

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 151 OF 2010

JAMES MAINA NDERITU

TOP RANGE LIMITED

JOSEPHAT M. J. KINYUA

TONNY ENTERPRISES LIMITED

SAMUEL MURIUKI MURAGE

GRACE MUMBI KANG'ETHE

IRUNGU KAMAU.....PLAINTIFFS

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED..DEFENDANT

RULING

1. The Plaintiffs filed this suit on 11th March, 2010 seeking a permanent injunction restraining the Defendant from disconnecting their electricity. This suit was filed together with a chamber summons seeking injunctive orders pending the hearing and determination of this suit. When the application came up for hearing on 21st June, 2010, learned counsel for the Plaintiffs Mr. Mutiso sought an adjournment and leave to file a further affidavit. The said orders were granted. Since the said date, no further affidavit was filed nor has the Plaintiffs made any progress in proceeding with this matter.
2. The Defendant has filed a notice of motion dated 24th October, 2014 seeking to dismiss this suit for want of prosecution. It is the Defendant's contention vide the supporting affidavit of John Katiku that since 21st June, 2010 when the matter came up for hearing of the Plaintiffs' application dated 12th March, 2010 which application was not heard following the Plaintiffs' counsel application for adjournment, the Plaintiffs have not taken any action to prosecute the suit.
3. The application is unopposed. The test to be applied by courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, and the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but will be ordered that it be set down for hearing at an earliest possible time. It means that it is a matter of court's discretion. It is clear from the record that close to four (4) years have lapsed since the last time this matter was before court. The unexplained delay of about four (4) years is in my view inexcusable and inordinate considering that the Defendant has been left hanging on the suit indefinitely. Such a delay is likely to occasion the Defendant prejudice since the Defendant is likely to lose evidence or witnesses, and the delay causes the Defendant unnecessary anxiety. Further to the aforesaid, the issues in the supporting affidavit to this application have not been contested. The Plaintiff has not bothered to file a replying affidavit to explain the delay in prosecuting this suit, the facts as presented by the Defendant are therefore taken to be true. In the circumstances this application is merited and allowed with costs to the Defendant.

Dated, Signed and Delivered in open court this 8th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

N/A for the Plaintiffs

Miss. Miring'u h/b for Njuguna for the Defendant