

Attorney General v Saeed

High Court, at Mombasa July 29, 1985

Aragon J

Civil Case No 584 of 1977

July 29, 1985, Aragon J delivered the following Ruling.

This is an application by Messrs A Y A Jiwaji & Jiwaji who are now acting for the defendant for dismissal of this suit for want of prosecution. In the plaint the plaintiff claims damages for breach of contract by the defendant. The defendant was a medical student and it is alleged in the plaint that in consideration of receiving remuneration from Government during his internship training the defendant executed a bond to repay to the Government a sum of Kshs 20,000 which however would not become so repayable if the defendant served for two years after qualifying with the Government. The defendant resigned prematurely with the result that the plaintiff now claims the amount of the bond.

Originally the defendant instructed Messrs Bryson Inamdar & Bowyer who filed a defence denying liability. The suit then took its normal course and eventually a summons for directions was taken out and orders thereon made on the November 24, 1977. Thereafter the suit became ripe for hearing but no date for that purpose appears to have been fixed.

In due course the defendant changed advocates and appointed Messers A Y A Jiwaji & Jiwaji instead of Bryson Inamdar & Bowyer. The latter, a month after their appointment on January 31, 1979 applied for the suit to be dismissed for want of prosecution. That application was listed for hearing on April 14, 1983. On that day the late Mr Githieya appeared for the plaintiff and Mr Jiwaji for the defendant, when Mr Jiwaji applied for an adjournment on the ground that he had been served with replying affidavit only a day before. The adjournment was granted and the matter stood over generally.

After being thus stood over generally nobody seems to have taken any other action thereon. Mr Jiwaji says that this was due to the fact that the file was not traceable in the registry. On the other hand Miss Khisa, who now appears for the plaintiff, states that the application was only re-listed for hearing as a result of a letter she wrote to Jiwaji on July 12, 1985, asking him to do so. It has become a standard ploy on the part of advocates to give as a reason for having taken no action that the file is not traceable in the registry. It is however very surprising that whenever the matter is reported to me and I ask for the file it is produced forthwith or within a very short time. I am rather inclined to believe Miss Khisa on the subject. In the Attorney-General's chambers in Nairobi the matter was being dealt with by a Mr Raballa who resigned from Government service and thereafter the file seems to have remained buried somewhere in the archives since, according to the replying affidavit filed by the late Mr Githieya, Mr Raballa did not hand over the file to anyone in particular. Knowing Mr Raballa as I do, I am inclined to believe that that in fact happened. We have therefore here equal delay on both sides. In those circumstances I am not prepared to say that the plaintiff is more dilatory than the defendant. I should say they are both equally liable for the delay.

The application is therefore dismissed but I will make no order as to costs. I further recommend to the Deputy Registrar that he makes every effort to have this case urgently listed in next year's call over list for fixing a hearing date.