



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO 66 OF 2018

KENCENT HOLDINGS LTD.....PLAINTIFF

VERSUS

KENYA POWER &

LIGHTNING COMPANY LTD.....DEFENDANT

RULING

1. The defendant moved the court vide his Notice of Motion application dated 9th February 2018 seeking orders;

(a) The court be pleased to dismiss the suit for want of prosecution.

(b) Costs of the application be in the cause.

2. The application is premised on the grounds listed on its face inter alia that the suit was filed on 7th December 2009 and since then has never been set down for hearing. That since 17th November 2015 when the Judge gave parties time to comply and set the matter down for hearing, the plaintiff has not done so meaning the plaintiff is not interested in pursuing the claim.

3. The plaintiff opposed the application through the affidavit of Wainaina Muraya sworn on 7th November 2018. In brief, Mr Muraya deposed that the matter has come up in court on several dated e.g on 1st October 2009, 1st December 2009, 22nd February 2010, 8th March 2010, 29th June 2011 and 17th November 2015. That subsequently on 21st March 2018 the case was transferred from the High Court to the Environment & Land Court. The plaintiff avers the application is misplaced because the defendant is yet to comply with pre-trial directions. That the plaintiff is keen to prosecute this matter and asked for a hearing.

4. Parties filed their respective submissions. It is indeed true that this is an old matter. The Civil Procedure Rules under Order 17 provides for prosecution of suits and the consequences in case of default. From the record, the matter was active in the years 2009 and 2010. The parties subsequently went to slumber from 2nd June 2011 until 8th July 2015 when the suit was fixed for notice to show cause why the suit should not be dismissed for want of prosecution. It is therefore not right for the plaintiff to plead as contained in her preliminary objection dated 7th Nov 2018 that the present application is premature because notice to show cause has not been served on them.

5. On the said date of 8th July 2015, Mr. Wachira advocate appearing for the plaintiff informed Justice Nyakundi that the case involved several parties and they had been negotiating the matter. Mr. Wachira sought for more time to reactivate the suit which application was granted. The matter was thus fixed for pre-trial directions on 17th November 2015. The directions were indeed issued on 17th November 2015 and the matter subsequently listed for hearing on 20th March 2018 for the Notice of Motion dated 9th February 2018 (current application).

6. The plaintiff did sleep on the directions issued by the court on 17th November 2015 to the time this application was filed on 9th February 2018. That is a period of two calendar years. Under the Provisions of Order 17 rule 2(1), this suit meet the threshold of dismissal for want of prosecution. However on record and filed on 14th November 2018 are plaintiff's list of witness and documents. Considering the provisions of Section 1B of the Civil Procedure Act which mandates this court under the Oxygen Principles to ensure just determination of proceedings and efficient disposal of the business of the court and Section intended at meeting the ends of Justice, I shall grant the plaintiff a last opportunity to prosecute his case.

7. Thus although I find the application dated 9th Feb 2018 is merited, I shall hold in abeyance the issuance of the orders sought for the

reasons stated in paragraph 6 above on condition that;

- (a) The plaintiff does file and serve the statements of its witnesses within a period of 30 days from today;**
- (b) The plaintiff shall attend the registry to list the matter for hearing within a period of 45 days from today (of ruling);**
- (c) The plaintiff to pay the defendant costs of this application assessed at Kshs20,000/= within 30 days from date of this ruling.**
- (d) In default of any one of the conditions set herein above, the application stands allowed automatically dismissing the suit for want of prosecution.**

Dated, Signed and Delivered at Mombasa this 19th day of June 2019.

A. OMOLLO

JUDGE.