

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 794 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

GIDEON AROKO MWAYA.....CLAIMANT

VERSUS

DON BOSCO BOYS TOWN INSTITUTE.....RESPONDENT

RULING

1. This was a notice to show cause dated 28th June 2021 and served on the parties by email on 29th June 2021 and in particular the Claimant and an affidavit of service dated 12th day of July 2021 filed in Court. The hearing was scheduled for 19th October 2021 on which day none of the parties were in Court when the matter was called out initially. The case was dismissed for want of prosecution.
2. However, subsequently, Counsels for both parties logged in and were admitted to the day's session.
3. Counsel for the Claimant M/s Mungoni stated that the matter was proceeding as undefended and that she had filed a Replying Affidavit dated 18th October 2021 to the notice to show cause showing that a letter had been done on 10th March 2021 asking for a mention date. Counsel urged that the Claimant was ready and willing to prosecute the matter to conclusion and expressed dismay of the notice to show cause. She urged that her position was buttressed by the fact that the Respondent had not responded to the claim.
4. Counsel for the Respondent on the other hand indicated that she filed a memorandum of response on 9th April 2019 and notice of appointment on 18th February 2019 but had not been served with a mention date from the Claimant's Counsel and prayed for dismissal of the suit for want of prosecution since the Claimant had not shown any serious interest in prosecuting the matter.
5. After hearing the parties, the Court vacated the dismissal order and gave the parties a hearing date by consent on 2nd February 2022 and recorded the day's adjournment as the last. The Respondent was given leave to serve its documentation on the Claimant.
6. On 2nd February 2022, the matter was called out at 10.00 am but only Miss Odongo, Counsel for the Respondent was present in Court. Counsel urged the Court to note the directions it had given on 19th October 2021 on adjournment and persuaded the Court that since the date was taken by consent, firm action should be taken against the Claimant. The Court placed the file aside at 10.03 am and requested Counsel to establish contact with Counsel for the Claimant for the hearing to proceed as scheduled.
7. Counsel for the Respondent remained on the call until 12.37 pm when the Court called out the matter again. Counsel reported that her attempts to establish contact had fallen through. She told the Court that she made three calls at 10.04 am, 11.31 am and at 12.02 pm to cell phone number **0725 891 503** gotten from the Claimant's Counsel letterhead in a letter dated 28th January 2016 (a demand letter). True caller showed that the number is registered in the name of the Counsel for the Claimant.
8. Counsel submitted that in the circumstances, the case should be dismissed for nonattendance with costs to the Respondent.
9. This is a 2016 matter and from the records, the Claimant has not been very keen to prosecute it to conclusion. The hearing date for 2nd February 2022 was taken by consent and the Court made it clear that the adjournment on 19th October 2021 would be the last.
10. It is apparent that the Claimant is not keen in prosecuting this old matter. The previous inaction and the nonattendance of a consensually agreed hearing date makes the claim a good candidate for dismissal principally for non attendance of the Claimant or Counsel.
11. The fact that the Respondent's Counsel made three attempts to reach out to the Claimant's Counsel is testimony that it was not keen to have the matter dismissed.
12. **In light of the foregoing, the claim no. 794 of 2016 is hereby dismissed with no orders as to costs.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF FEBRUARY 2022

DR. JACOB GAKERI

JUDGE