



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2379 OF 2016

CHARLES MWANIKI IRERI.....CLAIMANT/APPLICANT

VERSUS

ZTE KENYA LIMITED.....RESPONDENT

RULING

1. The suit was dismissed on 7th June, 2021 following the hearing of a Notice to Show Cause why the suit should not be dismissed for want of prosecution.
2. The claimant/applicant filed a Notice of Motion application dated 13th September, 2021 seeking the Court to set aside the orders of 7th June, 2021 dismissing the suit and reinstating the suit for hearing and determination.
3. The application is premised on grounds set out on the face of the Notice of Motion to wit; that the suit was filed on 22nd November, 2016 and served on the Respondent to file a Statement of Response on 20th January, 2017.
4. That the suit was listed for pre-trial at the behest of the claimant and matter was fixed for hearing on 9th July, 2019 having been certified as ready for trial.
5. That on 9th July, 2019, the suit did not proceed since the Court was not sitting and parties were then advised to take a fresh hearing date at the Registry.
6. That whilst awaiting the opening of the diary, the processing of the matter was negatively affected by the advent of COVID – 19 pandemic which saw close of the Court's registry for the better part of the year, 2020.
7. That neither the claimant nor the claimant's advocates on record were served with a Notice to Show Cause for the 17th July, 2021 thus denying the claimant an opportunity to show cause why the suit ought not to be dismissed.
8. That the claimant had taken tangible steps to prosecute the matter evidenced by that on 15th May, 2017, the claimant sought and secured a mention date for directions in regard to fixing a hearing date. On 6th July, 2017, the claimant served a mention notice upon Respondent.
9. On 11th July, 2017, the claimant attended Court before Abuodha J. when matter was certified ready for hearing. By a letter dated 12th November, 2018, a hearing date was fixed for 9th July, 2019.
10. On 9th July, 2019, the claimant attended Court when the Court was not sitting. That the application has merit and it be allowed.
11. The Respondent filed grounds of opposition to the application dated 5th October, 2021 and filed on 6th October, 2021 in which the respondent states that the claimant has not shown cause why he has not prosecuted the suit for over 2 years.
12. The claimant and the respondent filed written submissions which the Court has carefully considered in light of the application by the claimant and the grounds of opposition filed by the respondent.
13. The Court is well aware that the primary duty to prosecute a case rests with the person who presented it. See **Barnabas Maritim –vs- Manywele Korgoren & Another (2016) eKLR** (per Sila Munyao). The Court is also aware that the decision to set aside its order for

dismissal of a case for non-prosecution is discretionary and must be exercised judiciously based on the justification given by the applicant for the delay in prosecuting the matter.

14. That as was stated in the case of **John Nahashon Mwangi –vs- Kenya Finance Bank Limited (in liquidation) (2015) eKLR**,

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 150 of the Constitution. Article 50 coupled with Article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties respectively, constitutes the defined principles which should guide the Court in making a decision on such matter of reinstatement of a suit which has been dismissed by the Court.”

15. Upon a careful consideration of all the circumstances of this case, the Court is persuaded that the applicant has proffered sufficient reasons to have the decision to dismiss the suit for want of prosecution set aside and the suit reinstated to proceed to full hearing on the merit.

16. The Court is satisfied that the steps taken thus far by the claimant indicate a serious intention to honestly and faithfully prosecute their case to conclusion. The Court is satisfied that reinstating the suit will not prejudice the respondent in any manner that cannot be remedied by way of costs.

17. Accordingly, the Court sets aside its orders of 7th June, 2021 dismissing the suit and reinstates the same to proceed to full hearing on merits on a date to be set by the Court.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 17TH DAY OF FEBRUARY, 2022.

Mathews N. Nduma

Judge.

Appearances

Mr. Nanyuki for claimant/Applicant

Ms Songok for Respondent

Ekale - Court Assistant