

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Suit 105 of 2002

ABDUL AZIZ SALIM BAJABER

T/A BAJABER SERVICE STATION.....APPLICANT/PLAINTIFF

VERSUS

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

RULING

This application is dated 14.4.2005. It seeks dismissal of this suit for want of prosecution. The facts show that the suit was filed on 15.8.2002 under a certificate of urgency. Interim injunction orders were granted to the plaintiff/respondent ex-parte and the application accompanying the suit was fixed for a hearing interpartes on 4.9.02. But the application was not so heard until 11.3.2004 and on 23.3.2004 a ruling was made granting temporary orders until the case is heard and finally determined.

By 28.4.2005 when this application was filed, the suit had not been fixed for a hearing – a period of about one year. Hence the filing of this application for dismissal of the suit for want of prosecution, as submitted by Mr. Makini for the defendant/applicant.

Mr. Kibanga for the plaintiff sought for more time to have the case be fixed for a hearing. He said his client was interested in the case and he as his advocate contributed to the delay due to sickness.

I have carefully perused the material upon which this application is based together with the arguments advanced by both sides. The principles upon which a case can be dismissed for want of prosecution are generally settled. A court will dismiss a case if considering all the circumstances of the case, including the cause of the delay, it finds that it will be in the interest of justice to do so. The court will accordingly take into account the length of the delay, the reasons for delay, whether or not a trial at the time of the application will be fair or not; or whether a trial will be unfair or will be easy or complicated due to the kind of evidence possibly needed to prove the case. This means that the grounds for dismissing or not dismissing a case are not limited and every case will be considered on its own circumstances. In my view the legal authorities submitted in support of either party herein, support the above principle.

In the case before me, the plaintiff definitely delayed fixing the suit for a hearing for about a year. He expresses a strong interest to prosecute the case, The applicant himself failed to take a hearing date when he realised that the plaintiff had failed to do so, at least to fulfil the optional requirement under the rule of procedure under which he has approached this court for dismissal. The court also notes that the plaintiff's advocate was sick for a reasonably long period and claims some responsibility for the delay.

Having considered the above circumstances, I have come to the conclusion that it will not be in the interest of justice to dismiss this suit at this stage. This application therefore fails to succeed and is rejected. Each party to bear own costs. It is so ordered.

Dated at Machakos this 28th day of **September, 2006.**

D.A. ONYANCHA

JUDGE