



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 2619 OF 1998

POWER TECHNICS LIMITEDPLAINTIFF

V E R S U S

TRANSAMI (K) LIMITEDDEFENDANT

R U L I N G

This is an application by the Defendant for dismissal of the Plaintiff's suit for want of prosecution. It is brought under Order 16, rule 5(d) of the Civil Procedure Rules (the Rules). Under that rule, if, within three months after the adjournment of the suit generally, the plaintiff, or the court on its own motion on notice to the parties, does not set down the suit for hearing, the Defendant may either the suit down for hearing or apply for its dismissal. There is a supporting affidavit sworn by one JOSEPH GIKANDI, the Defendant's learned counsel.

The Plaintiff has opposed the application upon the grounds set out in the replying affidavit sworn by one JOSEPH NJOROGE MBUGUA, the Plaintiff's learned counsel. It is stated in that affidavit that since the case was first adjourned generally on 26th October 2005 the Plaintiff's learned counsel has been trying to trace one of the Plaintiff's three witnesses, and that that is why the case could not be set down for hearing. It is further stated in the affidavit that the witness has now been traced.

I have considered the submissions of the learned counsels appearing, including the one case cited. Dismissal of a case for want of prosecution is a matter for the discretion of the court. This discretion will normally not be exercised in favour for the applicant unless the court is satisfied:-

1. That the default has been intentional and contumelious.
2. That there has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his advocate.
3. That such delay will give rise to a substantial risk that it will not be possible to have a fair trial of the case, or is such as is likely to cause or to have caused serious prejudice to the defendant.
4. That except in cases of contumelious conduct by the plaintiff, the power to dismiss an action for want of prosecution should not be exercised within the currency of any relevant period of limitation as the plaintiff could then simply file another action.

For these principles see "HALSBURY'S LAWS of ENGLAND", 4th Edition, Volume 37, paragraph

It has also been repeatedly held by our higher courts that the power to dismiss a suit for want of prosecution being so drastic, it should be exercised only as a last resort, and where the suit can be heard without further delay, an application for dismissal ought to be refused.

I have considered the present application in light of the above principles. I am satisfied that there has been inordinate and inexcusable delay in prosecuting this old matter. The plaint is dated 15th February, 1997 and was not filed on 23rd November, 1998. The suit first came up for hearing on the 13th March, 2002. It was adjourned upon the Defendant's application. It next came up for hearing on 21st September, 2005. This time round the Plaintiff sought adjournment, and the same was granted.

For a suit that is nearly ten years old, the Plaintiff has not demonstrated much interest in prosecuting the same. It is said in the replying affidavit that since the suit was last adjourned it could not be set down for hearing because the Plaintiff's learned counsel could not trace one of the Plaintiff's three witnesses. I do not consider this to be good reason not to have set down the suit for hearing. The Plaintiff's two available witnesses could have been heard and then adjournment sought in respect of the third witness. The delay is therefore inordinate and inexcusable; it has not been credibly explained.

But, to dismiss the case I must also be satisfied that the delay in prosecuting it will give rise to a substantial risk that it will not be possible to have a fair trial of the case, or that the delay is such as is likely to cause, or has indeed caused, serious prejudice to the Defendant. Unfortunately, the Defendant has not addressed these issues in its application. No material has been placed before the court as would enable me to conclude that the delay will give rise to a substantial risk that it will not be possible to have a fair trial of the case, or that the delay is such that it is likely to cause, or has indeed caused, serious prejudice to the Defendant.

I must therefore refuse the application. It is hereby dismissed. I will, however, award the costs of the application to the Defendant as it was entitled to bring the application. I will assess those costs at KShs. 35,000/00. The same must be paid within 14 days of delivery of this ruling. In default the Defendant may execute for the same.

I will further order that within thirty (30) days of delivery of this ruling the Plaintiff must take a demonstrable step towards prosecution of the suit. In default, the suit shall stand dismissed for want of prosecution without the necessity of another application.

Those will be the orders of the court.

DATED AT NAIROBI THIS 11TH DAY OF JUNE 2007

H. P. G. WAWERU

JUDGE