

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

Civil Case 22 of 1992

KENYA NATIONAL CAPITAL CORPORATION..... PLAINTIFF

VERSUS

KIBOGOYE GENERAL STORES LTD & TWO OTHERS DEFENDANT

RULING

On the 22nd November 2004 the suit herein was dismissed for non-attendance of both parties. The Plaintiff then filed an application by Chamber Summons dated 23rd November 2004 seeking the setting aside of the aforesaid order of dismissal. That application was filed under certificate of urgency and placed before Mutungi, J. on the 24th November 2004. Upon hearing counsel for the Plaintiff Mutungi, J. dismissed the application. It appears clear from the record that the matter came up before Mutungi, J. for purposes only of certifying the application as urgent and not for hearing of the application, which of necessity had to be heard *inter partes*. The worst that Mutungi J. could have done was to refuse to certify the application as urgent and send the Plaintiff's advocate to the registry to take a hearing date. It is not clear why he dismissed the application at that stage.

The Plaintiff has now come to Court by notice of motion dated 28th January, 2005 for a review and setting aside of the order of Mutungi, J. of the 24th November, 2004. Should this application be allowed the Plaintiff's application by chamber summons dated 23rd November, 2004 will be reinstated to enable the Plaintiff to properly prosecute it. Though the Defendants were served with the application and hearing notice no papers in response were filed, and there was no appearance for them at the hearing. Mutungi, J. was no longer available to hear this application as he was transferred from this Division. That is why I heard the application.

I think the justice of the matter demands that the Plaintiff be accorded the opportunity to prosecute its application by chamber summons dated 23rd November, 2004 which, as I have already indicated above, was dismissed prematurely when it came up solely for certification as urgent. It was thus dismissed in error and I find no difficulty at all in setting aside the order of 24th November, 2004. I will therefore allow this application, set aside the orders of 24th November, 2004 and reinstate the chamber summons dated 23rd November, 2004. A hearing date for the same may be taken at the registry. Costs of the application shall be in the cause. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF MAY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED ON THE 19TH DAY OF MAY, 2006.