



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 25 OF 1998**

**JAMES M. NJIRI.....PLAINTIFF/APPLICANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

This is one of the oldest cases pending determination in our courts. The plaintiff's suit was dismissed on 5<sup>th</sup> July, 2004. There is now before me an application by way of Notice of Motion dated 6<sup>th</sup> November, 2019 seeking to set aside the dismissal order, and transfer the matter to Employment and Labour Relations Court for hearing and determination. The application is supported by grounds on the face of the application and the supporting affidavit sworn by the plaintiff on 6<sup>th</sup> November, 2019.

The application is opposed and there is a replying affidavit sworn by one Samuel Mundia, an advocate of this court and the defendants Head, Commercial Transactions and Litigation department. Both parties have also filed the respective submissions. There is no doubt that this application was filed very late from the date of the said dismissal. There is every reason to expect any litigant who comes to court to ensure expeditious disposal of any matter placed before the courts. The plaintiff has given a chronology of events which impacted on the delay in the prosecution of this suit. These include his exile from the country, indisposition and connected litigation in the Industrial Court.

There is also the issue of whether or not the plaintiff was notified of the intended action to dismiss his claim. Whatever the case anyway, he was expected to pursue his claim against the defendant within a reasonable time.

Courts are faced with a delicate balance in considering the interests of the parties. The order sought is discretionary but such discretion but be considered judiciously. More often than not, costs would be sufficient to correct some delay. Cation however must be exercised to avoid any prejudice that may, befall the defendant. In making a decision whatever way the nature of the claim has to be considered.

I have considered as expected of me, the positions of the parties herein. The plaintiff has persuaded this court that the reasons for delay are plausible and his filing of another claim in the pendance of this suit was an error of judgment. I have looked at Order 12 Rule 8 and Order 17 Rule 2 of the Civil Procedure Rules. The plaintiff's suit was dismissed for want of prosecution and therefore Order 17 Rule 2 of the Civil Procedure Rules was applicable.

Taking into totality the circumstances of this case, I allow the plaintiff's application and set aside the dismissal order of 5<sup>th</sup> July, 2004. The suit is accordingly reinstated for hearing. Following the enactment of the Employment and Labour Relations Court Act, this court is divested of jurisdiction to hear and determine this dispute. This is informed by the pleadings contained in the plaint dated 5<sup>th</sup> January, 1998 and the prayers thereunder.

This case is therefore transferred to ELRC for hearing and determination. The plaintiff shall however pay the defendant the costs occasioned by this application. Such costs shall be agreed and if not taxed by the taxing officer.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of October, 2020.**

**A.MBOGHOLI MSAGHA**

**JUDGE**