

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

Civil Case 774 of 2000

THEODORE OTIENO KAMBOGO.....PLAINTIFF

VERSUS

NORWEGIAN PEOPLE'S AID.....RESPONDENTS

R U L I N G

Theodore Otieno Kambogo the Applicant herein seeks to have the order made on the 9th December 2004, dismissing his application dated 18th November 2004, set aside, and the application dated 18th November 2004, reinstated for hearing.

It is the Applicant's contention that the dismissal was caused by the failure of his advocate to attend court. The Applicant urges the court not to punish him for the negligence of his advocate. He maintains that He has all along been interested in the prosecution of his suit, and the application, but that it is his former advocates who let him down. He further maintains that the Defence will not suffer any prejudice if his application is granted.

The Defendant has filed grounds of opposition in which it is claimed *inter alia*, that there has been inordinate delay in bringing this application and that the delay has greatly prejudiced the Defendant, as defence witnesses have left the country. It was maintained that there was no provision for reinstatement of the application and that the Plaintiff should have instead brought a new application.

I have carefully considered this application and the entire court record. The issue of the delay by the Plaintiff in prosecuting this suit was dealt with at length by my brother Waweru J. in his ruling of 27th February 2007. He found that although there was inordinate delay in prosecuting the suit, the delay had been satisfactorily explained and was excusable. Waweru J. further noted that there was a genuine desire on the part of the Plaintiff to prosecute his suit as expeditiously as possible. It is evident to me that the application dated 18th November 2004, was part of the process of prosecuting the Plaintiff's case. It is clear that the Plaintiff was let down by his former advocates. It is clear that the Plaintiff was greatly dissatisfied by his former advocates and even reported the matter to the Advocates' Complaint Commission. It would not be fair nor just to punish the Plaintiff for a mistake made by his counsel. Although there has been a great delay in bringing this application, that delay has been explained and is excusable.

As regards the prejudice caused to the Defendant by the delay, I would reiterate what my brother Waweru J. stated, that the Defendant can be easily compensated by an award of costs, and that the witnesses who are out of the country can give evidence by way of depositions.

For the above reasons, I allow the Plaintiff's application dated 6th April 2007, and set aside the order of dismissal dated 18th November 2004. The Plaintiff shall pay costs of the application to the Defendant.

Orders accordingly.

Dated, signed and delivered this 18th day of October 2007.

H. M. OKWENGU

JUDGE