REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1765 OF 2015

MALACHI ODONGO.……...…CLAIMANT/APPLICANT

VERSUS

PAMOJA TRUST……RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 14th September 2020 seeking to be heard for orders that this court be pleased to review and/or set aside the orders made on 25th November 2019 dismissing the Claimant's case in the suit herein. He further seeks for the court to reinstate the suit herein for hearing and determination on merit and for costs of this application to be provided for. The Application is based on the grounds that the suit was dismissed without proper service on the Claimant's advocates and that it would be just and proper in the circumstances to reinstate the suit for hearing and determination on merit. That the Claimant is keen on prosecuting this suit to its final conclusion and that no prejudice will be occasioned to the Respondent since it had not filed a defence or response as at the time of dismissal.

2. The Application is supported by the Affidavit sworn on 14th September 2020 by the Claimant/Applicant's advocate, Nelson W. Osiemo who is currently practicing as a partner in the law firm of Osiemo Wanyonyi & Company Advocates. He avers that prior to dismissal of the suit he had been given a mention date of 10th September 2019 on his request and which date he proceeded to notify the Respondent of. That however on the said date the matter was never mentioned as the Judge did not sit and they were informed to fix fresh dates from the registry. He is further shocked to learn that a Notice to Show Cause was served on the firm of Okatch Partners on 21st November 2019 when in fact he had filed a Notice of Change of Advocates to Kiplagat & Company Advocates after transitioning with the Claimant's file to the said firm. That the said Notice to Show Cause which led to the eventual dismissal of the suit was thus improper and unlawful with the consequence that the Claimant was not duly served to require his attendance or that of his counsel on record. He further avers that the Claimant will abide with all the necessary terms and conditions to be imposed by this Court to enable the suit be heard on its merit.

3. The Respondent filed Grounds of Opposition dated 16th November 2020 opposing the Claimant's Application on the grounds that the Claimant is guilty of laches and has delayed this matter inordinately without any justifiable reason whatsoever. Further, that the Claimant/Applicant has approached this Court over 1 year after the suit was dismissed. That the court dismissed this suit *suo moto* after the Claimant inexplicably failed to set down the matter for hearing from 2015 and that it is clear from the record that the Claimant lost interest in the matter long before it was dismissed. That an order reinstating the suit will thus not serve any purpose and that the Claimant does not deserve any second chance.

4. The Claimant/Applicant submits that he has duly explained in length in the affidavit supporting his Motion, the steps they took in prosecuting this suit. He submits that that there was no proper service of the Notice to Show Cause on himself nor his Advocates as pleaded and that the improper service made him and his Advocates miss attending the hearing of the Notice to Show Cause on 25th November 2019. He refers to **Order 5 Rule 8 (1) of the Civil Procedure Rules** which provides that:

"*Whenever it is practicable, service will be made on the Defendant in person, unless he has an*

agent empowered to accept service, in which case service on the agent shall be sufficient."

5. The Claimant/Applicant submits that it is trite that the power to set aside ex-parte proceedings and indeed judgments is discretionary of the Court in the circumstances of the case before it. The Claimant relied on the case of **Esther Wamaitha Njihia & 2 Others *v* Safaricom Limited [2014] eKLR**, where it was held that the main concern of the courts in the exercise of the discretion is to do justice to the parties before it (*see Patel -vs- E.A. Cargo Handling Services Ltd*) and not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (*see Shah -vs- Mbogo*). The said Court went on to hold that courts should consider the nature of the action; the defence if any; the question as to whether the plaintiff can reasonably be compensated by costs for any delay; and the reason for failure to attend. The Claimant submitted that in **Shah *v* Mbogo [1968] E.A 93**, the Court held that for such orders to issue, the Court must be satisfied that either the defendant was not properly served with Summons; or that the defendant failed to appear in Court at the hearing due to sufficient cause. He further relies on the Court of Appeal case of **Richard Ncharpi Leiyangu *v* IEBC *&* 2 Others [2014] eKLR** where the court held that even if the courts have inherent jurisdiction to dismiss suits, it should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and that there should be proportionality at the end of the day. The Claimant submitted that he relies on the findings of Mativo J. in **Wachira Karani *v* Bildad Wachira [2016] eKLR** that as a fundamental principle of natural justice applicable to all Courts whether superior or inferior, a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. That if this principle is not observed then the person affected is entitled to have any determination affecting him set aside.

