



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 913 OF 2004

KENYA POWER & LIGHTING CO. LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

LONDON DISTILLERS (K) LIMITED.....DEFENDANT/APPLICANT

RULING

1. Before this court for determination is the Notice of Motion dated 11th December, 2019 brought by the defendant/applicant seeking the dismissal of the plaintiff's/respondent's suit against it for want of prosecution plus costs thereon.
2. The Motion is supported by the grounds presented in its body and the facts stated in the affidavit of *Isaac Wanjohi*.
3. The deponent stated that since instituting the suit way back in 2004 the plaintiff/respondent has taken no active steps in prosecuting the suit and that the applicant filed an application in 2014 in which it sought orders similar to those presently sought but which application was dismissed by the court vide the ruling delivered on 18th December, 2014.
4. The deponent asserted that since then, the respondent has shown laxity in the matter and without explanation, thereby depicting a complete lack of interest in the suit.
5. To this end, it was the deponent's averment that it is only fair that the respondent's suit be dismissed for want of prosecution with an award of costs being made to the applicant.
6. *Fredrick Okeyo* advocate for the respondent put in a replying affidavit in response to the Motion in which he contended that his office was unaware of delivery of the aforementioned ruling since the registry had indicated that the same would be delivered on notice and the advocate who had conduct of the suit has since left the firm.
7. The deponent further contended that his office has been consistently following up on the ruling to no avail since there was an indication that the court file could not be traced from the registry, adding that the respondent is still intent on prosecuting its case.
8. In disposing of the Motion through oral arguments, *Mr. Shah* counsel for the applicant restated the contents of the Motion save to argue that his client stands to be prejudiced if the prayer for dismissal of the suit is denied for the reason that its witnesses are unavailable. The advocate further submitted that the letters alleged to have been written by the respondent to enquire on availability of the court file are not on the record.
9. *Miss Sagini* advocate acting for the respondent on her part relied on the facts stated in the replying affidavit and added that the letters referenced by her colleague bear the registry stamp to show that they were received.
10. I have considered the grounds set out in the body of the Motion, the supporting and replying affidavits, and the rival submissions.
11. The applicable law on dismissal of suits for want of prosecution is **Order 17, Rule 2 (1) and (3)** of the **Civil Procedure Rules. Rule 2(1)** which concerns itself with the dismissal of suits upon issuance of a notice to show cause by the court whereas **Rule 2(3)** provides for the dismissal of suits upon the application of a party.
12. The guiding principles in an application of such nature have been articulated in several authorities. For ease of reference, I will cite the case of **Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others [2014] eKLR** where the court laid out the relevant principles in the following order for consideration:

i) Whether there has been inordinate delay in the prosecution of the suit by the plaintiff;

- ii) Whether the delay is intentional and thus inexcusable;*
- iii) Whether the plaintiff has offered a reasonable explanation for the delay;*
- iv) Whether the delay is an abuse of the court process;*
- v) Whether the delay prejudices the defendant(s);*
- vi) The prejudice that will be visited upon the plaintiff; and*
- vii) Whether justice can still be done notwithstanding the delay.*

13. On the first principle, it is apparent from the record that the suit was last in court on 18th December, 2014 when the court delivered a ruling in respect to an application of similar nature brought by the applicant.

14. Since then, a span of over five (5) years has passed. Upon considering the legal standard that what amounts to inordinate delay varies from one case to another, I am convinced that there has been an inordinate delay in the suit.

15. In respect to the second, third and fourth principles which I will address together, I considered the explanation offered by the respondent for the delay and I looked at the annexures to the replying affidavit.

16. The record shows that when the parties appeared before the court on 6th November, 2014 the court scheduled the relevant application for ruling on 5th December, 2014. It is therefore not true that the court directed that the ruling would be delivered on notice, as the respondent contended.

17. From the record, it is apparent that the ruling was not delivered on 5th December, 2014 as had earlier been directed by the court; instead, the same was delivered on 18th December, 2014 in the absence of both parties.

18. Be that as it may, I find it rather odd that the respondent severally wrote to the Deputy Registrar to confirm the status of the ruling and the court file yet the respondent is well aware that a matter pending ruling stays in chambers with the respective judge and not with the Deputy Registrar or in the registry. If at all the respondent was under the belief that the ruling was pending delivery all along, it ought to have shown reasonable efforts made at contacting the judge to confirm the position regarding the ruling; this was not done.

19. On the issue of the letters whose authenticity the applicant appeared to challenge through its advocate, Mr Shah's submissions, this court was able to verify from the registry that unlike other documents filed in the registry, correspondences are not paid for hence the applicant's argument that there is no evidence to show that the letters drafted by the respondent's advocates and delivered in court were filed holds no water.

20. That notwithstanding, the respondent has to my mind demonstrated a high degree of laxity and indolence in prosecuting its case. As earlier noted, the respondent has not shown any diligent steps taken in ensuring the progress of its case especially given its age and even after being prompted by two (2) earlier applications for dismissal filed by the respondent and upon being given previous opportunities to prosecute the suit.

21. I therefore take the view that the explanation behind the delay is neither reasonable nor sufficient and as such, the delay amounts to an abuse of the court process.

22. Turning to the principle to do with the prejudice which will be visited upon the parties, the respondent on its part did not address me on this subject. On the other part, the applicant explained that not only have some of its witnesses left its employment since, but that crucial evidence has gone missing from its custody, thereby resulting in grave prejudice. This cannot be compensated for an award of damages given that the defendant will not be able to defend the suit due to the delay caused by the plaintiff in prosecuting the suit. Justice must look both ways.

23. In the end and drawing from my analysis above, I find the Motion to be meritorious and the same is allowed as prayed. Consequently, I make an order that the plaintiff's suit be and is hereby dismissed with costs to the defendant. The defendant shall also have costs of the Motion.

Dated, signed and delivered at NAIROBI this 5th day of March, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant