



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 2013 OF 1998**

**NICHOLAS KINYUA MBUI.....PLAINTIFF**

**V E R S U S**

**THE KENYA POWER AND**

**LIGHTING COMPANY LIMITED.....DEFENDANT**

**RULING**

The Defendant herein has sought (by Notice of Motion dated 30<sup>th</sup> July 2014) dismissal of the Plaintiff's suit for want of prosecution. The application is brought under **Order 17, rule 2** of the **Civil Procedure Rules 2010** (the Rules). Under rule 2 sub-rules((1) and (3)), in any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

The grounds for the application appearing on the face thereof include;

- i. That the Plaintiff has not taken any step at all towards the prosecution of the suit since December 2009
- ii. The Plaintiff has not complied with Order 11 of the Rules.
- iii. That the Plaintiff's Advocate's failure to attend court during call over dates for confirmation of hearing has led to its removal from the hearing list on several occasions.
- iv. That the Defendant has suffered prejudice as a result of the delay in prosecuting and most of its witnesses are now unavailable.
- v. That it is just and reasonable that the case be dismissed.

A supporting affidavit sworn by **Peter Ohanya**, the Senior Insurance Officer of the Defendant is attached to the application.

The application has been opposed by the Plaintiff who has filed a replying affidavit dated 28<sup>th</sup> May, 2015 sworn by Munyalo Nthuli his Counsel. He has explained the delay in prosecuting the suit as follows –

- i. That the matter has been ready for hearing all along as the Plaintiff undertook pretrial steps of discovery as early as 13<sup>th</sup> July 2007 when they filed their bundle of documents.
- ii. That the matter has come up for hearing several times between the year 2002 and 2009 which hearings have been prompted by him.

- iii. That the alleged unavailable witnesses of the Defendant are foreign to him as he has never been served with any witness statements or a list of the intended witnesses hence the claims made should be disregarded.
- iv. That he is willing to prosecute the case now that he has complied with all the new rules as evidenced by the filing of documents, witness statements and issues.

Counsels made oral submissions. No authorities were cited. This is a very old suit which was filed in **1998**. The cause of action is pleaded to have arisen on **4<sup>th</sup> April, 1996**. Upon perusal of the court file, the following is evident - The first time it was fixed for hearing was for **7<sup>th</sup> and 8<sup>th</sup> May, 2002**. Hearing did not proceed as the Plaintiff did not attend the call over. It was subsequently fixed for hearing for **12<sup>th</sup> and 13<sup>th</sup> June, 2006**. Hearing did not proceed on that date either; it was again set for **29<sup>th</sup> and 30<sup>th</sup> November 2006**; it was yet again set for **16<sup>th</sup> and 17<sup>th</sup> July 2007** but on that date it was adjourned as the Defendant raised an objection. The only other time the suit was fixed for hearing was for **1<sup>st</sup> and 2<sup>nd</sup> December, 2009**. Once again it did not take off.

The Defendant's Senior Assurance Officer has deponed in the affidavit supporting the application, that the Plaintiff's Advocate did not attend the call-overs to confirm the hearings. This has not been traversed as the Plaintiff has only stated that the suit has come up for hearing several times without adding more.

Even then, since 2<sup>nd</sup> December, 2009 the Plaintiff has not set down the suit for hearing. This delay of nearly five (5) years is inordinate. It has furthermore not been satisfactorily explained in the Plaintiff's replying affidavit.

The Defendant has also deponed, that because of the long delay a fair trial of the action will no longer be possible, especially because two of their witnesses in the matter have since relocated to the United States of America and one has subsequently died. Considering when the cause of action arose (**about 19 years ago**) and when the suit was filed (**17 years ago**), It will no longer be possible to have a fair trial of the action. It is totally unacceptable that this suit should continue to hang over the Defendant's head especially after it has demonstrated that its witnesses are no longer available to testify in court. It is generally the accepted policy that the courts should endeavour to sustain suits rather than dismiss them. However, injustice must look at both sides. In the instant case, the suit cannot be maintained without resultant injustice to the defendant. It is clear that the Plaintiff has lost interest in the suit and may continue delaying prosecution of the same.

The application is therefore allowed. The Plaintiff's suit is hereby dismissed for want of prosecution with costs to the Defendant. It is so ordered.

***Dated, signed and delivered at Nairobi this 7<sup>th</sup> day of July, 2015***

**A. MBOGHOLI MSAGHA**

**JUDGE**