

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2330 OF 1989

KIRIRO WA NGUGI.....PLAINTIFF

VERSUS

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

R U L I N G

On 29th November, 1995 Aluoch J. dismissed the plaintiff's suit under order 16 Rule 6 of the Civil Procedure Rules.

There is now before me an application by way of Notice of Motion under Order 44 Rule 1 of the Civil Procedure Rules and section 3 of the Civil procedure act seeking a review of the court order made on 29th November, 1995, that the said order be set aside, suit be re-instated and set down for hearing.

The application is supported by an affidavit sworn by Jackline L. Mola an advocate of this court to which the grounds of objection have been filed on behalf of the defendant.

A brief custody of this matter is important. After pleadings were closed the plaintiff applied to strike out the defence for not disclosing triable issues. This application was dismissed. The plaintiff filed a Notice of Appeal. The appeal was struck out for reasons that it was filed out of time. An application was filed to re-instate the appeal. When the said application came up for hearing the same was dismissed as counsel did not appear for reasons that he was indisposed. Counsel filed yet another application to reinstate the dismissed application but before it was heard, counsel advised the plaintiff to abandon the application in the Court of Appeal and persue the main suit in the High Court. Hearing dates were then for 1st and 2nd July, 1996.

As at the time the dates were given it would appear that the court and the counsel appearing for both parties did not know of the dismissal order. This is confirmed by the court record which shows that the dates were given on 14th February, 1996, close to two and a half months after the dismissal order was made. Further, as late as 20th June, 1996, the advocates for the defendant were writing to the advocates for the plaintiffs in respect of summons for directions in the same matter.

It is not a requirement of order 16 Rule 6 that the parties be given notice before or after the dismissal order is made. But one can immediately see the prejudice that may be suffered by a party who may honestly but mistakenly be addressing matters within the suit but which do not hold time from running.

Be that as it may, the attempt to have the defence struck out if successful would have led towards the finalisation of the plaintiff's claim. That being the case it was a step towards prosecuting the suit and cannot be isolated. If that be the case, and I believe it should, then time should have started running against the defendant on or about 7th July, 1995 when he was advised to abandon the application to re-instate the application relating to the dismissed appeal.

Further to the foregoing, the plaintiff's persistence in filing application after the appeal was struck out is evidence enough to show his interest in the suit.

I find that he has shown that to the satisfaction of the court that discretion should be exercised in his favour to review the dismissal order "for any other sufficient reason."

Accordingly the dismissal order is hereby set aside and suit re-instated for hearing after due compliance with all procedural steps. The defendant shall however have the costs of this application.

Order accordingly.

Dated and delivered at Nairobi this 22nd day of September, 1998

A. MBOGHOLI MSAGHA

JUDGE