



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR REALTIONS COURT
AT MOMBASA

CAUSE NO. 166 OF 2021

SIMON MACHEMBO MATANO.....CLAIMANT

VERSUS

CITY BOOKSHOP LIMITED.....RESPONDENT

R U L I N G

1. The application before me is a Notice of Motion dated 15th October 2021, and is expressed to be brought under Order 12 Rule 7 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. The Claimant/Applicant seeks orders that:-

- a. the Honorable Court be pleased to set aside the Ruling delivered on 29th September 2021.**
- b. that the Honourable Court be pleased to reinstate the Plaintiff's suit for hearing and determination.**
- c. that costs of the application be provided for.**

3. The application is based on the supporting Affidavit of ANNAH NYAMBURA ADVOCATE sworn on an unspecified date and filed together with the Notice of Motion on 1st November 2021. It is deponed in the said Supporting Affidavit, *inter-alia*:

- a. that the claimant's case was heard and closed on 11th November 2019, whereupon the Respondent requested for another date as it was not ready to proceed on the said date.**
- b. that the Court fixed 18th March 2021, a date on which the Court did not sit, and parties were instructed to take dates at the Registry, and were subsequently given 13th October 2020.**
- c. that by a Ruling delivered on 29th September 2021, the plaintiff's suit was dismissed for want of prosecution, though no notice to show cause had been issued.**
- d. that the Court file had been missing from the Court's Registry since 13th October 2020 when it was last scheduled for mention to take a date for hearing of the Respondent's case.**
- e. that the Claimant/Applicant subsequently wrote letters and send emails to the Court on the issue and submitted several requisitions requesting to fix the matter (for hearing), but to no avail. Copies of a letter by the Claimant's advocates dated 28th September 2021, an email dated the same date and service requisition forms dated 1st July 2021 and 25th August 2021 were annexed to the supporting affidavit.**

4. The Respondent is shown to have been served with the Notice of Motion on 1st November 2021. There is on record an affidavit of service sworn by one David Msena in that regard.

5. The Respondent did not file response to the Notice of Motion, and when the same came up for hearing on 17th November 2021, Mr. Mathare, learned counsel for the Respondent, admitted service of the application and invited the Court to make a determination thereon.

6. On her part, Miss Kamau, learned Counsel for the Claimant/Applicant, urged the application based on matters deponed to in the supporting affidavit referred to in paragraph 3 of this Ruling.

7. Perusal of the Court's record shows:

a. that the Claimant's claim herein was filed in Court on 23rd March 2018, and that after several mentions, the suit was on 22nd March 2019 fixed for hearing on 11th November 2019.

b. that on 11th November 2019, the Claimant's case was heard and closed; upon which Counsel for the Respondent sought to be given another date. The suit was then fixed for mention on 5th December 2019.

c. that on 5th December 2019, the Court fixed the hearing for 18th March 2020.

d. the Court's record does not have any proceedings for 18th March 2020.

e. on 29th September 2020, a representative of the Respondent's Advocates on record attended the Court's Registry and fixed the suit for mention on 13th October 2020.

f. on 13th October 2020, the trial judge noted that he was on transfer and directed parties to move the Court when the incoming judge was available.

g. on 14th September 2021, the Court's Deputy Registrar issued a Notice to Show Cause under Rule 16 of the Employment and Labour Relations Court (Procedure) Rules 2016, calling upon the parties herein to attend Court on 29th September 2021 and show cause why the suit herein could not be dismissed for want of prosecution.

h. there being no appearance on the part of the parties on 29th September 2021, the Court dismissed the suit for want of prosecution.

8. Aggrieved by the said dismissal order, the Claimant/Applicant brought the present application.

9. The Claimant/Applicant denies having been served with the Notice to Show Cause. I have seen on record a copy of the Notice to Show Cause served on the Respondent's Advocates on 23rd November 2021. I have not seen proof of service on Counsel for the Claimant.

10. Further, the Notice to Show Cause appears to have been issued by the Deputy Registrar before expiry of one year from 13th October 2020 when the matter was last in Court. The Notice to Show Cause is dated 14th September 2021.

11. Rule 16(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides:-

"In any suit where no application has been made in accordance with rule 15 or no action has been taken by either party within one year from the date of filing, the court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit."

12. In the suit herein, the Notice to Show Cause issued before expiry of one year from the date the suit was last in Court, and the suit was subsequently dismissed for want of prosecution on 29th September 2021, again before expiry of one year from 13th October 2020, the date on which the suit was last in Court.

13. Having taken note of the foregoing fact, and without considering the other matters raised by the Claimant/Applicant, I must allow the Notice of Motion dated 15th October 2021, and the same is hereby allowed in the following terms:-

a. the dismissal order dated 29th September 2021 is hereby recalled, and is set aside.

b. the Court's proceedings taken upto 13th October 2020 shall be typed and certified within forty five (45) days of this Ruling to pave way for further hearing and determination of the suit.

c. the suit will be mentioned on 15th March 2022 to confirm typing and certification of the Court's proceedings and to fix a date for further hearing.

d. Costs of the application shall be in the cause.

14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27th DAY OF JANUARY, 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mrs. Kualo for Kamau for Claimant

Miss

Maiga

Respondent