



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1042 of 2003

KENYA POWER AND LIGHTING CO. LTD .....PLAINTIFF

V E R S U S

KWETU COFFEE ESTATE LTD. ....DEFENDANT

R U L I N G

This is an application by the Defendant (by notice of motion dated 6<sup>th</sup> August, 2007) for dismissal of the Plaintiff's suit for want of prosecution. It is brought under Order 16, rule 5(c) of the Civil Procedure Rules (the Rules). Under that provision, if, within three months after the removal of the suit from the hearing list, the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal. There is an affidavit sworn by one RUSTAM HIRA, the Defendant's advocate, in support of the application.

The Plaintiff has opposed the application as set out in its grounds of opposition dated 25<sup>th</sup> January, 2008. In addition, there is a replying affidavit sworn by one GEOFFREY IMENDE, the Plaintiff's advocate.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing. The three scenarios for dismissal of a suit for want of prosecution under Order 16, rule 5 of the Rules are specific and particular:-

1. Where the suit has not been set down for hearing within three (3) months **after close of pleadings** (paragraph (a)).
2. Where the suit has not been set down for hearing within three (3) months **after the removal of the suit from the hearing list** (paragraph (c)).
3. Where the suit has not been set down for hearing within three (3) months **after the adjournment of the suit generally** (paragraph (d)).

The present application has been brought under paragraph (c); the Defendant must therefore demonstrate that the suit has not been set down for hearing within three (3) months **after it was removed from the hearing list**. It has not been shown that the suit came up for hearing on a particular day and was **removed** from the **hearing list**, and that thereafter it was not set down for hearing within three (3) months after that removal from the hearing list. What the Defendant has stated is that the suit was fixed for hearing for 13<sup>th</sup> and 14<sup>th</sup> March, 2007 but was not confirmed for hearing at the "**call-over**". It is not stated when the "**call-over**" was conducted. Non-confirmation of a suit for hearing at the "**call-over**" is not, in my view, the same thing as its removal from the hearing list. The latter presupposes that a hearing list was prepared and published. That was not the case here. The case never appeared in the hearing list

of either 13<sup>th</sup> or 14<sup>th</sup> March, 2007 because it was never confirmed for hearing for those dates; it thus could not have been, and was not, removed from the hearing lists of those two days.

For the above reason this application is misconceived and has no merit. It is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF MAY, 2008

**H. P. G. WAWERU**

**J U D G E**

DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY, 2008