergency alluded to by counsel for the Plaintiff was not disclosed to the court, and that in all fairness, the Plaintiff should have waited to testify before taking himself out of the jurisdiction of the court

(d) That counsel for the Plaintiff had failed to disclose whether the Plaintiff was in court.

(e) That the Defendant had 2 witnesses, one from Garissa and the other from Western Kenya both of whom were in court ready to testify.

5. In reply, Mr. Henia for the Plaintiff submitted that though the Plaintiff appreciated that the case was old, their main witness, Peter Grayson who could testify and produce the documents required to prove the Plaintiff's case was out of the country. Counsel for the Plaintiff pleaded for a last opportunity and also stated that he was unaware of the orders made by the court on 8/02/2008. Counsel for the Plaintiff admitted that the Plaintiff was not in court that morning. The court was not persuaded that the application for adjournment was merited and ordered the Plaintiff to proceed with the case at 11 .00 a.m. At 11.00 a.m., Mr. Henia told the court that he had no witnesses to call. He said that his efforts to contact his witness who was a lecturer at the Kenya Methodist University (KEMU) had been fruitless. Mr. Henia then told the court that he had no further instructions in the matter.

6. Mr. Gitonga for the Defendant then told the court that the Defendant did not admit any part of the Plaintiff's claim. He urged the court to dismiss the Plaintiff's suit under Order IXB Rule 4(1) of the Civil Procedure Rules which provides:-

*"If on the day fixed for hearing after the suit has been called on for hearing outside the court, only the Defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."*

7. It is the dismissal order issued consequent to the matters referred to above that the Plaintiff/Applicant wants reviewed and/or set aside. In its undated submissions filed in court on 16/10/2008, the Plaintiff submitted that one of its key witnesses, namely Dr. Edward Ragui was admitted at Aga Khan University Hospital and died 3 days thereafter; while the second witness, Peter Grayson was genuinely out of the country. The Plaintiff prays that the Plaintiff's application be allowed. The Plaintiff relied on the following 2 cases :- **Ngonie vs Plantex Company Ltd. – Civil Appeal No. 91 of 1983 and Consolata Ndunda Owiro & Others –vs- Banuellboris Omambia [2005]e KLR.** In both of these cases, the courts exercised their discretion in favour of the Applicants.

8. On its part, the Defendant submitted that the Plaintiff had not made out a case for review/setting aside of the orders of 23/06/2008. Counsel for the Defendant relied on the case of **Ochola versus National Bank of Kenya Limited [2005]2 EA 475** where the Court of Appeal held, inter alia,

*"where a party has appointed counsel to appear for him and that counsel has due instructions to proceed with the hearing of a suit, it should not be dismissed under Order IXB Rule 4(1).*

*However, when an advocate's request for an adjournment is refused and he has no instructions to present his client's case, there is no "appearance", even if his client is present in person but not ready to proceed. It would be contrary to the policy of law to hold that an absent party appeared by his instructed counsel."*

9. In the instant case, when Mr. Henia's application for adjournment was refused (and for good cause) he told the court that he had no evidence to offer and that he had no further instructions in the matter. From that moment on, there was no appearance of the Plaintiff and persuaded that this was the position. I proceeded to dismiss the Plaintiff's suit for non-appearance.

10. The Defendant also argued that the Plaintiff is not keen on prosecuting this case for reason that the Plaintiff has applied for numerous adjournments since the filing of the suit against the Defendant in 1992. The Defendant argues that the adjournments have delayed the hearing and determination of this suit. (see **Savannah Development Company versus Mercantile Finance Company Limited [1989] LLR 5426.**) The Defendant also argued that when the court file went missing sometime in 1999, until it was eventually traced in 2006, the Plaintiff simply sat back and took no steps towards retrieving the file when it knew that it was its duty to pursue its claims against the Defendant to its logical conclusion (see **Nilani versus Patel [1969] EA 340.**) The Defendant urges the court not to exercise its discretion in favour of the Plaintiff who it is alleged has been indolent all along. (see **Shah versus Mbogo [1967] EA 116.**) In the **Shah –vs- Mbogo** case above, the court held, inter alia that

*“--- applying the principle that the court’s discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”*

11. From the documents filed in court since the order of 23/06/2008, the Plaintiff’s representative Edward Ragui was in hospital and 3 days thereafter, he died. Documents to support the hospitalization and subsequent death have been produced to the court. The Plaintiff has also adduced evidence that its second key witness, Peter Grayson had travelled, although the reasons for the travel are not indicated on the air ticket. Margaret Wanjiru Ragui says at paragraph 10 of her Supporting Affidavit that Mr. Grayson was scheduled to travel out of the country on 21.06/2008 and return on the 25/06/2008.

12. On the basis of the above facts, and particularly the fact that Edward Ragui who was one of the 2 key witnesses for the Plaintiff was in hospital at the material time, I cannot say that on the 23/06/2009, the Plaintiff deliberately sought to obstruct or delay the cause of justice, though on previous occasions, one can say that the Plaintiff had caused delays. I think that the Plaintiff should be given a second chance to be heard so that his case is determined on its merit.

13. In the result, I hereby set aside the order of 23/06/2008 dismissing the suit and all other consequential orders. I hereby reinstate the suit for hearing and determination on merit. Since the suit is old, the parties must actively pursue the prosecution of the suit within the shortest possible time from the date of this order. Costs of the application to the Defendants/Respondent in any event.

Orders accordingly.

Dated and delivered at Nairobi this 24<sup>th</sup> day of September, 2009.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mr. Henia (present) for the Plaintiff/Applicant

Miss Babu (present) for the Defendant/Respondent

Weche - court clerk