

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 300 of 2003

JOHN F. MAKANGAPLAINTIFF

V E R S U S

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

R U L I N G

Learned counsel for the Plaintiff concedes that this suit should be struck out as, in his words, it died on expiry of two years without service of summons to enter appearance. However, he opposes award of costs of the suit to the Defendant upon the ground that the application the subject of this ruling (notice of motion dated 26th January, 2006) was made ten months after the death of the suit, the suit having died on 31st March, 2005.

Learned counsel for the Defendant on her part contends that the Plaintiff cannot escape costs; he should have served the Defendant with summons to enter appearance and copy of the plaint. As it is, only an interlocutory application for injunction was served. Counsel further contends that it would be a grave injustice to let the Plaintiff escape costs in a matter that he apparently filed without any intention of prosecuting.

I have carefully considered the submissions of the learned counsels. The only issue before me is whether I should award costs of the suit to the Defendant, the suit being liable to be dismissed under Order 5, rule 1 (7) of the Civil Procedure Rules (the Rules). I fail to see the basis upon which the Defendant claims costs of the suit. It has not defended the suit, in that it has not filed any defence for the very reason that it was never invited to do so by service upon it of summons to enter appearance. The Defendant says it would be unjust to let the Plaintiff escape costs of a suit he filed without the intention of prosecuting. I think it would be unjust to grant the Defendant costs of a suit it has not defended. Clearly the Defendant would be entitled only to costs of the present application and to any other costs it may already have awarded for the injunction application.

In the result, I will order that this suit be, and is hereby, dismissed under Order 5, rule 1(7) of the Rules with no order as to costs of the suit. However, the Defendant will get the costs of this application. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF JUNE 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 29TH DAY OF JUNE 2007