



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 1947 OF 1999

CHIENI ENTERPRISES LIMITEDPLAINTIFF

VERSUS

THE ATTORNEY GENERAL1ST DEFENDANT

(FOR AND ON BEHALF OF THE

MINISTER FOR FINANCE)

BIVAC INTERNATIONAL LIMITED2ND DEFENDANT

RULING

The 1st Defendant, the Attorney General, applied under Section 3 A of the Civil Procedure Act for an Order that the court Order made on 19th January 2004 dismissing its application dated 25th August 2003 be set aside and the said application be reinstated.

The application is brought on the grounds: -

- (i) That the failure to attend court by the 1st defendant's counsel on 19th January 2004 was not deliberate;
- (ii) That there is no inordinate delay in bringing this application.

The 1st defendant's counsel being the one seized with this matter stated that when the application came for hearing on 19th January 2004 she had been appointed to carry out an extraordinary inspection at the Nairobi City Council. This fact of counsel being out of the Attorney General Chambers was confirmed by the affidavits of Damaris Awinja. Damaris Awinja also confirmed that this subject file had not been allocated to another counsel to deal with at the said chambers.

Counsel for the 1st defendant argued that the present application was made in good faith and that any delay in prosecution of this suit cannot solely be blamed on the 1st defendant because although the plaint was filed in 1999 the summons were not served on the defendant until June 2001.

Counsel further submitted that the claim is for a large amount around kshs 36 million.

1st defendant's counsel said that the defendant has an arguable defence in that there is an issue that will be raised that the Plaintiff had failed to issue 30 days notice to the Attorney General as required.

For these reasons counsel submitted that the court should exercise its discretion in favour of the 1st defendant and further submitted that any delay could be compensated by payment of costs to the Plaintiff.

Counsel for the plaintiff opposed the application by saying that the application lacked merit for two reasons;

(i) That the present application seeks to reinstate the one dated 25th August 2003;

(ii) The application dated 25th August 2003 was seeking the reinstatement of the one dated 18th October 2001.

Plaintiff counsel submitted that the Attorney General Chambers has a large pool of advocates and the 1st defendant had formed a habit and pattern of not attending to the hearing of applications hereof and he therefore concluded that the 1st defendant is not keen to prosecute its applications hereof. Counsel further argued that the present application is being made 5 years after this suit was filed and after such a long period the plaintiff had not obtained justice but continued to suffer.

As I begin to consider this ruling I am aware that I have unfettered wide discretion; to borrow from the words of Sir **William Duffus, P.** in the case of **PATEL – V – E.A. CARGO HANDLING SERVICES LTD (1974) E.A.** page 76,

“I also agree with this broad statement of the principles to be followed. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

Looking at the proceedings hereof it seems that although the plaintiff initially was guilty of delay it cannot be compared to the delays occasioned by the 1st defendants in making applications and counter applications.

The conduct of the 1st defendant’s counsel is indeed without excuse when looked at as a whole. The conduct pertinent to this application is since August 2003 when the subject application was filed. The 1st defendant failed to list for hearing its own application and it had to take the initiative of the Plaintiff’s counsel to get a date fixed. On being fixed and the offices of the Attorney General being served with a hearing notice there is absolutely no sufficient explanation given why the matter, which came upon 19th January 2004, was not attended to.

This unfortunately has become a pattern of cases that are conducted at the Attorney General Chambers and when one considers that those chambers are entrusted to represent the interest of the taxpayer is indeed a sorry state. The counsel’s practicing at the those chambers ought to know that the hands of the courts are not ‘short’ that they cannot penalize them personally for the casual manner in which they conduct the matters thereof.

That as it may be the sufferer when such carelessness is perpetrated is the taxpayer who has to pay for numerous default judgments that are entered. As I stated before I have wide discretion and I am of the view that the same ought to be exercised in favour of the 1st defendant especially because I am of the view that there are certain issues raised in the defence, which ought, in the interest of justice, be heard inter parties.

For that reason I will accede to the 1st defendants application. The orders of this court are that: -

(1) The dismissal of the application dated 25th August 2003 is hereby set aside;

(2) The costs of the application dated 20th May 2004 will be the plaintiff’s in any event.

Dated and delivered this 4th day of October 2004.

MARY KASANGO

AG JUDGE