



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO.255 OF 2002**

**FESTUS MUTUA & 51 OTHERS.....PLAINTIFFS**

**VERSUS**

**EVEREADY BATTERIES (K) LIMITED.....DEFENDANT**

**RULING**

This suit was filed on 5<sup>th</sup> November 2002 by 52 plaintiffs against their former employer, the defendant, Eveready Batteries (K) Ltd claiming general damages for breach of contract of employment and special damages in the sum of risks Kshs.56, 928, 748.30. It would appear that the prayer for general damages for breach of contract was withdrawn.

Again for what I am able to glean from the record, several years after the filing of the suit, the hearing commenced before Kimaru, J on 21<sup>st</sup> March with one plaintiff giving a lengthy testimony. The hearing was adjourned to 13<sup>th</sup> June 2006. Instead, on that day, a date was taken at the registry for the mention of the matter before the judge on 7<sup>th</sup> July 2006.

A fresh hearing date of 23<sup>rd</sup> October 2006 was fixed. On that day, then counsel for the plaintiff sought and obtained adjournment to enable some of the plaintiffs to engage advocates of their choice. After that date there was only one attempt to set down the suit for hearing prompting the defendant on 24<sup>th</sup> July 2009 to bring an application seeking orders that the suit be dismissed for want of prosecution. The orders were duly granted on 18<sup>th</sup> November 2009.

The plaintiffs have now bought the instant application dated 26<sup>th</sup> May 2011 for the reinstatement of the suit. Charles Inyasa Iyumila on behalf of the rest of the plaintiffs has sworn an affidavit in which he has

explained that at the time the defendant sought to have the suit dismissed, the plaintiffs' advocate's application to cease acting for them was pending; that the plaintiffs were not served with the application for dismissal of the suit; that they cannot be punished for the mistakes of their advocate; that directions have not been taken.

In reply the defendant through Boniface Githinji Ndumia, Advocate, it is disposed that there is no evidence that the deponent of the affidavit in support of the application for reinstate had authority of the other plaintiffs to swear the affidavit; that the plaintiffs' erstwhile advocate never filed/served any application to cease acting; that the application for dismissal having been served on the plaintiffs' advocate, there was no need to serve it also on the plaintiffs; that there has been unexplained delay; that even after the present advocate for the plaintiffs came on record it took him three (3) months to bring this application; that in order to mislead the court, the advocate has filed another notice of change of advocates.

For these reasons, counsel for the defendant has submitted that the plaintiffs are undeserving of equitable remedy sought in this application. That litigation must come to an end. I have considered the arguments. The application is brought under **sections 3A and 63(e) of Civil Procedure Act and Order 12 rule 7 of the Civil Procedure Rules**. The latter provides that:

**“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as many be just”**

The court is therefore clothed with the discretion to either set aside or vary its judgment or order as the justice of the case may dictate. The justice of both parties must be considered. A judicial discretion must be exercised judicially and not capriciously or arbitrarily. The discretion to set aside orders or judgments of the court is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence or excusable mistake or error but not designed to assist a party who is deliberately seeking either by evasion or otherwise to obstruct or delay the course of justice (See **Shah V Mbogo & Another**, (1967) EA 116 at 123). I reinstate that the dispute involves a claim based on alleged breach of contract of employment for 51 employees.

The hearing commenced before Mr. Justice, Kimaru on 21<sup>st</sup> March 2006. Several attempts to set the case down for hearing failed, the last one being on 2<sup>nd</sup> July 2007. For two years from July 2007 to 23<sup>rd</sup> July 2009, when the application for dismissal was filled, the plaintiff took no steps to fix the case for hearing. Since the dismissal of the suit party and party bill of costs was allowed in the sum of Kshs.1, 530, 825, 50. The plaintiffs have blamed their erstwhile advocate for failing to inform them of the progress of this matter; that they did not even know that the suit had been dismissed. They have also deposed that they have learnt that their erstwhile advocate had filed an application to cease acting for them which was pending even as the suit was being dismissed.

Are these plausible grounds to warrant the setting aside of the orders dismissing the suit for want of prosecution? It is confirmed even by the learned counsel for the defendant in his affidavit in support of

the application for dismissal that the hearing could not proceed further after the initial hearing and in particular on 2<sup>nd</sup> July 2007, as the trial judge, Mr. Justice Kimaru was engaged in tribunal hearing in Nairobi and that that fact was communicated to counsel for parties by a letter dated 26<sup>th</sup> July 2007.

It is a matter of public knowledge that trial judge was, for some years engaged in tribunals set to investigate judges. Without being transferred from Nakuru, the trial could not proceed before any other judge. Secondly, counsel representing the plaintiffs at the time applied by chamber summons dated 29<sup>th</sup> May 2007 for leave to cease acting for them. That was one month before the application for dismissal.

These in my humble view are plausible reasons. Bearing in mind the numbers of plaintiff it may not be easy to coordinate them quickly. I find no merit also in the argument that the deponent of the affidavit in support of this application did not have any authority of all the plaintiffs to swear it.

With the promulgation of **Article 159(1) (d)** of the **Constitution** and the enactment of this **Sections 1A & 1B** of the **Civil Procedure Act**, it is the substantial justice as opposed to technicalities that must guide the court in situations like this unless the other party stands to suffer injustice or prejudice. The only prejudice I foresee is the delay and the fact that the bill of costs has been taxed. But there will be greater injustice to fail to hear the plaintiffs in their claim and order them to pay such huge costs.

For these reasons the application is allowed, the order dismissing the suit and consequential orders are set aside and the suit is reinstated. The defendants have the costs of this application.

**Dated, Signed and Delivered at Nakuru this 16<sup>th</sup> day of December 2011.**

**W. OUKO**

**JUDGE**