

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 927 OF 1999

SYSTEM RELIABILITY LIMITED....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

R U L I N G

The parties in this suit were given a Notice by the court under Order 16 Rule 2 (1) Civil Procedure Rules to show cause why the suit should not be dismissed for want of prosecution. The parties were to show cause on 3rd March 2003.

On 3rd March 2003 counsel for the Plaintiff attended court and said

“We have been having discussions. Defendant’s counsel passed away. Mention in 30 days.” The court order stated, “Mention on 28 th March 2003 to know what course to take. In default dismissal to follow.”

On 28th March 2003 there was no attendance by either parties and the court proceeded to dismiss the suit for want of prosecution.

It is in that background that the plaintiff presents its application dated 4th August 2004 seeking for the reinstatement of the suit. The plaintiff states in its grounds that the parties have been negotiating and are about to reach settlement; that the plaintiffs and its advocates were unaware that this suit had been dismissed for want of prosecution; that the plaintiff’s advocate’s file had been misplaced within their office; that the plaintiff’s claim is substantial in excess of Kshs 5 million and it remains unsettled.

The Plaintiff’s counsel by his affidavit in support states that they were informed that the suit was dismissed in April 2004 but they were only able to peruse the file in June 2004. That the notice of dismissal was also not placed on their office file because the office file had been misplaced and accordingly no one attended court on 3rd March 2003. That of course from the foregoing is not correct because the record clearly shows that Mr. Oyatsi attended court on 3rd March 2003.

In considering the Plaintiff’s application it is important to take note that his suit was filed on 16th July 1999. The last attendance in court was on 25th September 2000 when counsel for the plaintiff obtained an adjournment on the basis that the parties were discussing with a view to settlement. Thereafter was the attendance on 3rd March 2003.

The plaintiff seeks this court exercise of its discretion in its favour. In seeking that discretion there are explanations, which are not entirely satisfactory.

The plaintiff was informed that the suit was dismissed in April 2004 but they say they were not able to peruse the file till June 2004. If that was correct then where is the evidence of attempts to trace the file; and why delay until August 2004 before filing the present application.

The alleged lost file in the plaintiff’s advocate’s office is also not satisfactorily explained. At first when counsel submitted before court, counsel said that it was because of the lost file that no one attended court on 3rd March 2003 from the plaintiff’s advocate’s office. That is of course not correct since Mr. Oyatsi was in court, so when, if at all, was the file lost.

The major ground of this application is that parties have been negotiating and hence the reason no

steps were being taken on this matter. To begin with the letters dated 30th January 2004 is not admissible in evidence by virtue of Sections 23 of the Evidence Act, which prohibits the inclusion of admission made without prejudice. Even if one was to accept that letter can be admitted for the sake of determining that negotiations were going on I find that there is nothing conclusive that shows that consistent negotiations were going on. There are two letters from the defendant dated 20th April 2000 and 28th September 2000. After that there is long silence until the letter dated 30th January 2004. If indeed the plaintiffs were interested in following this action they ought during the period of silence to have fixed this matter for hearing.

I have also noted that the summons hereof contravene Order 4 rule 3 (4) in that the summons gave a period of appearance of 10 days.

All in all I am of the view that the plaintiff have failed to satisfactorily explain the long delay in setting down this suit for hearing, even if the parties were directly negotiating there is no reason why the advocates would have not moved on with this action. I note that even pre trial formalities had not been undertaken. For these reasons I decline to grant the orders sought and I do hereby dismiss the plaintiff's application dated 4th August 2004. There shall be no orders as to costs.

Dated and delivered this 2nd day of December 2004.

MARY KASANGO

AG JUDGE