



REPUBLIC OF KENYA

High Court at Meru

Civil Case 72 of 2002

KIJATA ENTERPRISES LTD.....PLAINTIFF

VERSUS

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

R U L I N G

The defendant /applicant in this suit brought up this application pursuant to Order 17 Rule 2(3) of Civil Procedure Rules seeing to have the plaintiff's/respondent's suit dismissed for want of prosecution.

The grounds in support of the application are stated in the annexed affidavit of Charles Wahome Gikonyo Advocate. The grounds are not stated on the face of the application. The application is opposed. The respondent swore a replying affidavit in opposition to the application.

When the application came up for hearing, this court heard oral submissions by Mr. Gikonyo learned Advocate for the applicant and Mr. Nyenyire learned Advocate for the respondent. This court has carefully considered the said submissions. It has also read the pleadings filed by the parties herein in support of their respective opposing positions.

The brief facts of this case is that the plaintiff/respondent filed this suit on 2/5/2002 against the defendant/applicant seeking general damages for breach of contract of supply, disruption of business operations and loss of income and profits when applicant interrupted power supply to the plaintiff/respondent's business.

The defendant/applicant filed statement of defence and counterclaim on 12.6.2002, to which the respondent/plaintiff filed reply to defence and counterclaim on 1/7/2002. The applicant/defendant subsequently filed reply to defence to counterclaim on 11.7.2002. On 7.2.2008 the applicant/defendant filed an application for dismissal of the suit for want of prosecution. The plaintiff/respondent's suit was dismissed on 4th June, 2008. The plaintiff/respondent filed an application dated 11/6/2008 for setting aside the dismissal of the suit for want of prosecution entered on 4th June, 2008. On 29th October, 2010 the plaintiff/respondent's suit was reinstated. That since the suit was reinstated the plaintiff/respondent did not take any steps to set the suit down for hearing. Consequently the defendant/applicant filed this application seeking that the plaintiff/respondent's suit be dismissed for want of prosecution.

The issue for determination is whether the defendant/applicant has met the test applied by courts in an application for the dismissal of suit for want of prosecution and further whether the delay is prolonged and inexcusable and if it is whether justice can be done despite the delay.

The instant suit was filed by the plaintiff/respondent on 2/5/2002. That the pleadings closed way back in

August, 2002 after the defendant/applicant filed and served its reply to defence to counterclaim . The plaintiff/respondent never bothered to take any steps to set suit down for hearing at any one moment, save when he filed his application to reinstate the suit after it was dismissed. That after reinstatement of the suit on 29th October, 2010 the plaintiff/respondent did not bother to set suit down for hearing. There is no evidence that invitation letter alluded to by the plaintiff/respondent dated 16th February, 2012 was ever filed as the court file had no copy of the same. Annexure "ZK1" has no court stamp and the applicant/defendant denied having been served with copy of the same. The respondent/plaintiff assertion that the suit was not given a hearing date as the registry had advised that old cases were being fixed and diary was full has not been supported by either a letter or affidavit by the in charge of the registry. The respondent has not deponed which cases if any could not be set down for hearing . The respondent has averred that he is willing to take a hearing date and have the matter finalized. He further averred that there is counter-claim to be heard and the defendant has not said anything about the counterclaim. The respondent also asserted that the applicant had also duty of fixing the case for hearing if it is serious with the counterclaim.

The delay in setting this court down for hearing is prolonged and inexcusable. The delay of 10 years since filing of the suit is not only prolonged but unjustified. The plaintiff did not give plausible explanation for failure to set the suit down for hearing. I do not find the reasons for failure to set suit down for hearing excusable in anyway.

In case of **IVITA-V-KYUMBU(1984) KLR 440**, Hon. Justice Chesoni, as he then was held:-

3. The test applied by the courts in an application for the 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, if 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 it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.

In the instant case it is now 10 years and 3moths since the suit was filed, without respondent setting it down for hearing. The plaintiff has not demonstrated having taken any steps to set this suit down for hearing at any one time after reinstatement of the suit. The plaintiff has all the time gone to sleep over his case.

In the circumstances, I find the delay to be prolonged and that the plaintiff/respondent has shown no sufficient excuse for the alleged delay. I am satisfied the defendant/applicant has established that there was prolonged delay in prosecuting this suit and in absence of any credible excuse by the plaintiff/respondent, I find that the delay in setting this suit down for hearing is inordinate and inexcusable. That the defendant has since 2002 been waiting for the plaintiff/respondent to set suit down for hearing without doing so. The witnesses and vital documents may not be easy to come by in defence due to delay of over 10years. That if this suit is allowed to proceed the defendant/applicant will be prejudiced and justice cannot be done to the parties.

That since the suit was reinstated for hearing it is almost 2years. According to Order 17 Rule 2(3) of Civil Procedure Rules where an action has been dormant for one year the defendants are entitled to apply to the court for its dismissal unless the plaintiff shows sufficient reason for not dismissing the suit. Each case must be decided on its own facts and the matter is one of the discretion of the court, but this court will not entertain any inexcusable delay and it will do everything possible to enforce just, expeditious and affordable resolution of disputes. The plaintiff's assertion that the defendant's counterclaim is pending is not and cannot be an excuse for the plaintiff/respondent failure to set down the suit for hearing. The respondent's allegation of directive that only old matters were to set down for hearing has not been proved to have been issued nor has the respondent demonstrated if such direction was issued, was issued by who and over what matters, and whether this suit was included in the alleged directive.

Accordingly in exercise of my discretion the application dated 26/3/2012 is allowed and the suit herein is dismissed for want of prosecution. The applicant is awarded costs of the suit and the application.

DATED, SIGNED AND DELIVERED AT MERU THIS 1ST DAY OF NOVEMBER, 2012.

**J. A. MAKAU
JUDGE**

Delivered in open Court in presence of:

1. Mr. Wahome for applicant/defendant(absent)
2. Mr. Ondari h/b for Rimita for defendant/applicant

**J. A. MAKAU
JUDGE**