6. The Respondent submits that the Applicant has not demonstrated to the satisfaction of this Court why he did not fix the matter or hearing for a period of over 4 years. That since a case belongs to the litigant, it behoves the litigant to make regular follow-ups with his advocates so as to ascertain the progress of their case. To this end the Respondents rely on the case of **Samuel Kipsang Kitur *&* Another *v* Eunice Kitur *&* 2 Others [2005] eKLR** where Kimaru J. observed that cases are owned by litigants and not by their advocates and a litigant cannot leave such responsibility to his advocate. The Respondent further submits that the Claimant's advocates' firm has similarly failed to explain to the Court why it took them over 1 year to file the application herein. That the Claimant/Applicant and his current and erstwhile advocates are guilty of inordinate delay and do not deserve the discretion of this Court being exercised in their favour. That the Applicant has especially not exhibited an affidavit from the former advocates to demonstrate that the delay was occasioned by them. That the inordinate delay and the 4 years in action period remain unexplained and that the Claimant's Application ought to therefore fail.

7. The main issue for determination is whether the Court should review the orders for dismissal and reinstate this suit for hearing. The Claimant has pleaded that they did not attend court on 25th November 2019 because the Respondent served the wrong advocates despite their being a Notice of Change of Advocates on record. The Respondent on the other hand has submitted that the Claimant has not explained why he did not fix the matter for hearing for over 4 years and submitted that the Claimant had a duty as the litigant to diligently prosecute his matter. Section 3A of the Civil Procedure Act and Order 17 Rule 2(1) of the Civil Procedure Rules grants this court the inherent power to order for a reinstatement of suit while Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made *ex parte*. The Claimant/Applicant did not explain to this Court why he filed the application herein almost 10 months after the court dismissed his suit on 25th November 2019. Even if he was to claim that he was not aware that the matter had been dismissed because of an improper service of the NTSC to his former advocates, he ought to explain what initiative he took to set down the matter for hearing after they were told to go back to the registry for dates. I am of the opinion that the Claimant did not diligently prosecute this matter. In **Fran Investments Limited *v* G4S Security Services Limited [2015] eKLR** the Court held that:

> *"[8] Order 17 Rule 2 (1) of the Civil Procedure Rules grants the court power to dismiss a suit in which no step has been taken for one year. The Order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit. This order is*

permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think, it is so especially when one fathoms the requirements of article 159 of the Constitution and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice….But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under Article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff. This is the test I shall apply here.

[9] Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word ''give notice''. The court may give notice of dismissal through its official website or through the cause-list. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2 (1) of the Civil Procedure Rules. But nothing precludes the court from serving the notice as per Order 5 of the Civil Procedure Rules.…Such delay is not inadvertent as alleged by the Applicant; it is deliberate as a party is expected to prosecute their cases without delay. The delay has not been satisfactorily explained and is a source of prejudice to the Respondent as well as to the fair administration of justice. These are sufficient reasons to refuse to reinstate a suit and let it lie in peace in judicial grave. The amount of time which has passed by will not allow any and is not conducive to having a fair trial in this matter. ….Accordingly, and with a lot of trepidation, I dismiss the application dated the 20th February 2014…"

8. Clearly, a litigant remains the driver of his case and whether the advocate served with the notice is the wrong one there is no explanation why there was no action from 10th September 2019 when the case was due for fixing of a date for hearing. It was only in mid-September 2020, 14th September to be precise that the Claimant moved the Court to reinstate the suit which had been dismissed in November 2019. The Claimant had done nothing since 10th September 2019 which was in excess of one year since the matter was last in Court. In my considered view, the Claimant has lost interest in the case which in any event had remained pending and not concluded over 5 years since its inception. He was not diligent in the prosecution of his case and the inevitable result of the motion to reinstate is that the suit must lie where it is – concluded by way of dismissal. Motion is dismissed albeit with no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 23rd day of February 2021

Nzioki wa Makau

JUDGE