

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 209 of 2001

RIFT VALLEY BOTTLERS LIMITED PLAINTIFF

VERSUS

STEPHEN KAMAU KIRUNGA DEFENDANT

R U L I N G

On 24/6/2004, I dismissed a suit by Rift Valley Bottlers Ltd., plaintiffs herein, for want of prosecution. The said order was granted following an application by Stephen Kamau Kirunga, who appears as the defendant and who was present in court on that day.

The plaintiff has now moved the court and it seeks an order for the reinstatement of its suit, which, it prays should be heard on the merit.

The application is based on several grounds, but mainly that it's counsel failed to diarize the matter, that it is the one and not the defendant which stands to be prejudiced if the orders which it seeks are not granted.

Mr. Shivaji, who appeared for the applicant urged the court to exercise its discretion especially in view of the fact that errors of advocates are usually excusable.

Mr. Kuloba, for the respondents was however of a different view, and he was of the opinion that the reason for non attendance by the plaintiff's counsel are not only incredible but that they are misleading, and that they would not in the circumstances qualify for the orders which they seek especially in view of the fact that they have not been diligent in prosecuting this suit. He urged the court to find that the matter was properly dismissed, and to dismiss the application with costs to his client.

I have taken into account the pleadings herein and the submissions of both counsel. I am alive to the fact that the applicant calls upon me to exercise my discretion, which discretion should be exercised judiciously.

It is clear that though the defendant's counsel had been invited to fix dates, he did not appear at the scheduled time, and the hearing dates were fixed on 19/2/2004 by the plaintiff's counsel ex-parte. It is also clear that the plaintiff's counsel issued hearing notices to the defendant's counsel vide his letter of 25/2/2004.

I am well aware of the fact that a litigant should not be made to suffer the consequences of the mistakes of his counsel, but I am also alive to the fact that the litigant must be candid enough, and it must be shown that the mistake was genuine and was not meant to delay the cause and further that it does not prejudice his adversary.

I have perused the affidavits by the plaintiff's counsel and I do note that there was confusion in the dates when the matter would be heard right from the beginning when the counsel who fixed the dates on behalf of the plaintiff's counsel informed him that the suit would be heard on 24/6/2004. It is also evident

that the hearing notice which was issued to the defendant's counsel indicated that matter would be heard on the aforementioned date which was a Saturday. The plaintiff's counsel depones that when he noted the said dates he assumed that the matter would be heard on 26th July, which was a working day, and not in June. To me, that sounds very credible and I am sure that had the defendant's counsel notified the court of the date which appeared on the said hearing notice, the court would have issued a different order.

I am convinced that the mistake by counsel was genuine, and I do hereby set aside my orders of 24/6/2004 and do order that the suit be reinstated and that it be heard on the merits. The plaintiff shall however bear the thrown away costs.

Dated and delivered at Eldoret this 7th day of July 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

No appearance for either party