

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 3123 OF 1989

PETER DESIDERY NGENDO.....PLAINTIFF

VERSUS

LIZ ENGINEERING CONSTRUCTION LTD.....DEFENDANT

R U L I N G

1. It appears that the original court record of this case was deemed irretrievably lost at some point; there is on record an application to reconstruct the file (notice of motion dated 5th May 2005). The court record was reconstructed. It appears also that the original court record was subsequently found; I can see it together with the reconstructed file.
2. At some point there was an application for dismissal of the Plaintiff's suit for want of prosecution. That application was heard *inter partes* by Ransley, J. In a ruling dated and delivered on 29th September 2004 the learned Judge allowed the application and dismissed the Plaintiff's suit for want of prosecution.
3. Subsequently the Plaintiff applied by notice of motion dated 8th November 2005 to review and set aside the said order of dismissal. That application was heard by Sitati, J on 6th May 2008. The record of the court shows that the learned Judge delivered her ruling on 20th of June 2008. The parties are aware of that fact. They even know what the ruling was: it is common ground that Sitati, J dismissed the application.
4. The problem now is that there is not on the court record the said ruling, either a handwritten draft or the original typed and signed, or indeed a copy of the ruling. It gets worse: neither party has a copy of that ruling. There is not on the record any extracted order.
5. I recall that sometime in August 2013 at the request of the Deputy Registrar in-charge of the Civil Division at Nairobi, Mr Ndung'u, I talked to Judge Sitati on the phone in an effort to try and get a copy of the ruling. The Judge, who had since been transferred to Kisii, was unable to assist to get a copy of her ruling.
6. In these circumstances on 6th of August 2013 the Deputy Registrar of the Civil Division advised the parties to move the court as they might deem appropriate.
7. The Plaintiff then filed **notice of motion dated 29th August 2013** which is the subject of this ruling. He seeks directions of the court "for the further conduct of this matter". The main ground for the application of course is that the ruling of Sitati, J of 20th June 2008 cannot be found and neither party has a copy of the same. He says he needs a copy of the ruling in order to appeal against Sitati, J's order that dismissed his application for review of the order that dismissed his suit for want of prosecution. There is a supporting affidavit sworn by the Plaintiff. The Defendant did not respond to the application nor appear at the hearing thereof.
8. I note that there is no copy of notice of appeal lodged under the ***Court of Appeal Rules*** annexed to the Plaintiff's supporting affidavit. I also find none on the court record. Be that as it may, since it is not in

dispute that Sitati, J in her ruling dismissed the Plaintiff's application, an order can be extracted and the same used in the intended appeal. A first appeal is in the nature of a re-hearing; without appearing to speak for the ***Court of Appeal***, as the Plaintiff's application for review and replying affidavit are available, that Court should be able to deal with the Plaintiff's intended appeal notwithstanding the absence of a copy of the ruling of Sitati, J.

9. I therefore find no cause at all to order a re-hearing of the notice of motion dated 8th November 2005 which was dismissed by Sitati, J as suggested by the Plaintiff.

10. There will be no order as to costs of this application.

DATED AND SIGNED AT NAIROBI THIS 16th DAY OF JULY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 18TH DAY OF JULY 2014