



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 340 OF 2015

ALFRED GEKE.....CLAIMANT/APPLICANT

VERSUS

GUSII MWALIMU SACCO LTD.....RESPONDENT

RULING

1. This ruling relates to a Notice of Motion Application dated 22nd July, 2021, wherein the Claimant/Applicant seeks the setting aside of the Orders of the Court issued on 22nd June, 2021, dismissing this suit for want of prosecution.
2. The application is premised on grounds on the face of the motion, and the supporting affidavit of **Joyce Nyandoro**, the Counsel acting for the Applicant. Counsel deposes that on the 22/6/2021, being the date, the suit was fixed for mention for purposes of a notice to show cause issued in the matter, she had a network challenge and was thus unable to join the on-line court, leading to the dismissal of the suit for want of prosecution.
3. Ms. Nyandoro deposes that her failure to attend court was not deliberate, but arose out of excusable reasons. It is her assertion that the Applicant will suffer irreparably if the order sought is not granted.
4. Ms. Nyandoro further avers that their Firm came on record in the matter on 26th April, 2021 and thereafter sought time to file a further witness statement on behalf of the Claimant before the suit is set down for hearing. It is her case that the default being an oversight on the part of counsel, should not be visited on the litigant. She avers that the application is made in good faith and prays that the order sought is granted.
5. The application is opposed vide a replying affidavit sworn by one **Evans Masira** on 9th September, 2021. The Respondent states that the reason given for failure of the Claimant and his counsel to attend court is not plausible, as there is no nexus between assessment, filling of a witness statement and attending court.
6. The Respondent states that this matter dates back to 2015 and the Applicant/Claimant has not demonstrated why it has taken him this long to prosecute their case, and which has occasioned a lot of inconvenience to the Respondent.
7. It is the Respondent's case that litigation must come to the end and any further dragging of this case is unfair to the Respondent.
8. Parties sought to canvass the application by way of written submissions.
9. The Respondent filed her submissions, wherein she challenges the affidavit in support of the application, asserting that the affidavit has been sworn by a stranger to the suit, and hence the application is not supported and should be dismissed. She cited the case of **Mojo Matanya Ole Keiwa v Chief Justice of Kenya & Others (2008) eKLR**, for the holding that affidavits sworn by persons who are not parties to the proceedings before court are incompetent and should be dismissed.
10. The Claimant/Applicant did not file submissions as directed by the court.

Determination

11. I have considered the application, the grounds and affidavit in support, the replying affidavit in opposition and the Respondent's submissions. The issue for determination is whether the Claimant/Applicant has justified the reinstatement of this suit.
12. The Applicant's counsel states that she was waiting to file the Applicant's witness statement and that she experienced network challenges on the morning the matter was before court, only to learn later that the suit had been dismissed.

13. A keen look at the court record, demonstrates that the Claimant/Applicant has lost interest in this matter. Twice after filing this application, neither the Applicant/Claimant nor his Counsel was present before court. Secondly, even after requesting to canvass the instant application through written submissions, no submissions were filed for the Applicant/Claimant.

14. The Applicant/Claimant's conduct in relation to this matter, does not justify its reinstatement, notwithstanding the fact that the dismissal was occasioned by the mistake of counsel. This is a very old case (2015), and which further demonstrates the Claimant's lack of interest in the case.

15. The upshot is that the application dated 22nd July, 2021, is without merit and is hereby dismissed.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF MARCH, 2022.

CHRISTINE N. BAARI

JUDGE.

Appearance:

N/A for the Claimant/Applicant

N/A for the Respondent

Ms. Christine Omollo-C/A