



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 669 OF 2013**

**JWM..... CLAIMANT**

**VERSUS**

**MARSHALLS EAST AFRICA LIMITED.....RESPONDENT**

**RULING**

1. The advocate for the Claimant/Applicant filed the application dated 2<sup>nd</sup> September, 2020 praying for an order that this honourable Court be pleased to reinstate the suit.
2. The application is based on grounds set out in the notice of motion and in the Supporting Affidavit of the Claimant's Advocate Juliah Mwangi and one by Dr. Tamar Mikhail which grounds may be summarised as follows: -
  - i. The suit was filed on 13/5/2013. The matter was set for hearing on 22/2/2017 but was adjourned because the claimant was sick and unable to orally give evidence.
  - ii. The claimant has been unwell and unable to stand trial. As a result, the matter was dismissed for want of prosecution. The claimant is yet to recover and the claimant wishes to have the matter reinstated to appraise the Court on her status.
  - iii. Juliah Mwangi deposes that she is the Advocate on record for the claimant. That she filed the suit on 13/5/2013. That the claimant seeks payment of terminal benefits from the respondent.
  - iv. That the matter came up for hearing on 22/2/2017 but could not proceed because the claimant has been sick and unable to stand trial. That the suit was dismissed for want of prosecution. That the claimant has not recovered to-date. That the suit be reinstated for the Counsel to appraise the Court of this medical status of the claimant.
  - v. That the claimant be accorded a chance to be heard as and when he recovers.
3. The application is further supported by an affidavit of Dr. Tamar Mikhail who deposes that he is a Medical Doctor and that the claimant has been undergoing treatment in Coptic hospital since the year 2016 for joint pains, staggering gait and dementia among others.
4. That on 10/3/2017, the claimant visited Coptic Hospital for examination and medical follow up whereby the said doctor examined him and found him to be still suffering from the said Dementia.
5. The Doctor has attached a medical note dated 10/3/2017 to support his deposition aforesaid. The Doctor has further attached a medical report dated 19/6/2017 to that by Dr. Yousuf Sorial his colleague who confirmed that the claimant still suffered from Dementia amongst other physical illness.
6. That on 31/1/2019, the Doctor, re-examined the claimant and found him to be suffering from Parkinson disease among others. The Doctor has annexed a medical certificate marked "TM3" to support this status.
7. The Doctor deposes that dementia is a chronic persistent disorder of the mental processes caused by brain disease or injury and marked by memory disorders, personality changes and impaired reasoning and has led to memory loss of the claimant.
8. The Doctor concludes that the claimant is incapacitated and consequently, he is not in a position to give evidence in Court or be cross-examined as his short and long memory has been grossly impaired.

9. The application is opposed by a replying affidavit of Henry Odhiambo Omulo who states that he is the Human Resource Manager of the respondent. That he has read and understood the application by the claimant.
10. That the matter came for hearing on 13/11/2018 and that due to the absence of the claimant and or his advocate, the matter was dismissed for want of prosecution with no orders as to costs.
11. That it is true that the matter and file was closed for inactivity due to the claimant's illness as the same was not communicated to the Court by the claimant's advocate.
12. That sometimes in July, 2018, the matter came up for hearing of the suit and the claimant's advocates informed the Court that the claimant was ill and unable to stand trial. The matter was stood over generally to allow the claimant to file a formal application regarding the capacity of the claimant.
13. That no such application was filed until the time this application was filed by the advocate for the claimant. That it is clear from the deposition in the supporting affidavit of Dr. Tamar Mikhail that the claimant has no capacity to conduct his suit and therefore there is no justification at all to reinstate this suit since the claimant lacks capacity to stand trial.
14. That the suit raises no triable issues and the claimant stands to suffer no prejudice since same was dismissed without costs.
15. That the claimant was and/or his advocate has been indolent and guilty of laches in pursuing this matter. That this application was filed after many years of inactivity and it should not be used to hold this matter in abeyance for an indefinite period of time and or engage in exercise of endless mentions for reasons of the claimant's medical condition when the matter has already been closed in Courts for close to 8 years.
16. That litigation must come to an end and that it is fair and just that the Orders sought be denied.

