



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 163 OF 2017

BENEDICT WECHULI.....CLAIMANT

VERSUS

NAVAKHOLO CONSTITUENCY DEVELOPMENT FUND.....1ST RESPONDENT

THE NATIONAL GOVERNMENT CONSTITUENCIES

DEVELOPMENT FUND BOARD.....2ND RESPONDENT

JUDGMENT

1. On 7/10/2019, the Court upon application by Counsel for the respondent made the following Order:-

“The suit is dismissed for want of prosecution and absence without explanation. No orders as to costs”

2. The suit was filed by the claimant on 26/4/2017 and an amended Claim was filed on 12/5/2017. The respondent filed a response to the statement of Claim on 4/7/2017 and an Amended Statement of Response on 14/9/2017.

3. An application to strike out the suit for lack of jurisdiction filed by the respondent was determined on 14/12/2017.

4. The suit was set for hearing on the merits on 10/4/2018. On that date both parties confirmed that they were negotiating settlement and they be given 30 days.

5. On 14/5/2018, the matter having not been settled was set for hearing On 14/2/2019. Mr. Ojulo appeared for the respondent and the claimant was in person. Claimant told the Court that his Advocate Mr. Momanyi was sick. The matter was allocated another hearing date on 7/10/2019. On the date Mr. Emukule appeared for 1st respondent and Mr. Otieno appeared for the 2nd respondent. Mr. Momanyi for the claimant and the claimant were absent without explanation.

6. The respondents applied to have the matter dismissed for want of Prosecution which order the Court granted.

7. The Court has considered the application dated 20/11/2019 for the Court to review the Order dismissing the suit for none attendance. The Court has considered also the replying affidavit by the respondents.

9. The Court is satisfied that Mr. Momanyi; Counsel for the claimant/respondent who had been stated to be sick, in the last attendance had not been served with the hearing notice for the 7/10/2019 when the suit was dismissed.

10. The respondent advocates did not disclose this fact to the Court in their submissions to have the suit dismissed. They only relied on the fact that the claimant who was present in the last appearance did not also attend Court on 7/10/2019.

11. The Court is satisfied by the explanation given by Mr. Momanyi for the claimant, that the claimant though present and unrepresented on 14/2/19 did not get the correct hearing date. That he had recorded the hearing date to be 17/10/2019 and not 7/10/2019. That indeed the claimant attended Court on 17/10/19 only to find the suit had been dismissed.

12. The Court finds that the application to set aside the Order of the Court issued on 7/10/2019 dismissing the suit has merit and reinstates the suit accordingly.

13. The matter to be fixed for hearing and heard on priority basis if not otherwise settled by the parties.

Costs in the cause.

Dated and delivered at Nairobi this 11th day of February, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Momanyi for claimant/Applicant

Otieno and Amisi Advocates for the 2nd respondent.

Otieno, Yogo, Ojuro & Advocates