



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
NAIROBI

CAUSE NO.1945 OF 2016

AUGUSTINE OJIAMBO.....CLAIMANT

VERSUS

BRINKS SECURITY SERVICES LIMITED.....RESPONDENT

RULING

The claimant filed application dated 8th February, 2021 seeking for orders that the dismissal order issued on 4th February, 2021 be set aside and the suit be reinstated for hearing on merit and a hearing date be allocated on priority basis.

The application is supported by the affidavit of Upendo Ignacious Allan and on the grounds that on 4th February, 2021 the suit herein was dismissed for non-attendance because the claimant's advocate experienced technical hitches on the gadget he was using and was unable to address the court when the matter was called and the same was dismissed. The claimant has never postponed this matter or failed to attend court when required and the unforeseen circumstances that he faced were beyond his control.

In his affidavit, Mr Upendo avers that he is counsel for the claimant and on 4th February, 2021 experienced technical hitch on the gadget he was using to access virtual proceedings and was not able to address the court when the matter was called. The claimant has been eager to be heard on his case and should not be punished for the mistake of his advocate.

In reply, the respondent filed the Replying Affidavit of Raymond Nzioka the human resource manager and avers that courts have been conducting virtual proceedings since the year 2020 and every advocate is expected to have full knowledge and experience in accessing the court virtually and cannot blame technical hitches.

Mr Nzioka also avers that on 4th February, 2021 when the matter came up in court for hearing he was in court together with his advocate when he was ready for the hearing of the matter. The claimant remained absent leading to dismissal the suit with costs to the respondent. The claimant's advocate is merely taking an easy way out as there will be no way of verifying the alleged technical hitch in accessing the court. There was no contract to the respondent's office or the court to report such hitch. The application is supported by the advocate and not the claimant an indication that the claimant is still not available.

Mr Nzioka also avers that the claim was filed in 2016 and without the claimant supporting his application; the same should be dismissed with costs. Where the court finds merit in the application, costs for attendance and defending the application should be awarded to the respondent.

Determination

An order dismissing suit for non-attendance of court is serious and to be vacated, cogent reasons must be given by an applicant seeking reinstatement of the suit. Once a suit is dismissed, there is a final order.

In **Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR** the court reaffirmed the decision in **f Njue Ngai v Ephantus Njiru & Anor CA 29 of 2015** and held that;

*Another issue may arise as to whether a dismissal of a suit for non-attendance of the Plaintiff or for wants of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the Plaintiff to attend Court in the case of **Peter Ngome vs Plantex Company Limited [1983] eKLR**. :*

*“Rule 4(1) does not say “judgment shall be entered for the defendant or against the Plaintiff.” It uses the word “dismissed.” The Civil Procedure Act does not define the word “judgment”. According to **Jowitt’s Dictionary of English***

Law 2nd ed p 1025:

“Judgment is a judicial determination; the decision of a Court; the decision or sentence of a Court on the main question in a proceeding or/one of the questions, if there are several.”

On the application before court seeking for the order of dismissal of the suit on 4th February, 2021 be set aside and that the suit be reinstated for hearing on merit for the reasons that counsel for the claimant was not able to attend due to technical hitches on his gadget, I have gone back on the court returns for the material date, 4th February, 2021 and the cause list for the day. What emerges is that parties had the two options. There was a virtual link to the court and a telephone number for the court assistant where parties could access and get assisted.

The claimant and or his advocate have not addressed the option given for accessing court session for 4th February, 2021. Where indeed counsel attending experienced technical hitches on his gadget and was unable to address the court, nothing stopped him from calling the court assist or counsel for the respondent in this regard.

This is an old matter going back to 2016. The matter has come up in court on several occasions;

On 25th May, 2017 the claimant was present but the respondent was absent;

On 15th June, 2017 the claimant was present but the respondent was absent; and On 4th February, 2021 the claimant was absent when the matter was dismissed.

To ensure justice and hearing on the matter on the merits, the court finds it just to reinstate the suit on condition that the claimant meets the respondent’s costs which are hereby assessed at ksh.20,000 and to be paid before the claimant is allocated a hearing date.

Accordingly, application dated 8th February, 2021 is hereby allowed, the order of 4th February, 2021 dismissing the suit herein is lifted; the claimant shall pay the respondent Ksh.20,000 and be allocated a hearing date at the registry. Costs to the respondent to be paid before a hearing date is allocated.

Where there is inaction for 30 days, the suit shall stand dismissed as of 2nd June, 2021.

DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF APRIL, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and