



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.143 OF 2016**

**KEPHA NYAMWEYA MOKAYA .....CLAIMANT**

**VERSUS**

**NYAMIRA TEA FARMERS SAVINGS AND CREDIT**

**CO-OPERATIVE SOCIETY LIMITED....RESPONDENT**

**RULING**

The claimant filed application and Notice of Motion dated 20<sup>th</sup> September, 2019 and under the provisions of Article 159 of the constitution and section 3 and 12 of the Employment and Labour Relations Court Act and seeking for orders that;

The court be pleased to set aside the order made on 4<sup>th</sup> May 2018 dismissing the claimant's suit and reinstate the suit herein and order that it be listed for formal proof in the normal manner on such date as the court may deem fit to order.

The application is supported by the claimant's affidavit and on the grounds that in the year 2016 he instructed the firm of Konosi & Company Advocate to file suit for him against the respondent and which was done and the respondent filed Notice of Preliminary Objections and the court delivered a ruling on 26<sup>th</sup> April, 2017. The claimant then visited his advocates on several occasions to follow up on the matter and would be informed that a hearing date for formal proof would be fixed.

On 21<sup>st</sup> August, 2019 the claimant visited the court registry to fix the matter for hearing but was informed the suit had been dismissed on 4<sup>th</sup> May, 2018 for non-attendance. The dismissal of the suit occurred due to the non-attendance by the advocates and who failed to inform the claimant.

Unless the suit is reinstated the claimant shall suffer irreparable loss and damage and seek the orders sought be allowed with costs.

The claimant also avers in his affidavit that he is keen to urge his case against the respondent and the same should be reinstated and a hearing date allocated.

In reply the respondent filed Replying Affidavit of Gladys Bwoma the CEO of the respondent and who avers that from the record, the suit herein was dismissed for non-attendance of the claimant. The Preliminary Objections filed by the respondent was dismissed 26<sup>th</sup> April, 2017 and since it has been over two years and the claimant has not taken any step to fix the matter for hearing.

Ms Bwoma also avers that the claimant cannot blame the court or his former advocates as this is his case and he admitted owing the respondent the sum of Ksh.5,402,186.72 vide his letter dated 23<sup>rd</sup> January, 2020. It is clear from his conduct that he has lost interest in the matter and the application is only filed as an afterthought and should be dismissed.

Both parties filed written submissions.

The court has analysed the affidavit and the filed written submissions.

Should the court reinstate the suit dismissed for non-attendance on 4<sup>th</sup> May, 2018?

The principles governing the reinstatement of a suit following a dismissal for non-attendance are anchored in the realm of judicial discretion as held in the case of **James Mwangi Gathara & another versus Officer Commanding Station Loitokot & 2 others [2018] eKLR**. The

main concern for the court is to do justice to all parties before it. A litigant who is not guilty of dilatory conduct should not be debarred from pursuing his rights in court because of the negligence of his counsel.

It is not sufficient for the claimant to blame his former advocate that they failed to take action to have the matter heard yet he sat back and did nothing. See **Elosy Murugi Nyaga versus Tharaka Nithi County Government & another [2020] eKLR**.

The claimant retains his right to move the court and secure his rights even where there is inaction by his advocates as he is the owner of the suit and not his advocates. Where his advocates have acted negligently he is not without remedy.

Such can be persuaded at the right forum.

The claimant moved the court on 20<sup>th</sup> September, 2016 under Certificate of Urgency and filed his Memorandum of Claim together with Notice of Motion seeking urgent orders and in reply the respondent filed Notice of Preliminary Objections on 11<sup>th</sup> October, 2016 and which the court addressed and delivered ruling dated 26<sup>th</sup> April, 2017 and dismissed the objections made.

On 23<sup>rd</sup> August, 2018 the respondent attended the court registry and was allocated a hearing date for the 5<sup>th</sup> October, 2017 and directed to serve the claimant.

On 12<sup>th</sup> April, 2018 the claimant attended the court registry and was allocated a hearing date for 4<sup>th</sup> May, 2018 and directed to serve the respondent.

On the due date there was no attendance by both parties and particularly the claimant who had secured the date with the court. I take it the respondent had not been served as there are no returns to indicate service.

The court satisfied there was no attendance on a date the claimant through his advocate had secured, dismissed the suit for non-attendance.

Where the claimant had moved the court under Certificate of Urgency on 20<sup>th</sup> September, 2016 the court takes it the issue(s) at hand remained urgent and required to be heard urgently. Upon the court delivering ruling on 26<sup>th</sup> April, 2017 and dismissed objections made by the respondent, the claimant ought to have moved expeditiously to secure a hearing date to have his application and suit heard. This was not done.

In his affidavit, the claimant avers that he visited the offices of his advocates severally to have the matter fixed for hearing. There is no communication or evidence that such request and visits were made. Even where the claimant made such visits and commination to have his matter heard, which is without evidence, the instant suit belongs to the claimant at all material times. Where his rights were allegedly violated by the respondent and he required urgent orders to preserve such rights, as the right holder he ought to have moved diligently to have the suit heard upon the delivery of the ruling on 26<sup>th</sup> April, 2017 dismissing objection made by the respondent.

The claimant has not given account as to what he did from 26<sup>th</sup> April, 2017 until 4<sup>th</sup> September, 2019 when the instant application was filed after a record twenty eight (28) months. Such lapse is inordinate and does not serve the claimant well.

The above is taking into account that under Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2016 the court on its motion is allowed to dismiss a suit where no action is not taken within a period of one (1) year. However such action was not necessary as the court moved by the claimant and having allocated a date for 4<sup>th</sup> May, 2018 failed to attend and the suit was dismissed at the instance of the claimant for non-attendance.

Accordingly, the application dated 20<sup>th</sup> September, 2019 is hereby found without merit and is dismissed. Each party shall bear own costs.

**DELIVERED IN OPEN COURT AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY, 2021**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

.....and .....