



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC CAUSE NUMBER 387 OF 2015**

**JANE WAMBUI KIBE.....CLAIMANT**

**VERSUS**

**CHRIST THE KING PARISH NAKURU.....1<sup>ST</sup> RESPONDENT**

**CATHOLIC DIOCESE OF NAKURU.....2<sup>ND</sup> RESPONDENT**

**(BEFORE HON. JUSTICE DAVID NDERITU)**

**RULING**

**1. INTRODUCTION**

1. In a Notice of Motion dated 26<sup>th</sup> October, 2021 the Claimant is seeking for the setting aside of this court's orders made on 13<sup>th</sup> October, 2021 dismissing this cause for want of prosecution. The said application is supported by the affidavit of **JANE WAMBUI KIBE**, the Claimant, sworn on 26<sup>th</sup> October, 2021. There is a further supporting affidavit of **ELIJAH MARAGIA OGARO**, Advocate for the Claimant sworn on 26<sup>th</sup> October, 2021. There are several annexures to the two affidavits.

2. The Respondents are opposed to the application by way of an affidavit sworn by **GIDEON GICUHI NDUNG'U**, a legal officer of the Respondent.

3. The Claimant swore a supplementary affidavit on 7<sup>th</sup> December, 2021 and the same was filed on record.

4. On 31<sup>st</sup> January, 2022 Counsel for both parties highlighted their respective positions and it was left to this court to write and deliver a ruling based on the brief oral submissions by Counsel for both parties and the affidavits filed by the parties.

**II. THE LAW**

5. **Order 17 rule 2 of the Civil Procedure Rules** provides as follows:-

***“(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.***

(2) *If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.*

(3) *Any party to the suit may apply for its dismissal as provided in sub-rule 1.*

(4) *The court may dismiss the suit for non-compliance with any direction given under this order.”*

6. The above provisions of the **Civil Procedure Rules** are echoed in **Rule 16(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016** which provides:-

*“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.”*

7. It is on the basis of the above laws that this court issued a Notice to show cause (NTSC) dated 24<sup>th</sup> September, 2021 which came up for hearing on 12<sup>th</sup> October, 2021. The Claimant was not represented during the hearing and this court proceeded to dismiss the cause for want of prosecution with no orders as to costs.

8. It is as a consequence of that dismissal that the Claimant is now seeking reinstatement of the cause.

### **III. ARGUMENTS**

9. This court has dutifully gone through the Notice of motion dated 26<sup>th</sup> October, 2021 (which does not indicate the provisions of the law relied upon) and all the materials placed before this court in respect thereof.

10. The Claimant’s counsel in his affidavit has expressed that he failed to attend the hearing of the NTSC due to technical issues in his gadgets and that there was a breakdown in communication about the link that this court was using on that day for the virtual court.

11. The mistake of Counsel may not be visited upon an otherwise innocent litigant. However, while there may be a reasonable explanation as to why counsel for the Claimant failed to attend the virtual court on 12<sup>th</sup> October, 2021, there is no plausible, logical, or reasonable explanation why this matter had not been prosecuted prior to the *suo motto* issuance of the NTSC by the court.

12. It is also important to note that the Respondents are equally to blame for the delay in the prosecution or dismissal of this cause. **Order 17 rule 2 of the Civil Procedure rules and Rule 16 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016** clearly give either party to cause the leeway to either fix the cause for hearing or to take such other steps as to enable an efficient, just, fair, and, expedient disposal of the same.

13. The Respondents did not take any steps in prosecuting or applying for dismissal of the cause and only came along in support of the dismissal after the court issued a NTSC for dismissal of the cause for want of prosecution, *suo motto*.

### **IV. DISPOSAL**

14. It is by now clear that both sides are to blame for the delay in disposal of this cause. The court holds that there is no reasonable or justifiable explanation given for the delay from either party.

15. Litigants engage Counsel for professional help in navigating the tricky and at times confusing arena of litigation. Often Counsel fail in their duties to advise their clients appropriately. There is no way for

this court to ascertain that the Claimant knew that the prolonged delay in prosecuting her cause could lead to dismissal of the same for want of prosecution. There is also no way of ascertaining that the Respondents knew that they could have applied for the dismissal of this cause for the prolonged delay in prosecution of the same. The parties rely on their Counsel for advice and direction. This court is not sure if Counsel properly advised their respective clients in this cause.

16. As much as there are no reasons given for the prolonged delay in prosecuting this cause on the one hand, and there has been failure to apply for dismissal of the same on the other hand, this court is of the view that the Claimant may be given a last opportunity to prosecute this cause.

17. This court reluctantly grants the Claimant a last chance to prosecute this cause on priority basis, purely and entirely in the interest of justice based on **Sections 1A, 1B, 3, and 3A** of the **Civil Procedure Rules** and **Section 3 of the Employment and Labour Relations Court Act**, among others.

18. In effect therefore, the Notice of motion dated 26<sup>th</sup> October, 2021 is reluctantly allowed in terms of prayers (a) and (b) with costs in the cause.

19. This cause shall now be allocated a hearing date to proceed without any further delay.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 31<sup>ST</sup> DAY OF MARCH, 2022.**

.....

**DAVID NDERITU**

**JUDGE**