



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 171 OF 2013

ELIUD TIMOTHY MWAMUNGA.....APPLICANT/PLAINTIFF

VERSES

**KENYA ELECTRICITY TRANSMISSION COMPANY
LTD.....DEFENDANT/RESPONDENT**

RULING

1. By a Notice of Motion Application dated 25th January 2017 and filed in Court on 20th April 2017, the Defendant/Applicant is seeking for the dismissal of the Plaintiff's suit for want of prosecution. The Application is predicated on the grounds that the suit hereof was instituted by a plaint dated and filed on 8th August 2017, that Defendant filed a Notice of Appointment of Advocate on 13th August 2013 and filed a statement of defence on 24th September 2013; that the suit was last in Court for hearing on 24th October 2014 when the same was stood over generally for the reason that the judge was on transfer and since then, the Plaintiff has taken no reasonable steps to have the matter fixed for hearing; that the delay is inordinate and continues to prejudice the Defendant by causing it great distress and anxiety and that it will be in the interests of justice if the orders sought are granted.
2. The Application is also supported by the affidavit of Duncan K. Macharia the Defendant's corporation secretary sworn on 25th January 2017 in which he reiterates the grounds in support of the Application.
3. The Application is opposed by the Plaintiff who filed a Replying Affidavit sworn by himself on 10th July 2017 in which he depones that his Advocate on record is acting for him in various cases/matters and there was an oversight on their part not to take steps to proceed with the case and the same was not deliberate. He further depones that the suit involves his land which the Defendant has already taken possession and erected thereon power transmission lines without compensating him. The Plaintiff further depones that the Defendant will not suffer any prejudice if the suit proceeds for hearing and determination on merit and that the same raises triable issues which should be canvassed at the hearing so that they are resolved with finality. The Plaintiff has undertaken to prosecute the matter without any further delay and urged the Court to disallow the Defendant's Application.
4. On 20th June 2017 directions were granted that the Application be canvassed by way of Written Submissions and the Defendant filed their submissions on 28th July 2017 while the Plaintiff filed his on 13th September 2017.
5. I have carefully considered the Application, the Affidavits on record, the submissions filed and the

authorities cited. The only issue for determination is whether the suit herein should be dismissed for want of prosecution. The power to dismiss a suit for want of prosecution is donated by Order 17 Rule 2 of the Civil Procedure Rules which provides as follows: -

counter-claim on 10th October 2013. At the time of filing the plaint, the Plaintiff also filed his list of documents and list of witnesses as well as witness statements. The Defendant filed its list of witnesses and witness statements as well as list of documents on 12th June 2014. Before then, the parties had by consent withdrawn the Plaintiff's Application dated 8th August 2013 together with the Defendant's Application dated 13th August 2013. This paved way for the suit to be set down for hearing and the matter was fixed for hearing on 24th October 2014. However, the hearing did not proceed and the parties were advised to take a fresh date from the registry. No action was taken in the matter until 20th April 2017 when the Defendant filed the present Application.

9. Dismissal of suit for want of prosecution is meant to prevent delayed justice and to ensure parties expedite their cases in Court. A Plaintiff who files a case in Court in pursuit of a remedy should take all steps at his disposal to achieve an expeditious determination of his claim. He should not leave the matter pending for unnecessarily too long without any apparent reason. On the other hand, when the Plaintiff fails to bring his claim to speedy conclusion, a Defendant is at liberty to invoke the process of Court towards that end as soon as is convenient by either applying for its dismissal or setting down the suit for hearing. As already stated hereinabove, the law and more so Article 159 of the Constitution commands that justice shall be administered without undue delay. And it is the duty of the Plaintiff to ensure that the suit is prosecuted expeditiously and without delay. Nonetheless, it is also settled that delay is a matter to be decided on the circumstances of each case. Where a reason for the delay is offered, the Court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. Whereas dismissal of a suit for want of prosecution is a matter of discretion of the Court, a Court of law should always avoid acting intuitively on such Application or hastily dismiss a suit for want of prosecution, but rather, it should make further inquiries into the matter to establish inter alia whether there has been inordinate delay on the part of the Plaintiff in prosecution the case, whether the delay is intentional or contumelious and therefore inexcusable, whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant; what prejudice the dismissal will occasion to the Plaintiff; whether the Plaintiff has offered a reasonable explanation for the delay and even if there has been delay, what does the interest of justice dictate?

10. The delay herein is from 24th October, 2014 when the case was last in Court for hearing but did not proceed up to 20th April 2017 when the Defendant filed this Application, which is a period of about 2 1/2 years. I note that the Defendant who has filed a counter-claim in the case did not over the same period set down the matter for trial. I would wish to associate myself with the sentiments of Gikonyo J in **UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS –VS- NIC BANK & ANOTHER (2014) eKLR** in which he stated as follows:

“I am guided by high sense of promoting the principles of substantive justice enshrined in the constitution and therefore convinced that the circumstances of this case deserve lenient exercise of discretion by the Court in favour of sustaining rather than dismissing the suit”

In my humble view, therefore if the suit is dismissed, I have no doubt in my mind that an injustice will be occasioned to the Plaintiff. This Court is alive to the constitutional dictates of Article 159 of the Constitution to render substantive justice to all parties to a dispute without undue delay, which principle, in my view, is overridden by the fundamental unlimited right to a fair hearing and the right to access justice. Although there has been delay on the part of the Plaintiff to set down the matter for hearing, this Court has not been shown that the delay, thought inordinate, is deliberate, contumelious and therefore inexcusable. In my view, in as much as there is delay, the interest of justice can still be served if the Plaintiff is given an opportunity to prosecute his case. I am also not convinced that the Defendant has suffered any injustice or prejudice considering that it is already in possession of the suit property having erected power transmission lines thereon.

11. Accordingly, I decline to grant the Defendant's Application dated 25th January 2017 and hereby dismiss it.

Each party to bear their own costs.

Ruling dated, signed and delivered at Mombasa this 27th day of November 2017

C. YANO

JUDGE