



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 630 OF 2007

RUFUS KITHELA KOBIA.....PLAINTIFF

VERSUS

KENYA TEA DEVELOPMENT AGENCY LIMITED.....DEFENDANT

RULING

The Plaintiff/Applicant has moved this court by way of a Notice of Motion dated the 23rd day of January, 2019 seeking the orders that, the firm of Meritad Law Africa LLP be granted leave to come on record for the Plaintiff/Applicant, that the orders issued on the 22nd June, 2016 dismissing the suit be set aside and that the suit be reinstated. He has also sought for orders that the suit be transferred to the Employment and Labour Relations Court which has jurisdiction to hear the matter.

The applicant has relied on the grounds set out on the body of the motion and on the annexed affidavit sworn by Rufus Kithela Kobia, on 23rd January, 2019.

In the supporting affidavit, the deponent avers that he was an employee of the defendant until the 19th day of December, 2006 when the defendant wrongfully and unfairly terminated his employment as a consequence of which, he filed the present suit through the firm of Gitobu Imanyara & Co. Advocates and he honestly believed that they would defend his interests in the matter and keep him updated on the progress.

That his aforesaid firm of advocates failed to update him on the progress and at some point, he was forced to follow up the matter himself but the court file could not be traced. It was at that point that he instructed the advocates currently on record who upon perusal of the file noted that it had been dismissed on 22nd day of June, 2016 for want of prosecution.

The Applicant blamed the delay in prosecution of the suit on his previous advocates and he has urged the court not to visit their mistake on him. The application is opposed by way of a replying affidavit sworn by Susan Musyoka on the 1st day of July, 2019 in which she has deponed that the matter is related with Civil Appeal Number 18 / 2007 and when it came up in court on the 19th January, 2010, parties agreed to have the matter stood over generally until Civil Appeal Number 18 of 2007 is heard and determined as the decision in that matter would have a bearing on this matter.

She further deponed that Civil Appeal Number 18 of 2007 was finalized and a judgment delivered on the 12th day of June, 2015 in which the court of appeal found that the respondents were not employees of Public Service Commission but parastatal employees and that the appellant had powers to terminate their employment. She contended that the suit does not raise triable issues and will be a waste of judicial time to resuscitate the same.

The deponent further averred that since the matter was last in court, the plaintiff has not exhibited any interest to prosecute the same and that the delay is inexcusable and it has not been satisfactorily explained.

The court has considered the application and the material in support as well as the replying affidavit in opposition to the same. I have also taken into account the submissions by the learned counsels for the respective parties in this matter.

The record shows that the matter was last in court on 19th January, 2010 when counsels agreed to stand it over generally pending the hearing and determination of Civil Appeal Number 18 of 2007 which is related to this matter.

On the 22nd June, 2016 the court on its own motion dismissed it for want of prosecution pursuant to notices issued to the parties under Order 17 Rule 2(1) of the Civil Procedure Rules. That dismissal order is the subject of the present application in which the applicant has sought the reinstatement of the suit. The aforesaid application was filed almost three years after the suit was dismissed on 22nd June, 2106.

The firm on record blames previous firm of advocates for the delay in prosecuting the suit.

Parties are in agreement that judgment in Civil Appeal No. 18/2007 was delivered on 12/06/2015 which was a year before the suit was dismissed for want of prosecution. Instructions were given to the advocates on record to take over the matter in the year 2016 but they only filed the application herein in the year 2019 which is a period of close to three years since.

The court has perused the letter dated 23rd November, 2016 by the plaintiff’s counsel to the Deputy Registrar requesting that they be allowed to peruse the file. The court notes that the same is not stamped with the registry stamp and it is not possible to ascertain if it was ever delivered to the court registry. The same applies to the one dated the 29th August, 2018.

The only authentic letter is the one dated 28th September, 2018 which was done long after the matter had been dismissed. The applicant blames his previous advocate for failure to keep him posted of the progress in the matter. The court is alive to the decision of the court in the case of Lucy Bosire vs. Kehancha Div. Land Dispute Tribunal & 2 others where the court held that

“It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case determined on merit, see Philip Kiptoo and another vs. Augustine Kubende (1986) KLR 492

However, it is not in every case that a mistake committed by an advocate would be ground for setting aside orders of the court. See the case of Savings and Loans vs. Susan Wanjiru Muritu Nairobi Hcc No. 397/2002 in which the court stated in part:-

..... it is trite that a case belongs to the litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocates failure to attend court. It is the duty of a litigant to constantly check with her advocate the progress of her case.....

I share the same sentiments with the court in the case of Savings and Loans (supra) and find that the application has no merit and it is hereby dismissed with no orders as to costs. However, prayer 2 of the same is allowed.

Dated, Signed and Delivered at Nairobi this 26th Day of SEPTEMBER, 2019.

.....

L. NJUGUNA

JUDGE

In the Presence of

.....***For the Applicant***

.....***For the Respondent***