



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NUMBER 292 OF 2015

ISAAC MURUNGU SHAKOME.....CLAIMANT

-VERSUS-

LUCY WAIRIMU T/A REDROSE RESTAURANT.....RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

RULING

1. INTRODUCTION

1. In a Notice of Motion dated 26th October, 2021 the Claimant is seeking for the setting aside of this court's orders made on 12th October, 2021 dismissing this cause for want of prosecution. The said application is supported by the affidavit of **ISAAC MURUNGU SHAKOME**, the Claimant, sworn on 26th October, 2021. There is a further supporting affidavit of **ELIJAH MARAGIA OGARO**, Advocate for the Claimant sworn on 26th October, 2021. There are several annexures to the two affidavits.

2. The Respondent is opposed to the application by way of a replying affidavit sworn by **LUCY WAIRIMU**, the Respondent, on 20th November, 2021.

3. The Claimant swore a supplementary affidavit on an unknown date filed in court on 23rd December, 2021.

4. On 14th February, 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 as stated above.

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 it 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 24th September, 2021 which came up for hearing on 12th October, 2021.
8. 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.
9. It is as a consequence of that dismissal that the Claimant is now seeking reinstatement of the cause.

III. ARGUMENTS

10. This court has dutifully gone through the Notice of motion dated 26th October, 2021 (which does not indicate the provisions of the law relied upon) and all the materials placed before this court in respect thereof.
11. 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.
12. 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 12th 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.
13. It is also important to note that the Respondent is 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 Labour Relations Court (Procedure) Rules, 2016** clearly give either party to a 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.
14. The Respondent 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*.
15. However, it is important to note that it is the Claimant who filed the cause in court and he was hence under obligation to prosecute the same. The duty upon the Respondent to prosecute the same or apply for dismissal is not couched in mandatory terms.

IV. DISPOSAL

14. It is by now clear that there is no reasonable or justifiable explanation given for the delay from either party and more so the Claimant who always had a legal burden and duty to prosecute his cause.
15. In effect therefore, the Notice of motion dated 26th October, 2021 is hereby dismissed with no orders as to costs.
16. The net effect is that this cause remains dismissed for want of prosecution as ordered on 12th October, 2021.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF APRIL, 2022.

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DAVID NDERITU

JUDGE