



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

Civil Suit 799 of 2001

BENSON OYULE TOYA.....PLAINTIFF

VERSUS

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

R U L I N G

The application is a Notice of Motion dated 6th November, 2006. It is brought under Order XVI, rule 5(d) of the Civil Procedure Rules. It seeks orders dismissing the suit with costs for want of prosecution and for costs of the application. Order XVI, rule 5(d) provides:-

“5. *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 grounds of the application are cited on the face of the application itself and further grounds given in the annexed affidavit of Beatrice Meso Muendo. The application was unopposed.

The Plaintiff filed this suit on 30th May, 2001 seeking an order directing the Defendant to reconnect and resume supply of electricity power to him at his premises. The plaint and summons requiring attendance were served on the Defendant who filed its memorandum of appearance on 13th June, 2001 and the defence on 3rd July, 2001.

I have considered this application and perused the record of the proceedings. I see that **Ibrahim, J.** on 14th January, 2004 commenced the hearing of the suit and heard the evidence of PW1 Benson Oyule Toya the plaintiff in the suit. The court adjourned the matter to 17th March, 2004 when the Plaintiff continued with his testimony in chief..

After the court heard the Plaintiff’s evidence in chief, on its own motion it recommended to the

Defendant to resume supply of electricity to the Plaintiff at the premises the subject matter of the suit. Subsequently on 29th March, 2004, the parties entered a consent order effectively effecting re-supply of electricity energy to the Plaintiff by the Defendants, at the Plaintiff's costs as to re-connection charges and further the Plaintiff was to pay the undisputed part of the Defendant's bill to him. Subsequent to that, the learned **Ibrahim, J** was to finalize the matter. However, the Plaintiff fell ill delaying the hearing of the matter on several dates set for hearing. Thereafter the Plaintiff changed Advocate to Khaminwa & Khaminwa Advocates which firm took an *ex parte* date on 28th November, 2006 for hearing of the suit on 16th July, 2007. The Defendant in the meantime filed his notice of motion application dated 6th November, 2006 on the 1st February, 2007. That was two months after the date of hearing of the suit taken by the Plaintiff's Advocate for hearing on a date yet to come.

I have given the summary to demonstrate two pertinent points:-

One that the Defendant/Applicant claim that no action had been taken by the Plaintiff to set case for hearing since 24th November, 2004 is misinformed.

Two, the Plaintiff is yet to serve the Defendant/Applicant with a hearing notice for the suit on date set of 16th July, 2007. That is understandable as the hearing date is two months away.

Having set out the brief history of the case, it is clear to me that the Plaintiff has on various occasions taken a step to ensure that the matter is set down for hearing. The last hearing date was taken on 28th November, 2006. The date is in the near future.

In the circumstances, I find that it would be oppressive and certainly not in the interest of justice to allow the application. The suit has a hearing date. In the circumstances the application is wholly unmerited and is therefore dismissed. Costs in the cause.

Dated this 25th day of May, 2007 at Nairobi.

LESIT, J.

JUDGE

Read, signed and delivered in presence of :-

Makori holding brief for Chelegat for Applicant.

LESIT, J.

JUDGE