



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 278 OF 2015

CAROLINE AKINYI OKOTH.....CLAIMANT

VERSUS

DARAD SHOPPING CENTRE LTD.....RESPONDENT

R U L I N G

1. The suit herein was filed on 30th April 2015, vide a Statement of Claim dated 29th April 2015. The Respondent filed a Counter-Claim on 22nd June 2015. A Notice to Show Cause why the suit could not be dismissed for want of prosecution was issued by the Court's Deputy Registrar on 14th July 2021. The Notice was issued pursuant to Rule 16 of the Employment and Labour Relations Court (Procedure Rules) 2016, calling upon the parties to attend Court on 27th November 2021 and to show cause why the suit could not be dismissed for want of prosecution.

2. The said notice was issued over three (3) years from 8th June 2018, the date on which the matter was last in Court, and at least over two (2) years from the filing, on 16th August 2019, of a Mediator's Report communicating the collapse of mediation efforts on the matter. The Claimant/Applicant did not make any effort to fix the suit for hearing.

3. The Claimant did not attend Court on 27th July 2021, and there being no cause shown as to why the suit could not be dismissed for want of prosecution, the suit was dismissed for want of prosecution. The dismissal order did not, however, mention the Respondent's Counter-Claim, which is a counter-suit.

4. On 17th August 2021, the Claimant filed the Notice of Motion dated 10th August 2021 seeking, *inter alia*, the setting aside of the dismissal order dated 27th July 2021 and reinstatement of the Claimant's suit.

5. The application is based on the Supporting Affidavit of **Daniel Ngonze Advocate** sworn on 10th August 2021. The deponent, while admitting service of the Notice to show Cause by EMS Postal Services, states that the said notice did not reach his office until 2nd August 2021. He has exhibited a copy of an envelope bearing his law firm's date stamp for 2nd August 2021. Curiously, no EMS delivery note, duly endorsed by the deponent's law firm, has been exhibited to confirm receipt of the Notice to Show Cause on the said date.

6. The application is opposed by the Respondent, whose counsel swore and filed a Replying Affidavit on 21st September 2021, sworn by **PAULINE AWINO OSINO Advocate** on 16th September 2021.

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

(1) "In any suit in which 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 its 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.

(2) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain expeditious hearing and determination of the suit.

(3) Any party to the suit may apply for dismissal as provided in paragraph (1).

(4) The Court may dismiss the suit for non-compliance with any direction given under this rule."

8. Both parties filed written submissions on the application pursuant to the Court's directions in that regard; which I have considered.

9. Orders sought by the Claimant/Applicant are purely discretionary, and although counsel for the Claimant has not demonstrated that the Notice to Show Cause was not served in good time, and has not shown reasonable cause why the suit was not set down for hearing after the mediator filed in Court a report signaling the collapse of mediation efforts, I am inclined to exercise the Court's discretion in favour of the Claimant.

10. Consequently, the Notice of Motion dated 10th August 2021 is allowed in the following terms:-

a) The dismissal Order dated 27th July 2021 is hereby recalled, and is set aside.

b) The Claimant's claim and the Respondent's Counter-Claim herein shall be prosecuted within six (6) months of this Ruling, failing which both shall stand dismissed.

c) The suit shall be mentioned in Court on 15/2/2022 for purposes of fixing a hearing date.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF FEBRUARY 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:

Mr. Ngonze for Claimant

No Appearance for Respondent