**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 199 of 2004**

**GIAKI HOLDINS LIMITED……...…..PLAINTIFF/RESPONDENT**

**VERSUS**

**KENYA POWER & LIGHTING**

**COMPANY……..……..…..…DEFENDANT/APPLICANT**

**RULING**

The application is dated 30th January, 2008 and is expressed to be brought under Order XVI rule 5 and Order L rule 1 of Civil Procedure Rules. It seeks an order dismissing the Plaintiff's suit for want of prosecution with costs and interest.

There are three grounds for the application cited on the face of the Notice of Motion.

a) THAT this case was last in court on 24th September 2004 when it was stood over generally.

b) THAT it is over three months now since this matter was set for hearing.

c) THAT its only just and fair that there must be an end to litigation.

MR. NARANGWI, an Advocate in the Defendant's firm of Advocates sworn an affidavit dated 30th January, 2008 in support of the application.

The application is opposed by the replying affidavit of GIBSON KAMAU KURIA, Advocate for the Plaintiff dated 22nd May, 2008. The suit was filed on 19th April, 2004 and simultaneously with a chamber summons application seeking injunctive relief against the Defendant, Kenya Power & Lighting Company, under a certificate of urgency. The application was seeking to have the Defendant ordered to restore electricity power to the Plaintiff. The Plaintiff's contention was that the disconnection of the power had affected a Secondary School with 650 students and 10 teachers both in terms of electric power supply and water supply, and had also affected a farm with 40 cows, 15 calves, 500 chicken and several families living on the farm.

The application was heard ex-parte in the first instance and an interim injunction was granted against the Defendant, pending inter-parties hearing. The application was set down for hearing inter-parties on 3rd May, 2004. On the 3rd May 2004, the Advocates for both parties agreed to adjourn the matter to 25th June, 2004 in order to enable the Defendant Company file its defence. The interim order was extended by consent.

On 25th June, 2004, Dr. Kamau Kuria for the Plaintiff was bereaved and by consent of parties, the hearing of the application was stood over to 24th September, 2004. On the 24th September, 2004, the parties again applied to have the matter adjourned, this time generally. The parties also agreed to maintain the status quo. The indication given to the court was that the parties were negotiating. No further action was taken by either party in the matter until this application was filed.

I have considered the submissions by Mr. Waiganjo for the Defendant/Applicant, and Mr. Gicheru for the Plaintiff/ Respondent and case relied upon by both parties.

Order XVI rule 5(d) of the application stipulates.

"*If, within three months after –*

*(a)……*

*(b)……*

*(c).....*

*(d) the adjournment of the suit generally, the Plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the Defendant may either set the suit down for hearing or apply for its dismissal".*

The Applicant has relied on the English case of ALLEN VS McALPINE 1[1968]543, a case cited in IVITA VS KYUMBU [1984] KLR 441, which the Respondent relied upon. Both these cases have set down the tests that a Court must apply in cases of this nature as put forward by LORD DENNING in ALLEN'S CASE, supra. These are that when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the Court may in its discretion dismiss the suit. The learned judge observed that the overriding consideration should always be whether or not justice can be done despite the delay. Chesoni J, as he then was in IVITA CASE, supra, observed that each case should be decided on its own facts and that the matter is one of the discretion of the court.

I have already set out the history of this case in the brief moment that it has existed. The matter has been dormant for three years less four months since it was last in court as at the time that the instant application was made. The Respondent has given an excuse for the delay. The Replying Affidavit of Dr. Kuria deposes that Mr. Kurauka, an Advocate in Kamau, Kuria and Kiraitu firm of Advocates, who was handling the matter for the Plaintiff within the firm, left the firm in December, 2004. The deponent recognizes that the matter was stood over generally in September 2004. The indication given to the court by both parties was that they wished to pursue settlement out of court. There was therefore a lack of explanation for the period between September and December 2004, when Mr. Kurauka still worked for the Plaintiff Advocates firm. No excuse is offered why the parties could not agree on a settlement. I note that no attempt was made to demonstrate any efforts made or steps taken to convene any discussion for the settlement of the matter out of court between September 2004 and January 2008 when this application was made.

Dr. Kuria suggested that the case should not be dismissed because the two parties were companies with perpetual succession and because the power was reconnected and contractual relationship between the parties was going on smoothly. On the other hand the deponent asserts that the only substantive prayer pending besides the interlocutory application which is yet to be heard, is the one for damages.

I have considered the excuse advanced by the Respondent why this suit should not be dismissed. The delay involved has been inordinate. The explanation given is unacceptable and inexcusable. The Plaintiff has been asleep for the last three years and four months. The application filed simultaneously with the suit has not even been argued inter-parties. The Plaintiff has not demonstrated that any attempts have been made by it or steps taken, either to settle the matter out of court, as initially intended, or to set the matter down for hearing. I find that the Plaintiff is without any credible or sufficient excuse for the delay.

I did consider that the contractual relationship between the parties herein is a continuing one. Since the Plaintiff's Advocate averred that the contractual relationship between both parties was running smoothly, it follows that there is no pending claim between the parties. Dr. Kuria in the replying affidavit deposed that there was a claim for damages pending. I have perused the filed plaint at paragraph 12(i), the Plaintiff avers that it was entitled to general damages for trespass committed when the Defendant's servants entered the Plaintiff's land for purposes of disconnecting electric power.

The issue in this case is however not whether there is any claim pending in this suit. The primary consideration is whether the suit should be dismissed or be allowed to pend for the reasons advanced by the Respondent. It is my considered and humble view that the explanation advanced by the Respondent why the suit was left inactive for four years was inexcusable and therefore unacceptable. I do not see any credible excuse that would justify this court to exercise its discretion in favour of the Plaintiff. The parties resumed their contractual relationship and that seems to be the reason the Plaintiff went to sleep over the case. I do find enough reason to rule that the Plaintiff has lost interest in the matter. I am also satisfied that the Defendant will suffer prejudice if the case remains pending for much longer. I am satisfied that the interests of justice are not being served by the continued delay in having the matter set down for hearing.

Having come to the conclusion that I have of this matter, I find that the Defendant's application dated 30th January, 2008 is merited. In the result I will allow the Plaintiff's application and dismiss the suit with costs to the Applicant. The Applicant will also get the costs of the suit.

Dated at Nairobi this 13th day of June, 2008.

**LESIIT, J.**

**JUDGE**

***Read, signed and delivered in the presence of:***

Mr. Waiganjo for Applicant

Mr. Gacheru for Respondent

**LESIIT, J.**

**JUDGE**