



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 79 OF 2013

GEORGE OTIENO ATUDO.....CLAIMANT/APPLICANT

VERSUS

MUNICIPAL COUNCIL OF KISUMU.....RESPONDENT

RULING

1. The application subject of this ruling is dated 1st March, 2022, and filed in court on 4th March, 2022. The Applicant seeks that the orders issued on 5th June, 2018 be varied and/or set aside, and the Statement of Claim filed in this matter be reinstated for hearing and final disposal.

2. The application is supported by grounds on the face of the motion and the affidavit of **George Otieno Atudo**, the Applicant herein. The crux of the application is that when the suit herein was dismissed, the Applicant was not issued with a notice to show cause as required by law, and that he is keen on prosecuting his case.

3. The Applicant further contends that his Advocate on record did not notify him that his case had been dismissed and that a similar suit he filed was dismissed.

4. The Respondent did not oppose the application.

Determination

5. I have carefully considered the application, the affidavit and the grounds in support and the Applicant's oral submissions. The singular issue for determination is whether the application meets the threshold for reinstatement of the suit herein.

6. It is within the general discretion of the Court to set aside any order issued by it ex parte so long as sufficient cause has been shown for the exercise of such discretion.

7. The court dismissed the suit subject of this application on 5th June, 2018, for failure of the Claimant, now Applicant to take steps to prosecute his suit. It is now close to four (4) years since the suit sought to be reinstated was dismissed. In *Ivita vs. Kyumbu [1984] KLR 441* the court stated as follows on reinstatement:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time...”

8. The applicant had been availed an opportunity to prosecute his suit, but which opportunity he squandered by both his non-attendance and that of his Counsel. As it were, he now seeks a second bite at the cherry.

9. It has been close to four (4) years of inactivity since the suit that is sought to be reinstated was dismissed. The reasons given are that the Applicant's Counsel sought time to amend the claim, but instead of the amendment, he filed another suit which suit was later dismissed. The Applicant further contends that neither him nor his Advocate was served notice under Order 17 Rule 2 of the Civil Procedure Rules.

10. The court record indicates that the Applicant's Advocates were served with notice to show cause why the suit should not be dismissed for want of prosecution and which notice is dated 14th May, 2018. The suit was dismissed on 5th June, 2018. The Applicant's assertion in this

regard does not hold.

11. Further, the reasons given for failure of the Applicant or his Advocates to attend court to defend the notice to show cause, is inexcusable in my opinion. It is not enough for the Applicant to blame his advocates for the inordinate delay. (*See Teacher Service Commission v Ex-parte Patrick M Njuguna [2013] eKLR*).

12. The delay in prosecuting the suit, coupled with the delay in filing the instant application for reinstatement is inordinate, inexcusable and unjustified. It is even more telling that the Applicant through his Advocates proceeded to file a similar suit and it was only upon dismissal of that suit that he now seeks to salvage this one. This is a clear abuse of the court process.

13. I find and hold that the Applicant is underserving of the exercise of my discretion, with the result that his application of 1st March, 2022 is dismissed with no orders as to costs.

14. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21ST DAY OF APRIL, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. George Otieno Applicant Present in person

N/A for the Respondent

Ms. Christine Omollo-C/A