



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**CIVIL CASE 459 OF 2001**

**JOHN MAKANGA .....PLAINTIFF**

**VERSUS**

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

**RULING**

This is an application by the Defendant under Order XVI Rule 5 of the Civil Procedure Rules for an order that the Plaintiff's suit against him be dismissed for want of prosecution.

The Defendant says that there has been inordinate delay. In support of the application Miceu Kirimi Advocate for the Defendant has sworn an affidavit giving grounds for the application.

The suit was filed on 22<sup>nd</sup> March 2001. The relief sought is reinstatement of the Plaintiff's power supply which had been disconnected. Simultaneously with the Plaint, the Plaintiff brought a Chamber Summons under Certificate of Urgency in which the Plaintiff sought mandatory orders commanding the Defendant to reinstate the disconnected Account Numbers which supplies power to the Plaintiff's premises. The Defendant entered Appearance and filed a defence on 10<sup>th</sup> April 2001.

The injunction application came up for hearing on 11<sup>th</sup> April 2001 when a consent order was recorded in the following terms.

- (a) The electricity supply be reconnected in respect of all the accounts in the premises of the Plaintiff.
- (b) Accounts be taken by both parties before the 30<sup>th</sup> April 2001.
- (c) There be a mention on 7<sup>th</sup> May 2001 to record a settlement if any, and
- (d) The Plaintiff do pay for the electricity consumed.

This case has been in court for the last 5 years. By 7<sup>th</sup> April 2001 the Accounts had not been taken as ordered by the court and therefore on 7<sup>th</sup> April 2001 when the parties appeared before the court the

matter was stood over generally. On 24<sup>th</sup> September a meeting was held between the parties in the Defendant's Advocates office to try to settle the Accounts but that the parties failed to agree and it was ordered that the suit do proceed to full hearing and since then the Plaintiff has not taken any step to set the suit down for hearing.

Counsel for the Plaintiff submitted that what contributed to the delay in setting the suit down for hearing were the negotiations to settle the matter out of court followed by the demise of the counsel for the Plaintiff then on record.

It is now settled that for the court to dismiss a suit for want of prosecution the delay must be prolonged and inexcusable and that such a delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or is likely to cause prejudice to the Defendant. Taking into account the circumstances of this case it cannot be said that the delay is prolonged and inexcusable on the part of the defendant. I decline to exercise my discretion in favour of the Applicant.

Accordingly the Defendant's application is dismissed.

I order that costs be costs in the cause.

Dated and delivered at Nairobi this 27th day of September 2007.

**J.L.A. OSIEMO**

**JUDGE**