

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 387 of 2002

KENYA POWER & LIGHTING CO. LTD.....PLAINTIFF

VERSUS

KENYA COLD STORAGE 1964 LTD.....DEFENDANT

R U L I N G

On the 2nd of February, 2004, Hon. Emukule J. issued an order dismissing this suit under Order XVI Rule 2 (1) of the Civil Procedure Rules. The suit had been filed by Kenya Power and Lighting Company Ltd (hereinafter referred to as the applicant) against Kenya Cold Storage 1964 Ltd (hereinafter referred to as the respondent) on the 28th March, 2002.

The applicant has now come to this court under sections 3 and 3A of the Civil Procedure Act, seeking to have the order made on 2nd February, 2004 dismissing the suit, set aside. The applicant contends that the notice to show cause which was issued before dismissal of the suit was never received by its advocates. The applicant further contends that it is interested in the suit and would suffer substantial loss if the suit is not reinstated as the suit involves a substantial amount of money. The applicant therefore urges the court to set aside the order of dismissal.

Counsel for the applicant relied on **HCCA. No.88 of 2005 (Kisii) Ogembo Tea Factory Ltd vs James Mogusu**. The application proceeded ex parte as the respondent's advocate though served did not attend court.

Having carefully considered this application I find that the authority cited by the applicant's counsel is distinguishable as that authority was dealing with dismissal of an appeal for want of prosecution under Order XLI Rule 31 (2) of the Civil Procedure Rules. This is different from the application herein which deals with dismissal of a suit for want of prosecution under Order XVI Rule 2 (1) of the Civil Procedure Rules.

In the cited case the court found that preliminary steps which were to be undertaken by the court before the hearing of the appeal had not been complied with. In this case there are no such preliminary requirements. Nevertheless dismissal of a suit under Order XVI Rule 2 (1) of the Civil Procedure Rules requires that notice be given to the parties to appear before the court to show cause why the suit should not be dismissed before any order of dismissal is made. I have perused the court record although there are copies of notices to show cause addressed to the parties' advocates there is nothing on record confirming that such notice were served on the parties' advocates. The contention that the applicant's advocate did not receive notice cannot therefore be overruled. I take note of the fact that the claim is of a substantial sum of almost Kshs.4 million. I also take note of the fact that the applicant has changed advocates and that this could also have contributed to the delay. Also worthy of note is the fact that the respondent has not objected to this application. For these reasons I find that it is necessary for this court to exercise its inherent jurisdiction by setting aside the order of dismissal in order to meet the ends of justice. Accordingly the chamber summons dated 3rd August, 2006 is hereby granted on condition that the applicant shall take action to finalize the pre-trial procedures and have the suit listed for hearing within 90 days from the date hereof.

I make no orders as to costs.

Dated and delivered this 29th day of May, 2008

H. M. OKWENGU

JUDGE