#### **Determination**

17. Counsel for the claimant filed written submissions dated 22/1/2021 in which she states that the claimant was not served with a notice to show cause before the suit was dismissed for want of prosecution. The counsel relies on the case of **Eunice Soko Mlagui –vs- Suresh Parmer & 3 Others [2018] eKLR** in which Odero M.A. reinstated the suit that had been dismissed without notice to show cause stating: -

“It is clear from the above that notice was not issued to either party before the suit was dismissed. In the circumstances, the dismissal of the suit under Order 17, Rule 2(1) was to say the least unfortunate and unprocedural.”

18. The applicant further cites the case of **Kenya Power and Lighting Company Limited –vs- Kenya Cold Storage 1964 Limited – HCCC No. 387 of 2002** wherein the need for a notice to Show Cause to be issued to the claimant before the suit is dismissed for lack of prosecution is stated.

19. The claimant's advocate further submits that the claimant will suffer prejudice if the suit is not reinstated.

20. The claimant further submits that the suit raises triable issues since the claimant seeks payment of Kshs. 1,878,038 terminal benefits on account of unlawful termination on account of redundancy. That the claimant prays for payment of severance pay and contributions to a provident fund established by the respondent for its employees in the year 2009.

21. That no prejudice would be suffered by the respondent if the suit is reinstated.

22. The respondent filed submissions dated 27/1/2021 in which it is submitted that the suit was filed on 13/5/2013 claiming Kshs. 1,031,333 severance pay and Kshs. 233,431 provident fund. That the claim total is Kshs. 1,875,038.

23. That the respondent filed a defence on 4/6/2013. That since then the matter has been in Court on several mentions and hearing dates given and that on one of the hearing date on 13/11/2018 the matter was dismissed due to the absence of the claimant or his counsel.

24. That this application is visited with inordinate delay.

25. That on 9/7/2018, the claimant's advocate made a request that the matter be disposed of by way of written submissions, and so it is not true that the advocate was last in Court on 2/2/2017.

26. That it is clear that the claimant lacks capacity to conduct his suit and so it would be futile to have the suit reinstated.

27. That the claimant's advocates have been indolent and guilty of laches in pursuing this matter.

28. That the advocate has not taken up lawful options on how to proceed on a matter of incapacity such as this one. The advocate clearly lacks authority to swear the supporting affidavit on behalf of the claimant when there are available options known in law and procedure and in view of the claimant's state of mind such power has not been donated to the advocates.

29. The Court cannot hold this matter in abeyance, indefinitely on account of the claimant's medical condition.

30. That the application be dismissed for lack of merit.

#### FINDING

31. It is apparently clear from the medical reports presented before Court that the claimant lacks capacity to prosecute his suit on account of an illness of the mind described in the medical report, to be dementia and later Parkinson's disease. Dr. Tamar Mikhail concluded in his affidavit

“[10] Dementia is a chronic or persistent disorder of the mental processes caused by brain disease or injury and marked by memory disorders, personality changes and impaired reasoning and has led to his memory loss.

**[11] That the aforementioned has rendered the claimant incapacitated and consequently, he is not in a position to give evidence in Court or be cross-examined as his short or long term memory has been grossly impaired.”**

32. It is very clear that this suit was dismissed due to the wanting manner in which the counsel for the incapacitated claimant has conducted it. There has been inordinate delay not only in prosecuting the matter but also in the clear omission by the advocates for the claimant to apply for substitution of the claimant on account of incapacity so that the suit may be prosecuted by the next of kin of the claimant.

33. The present application is wanting on many fronts. Firstly, the claimant lacks capacity to prosecute this suit and there are therefore no justifiable reasons to reinstate the same and keep the respondent in endless anxiety as to when the suit would come to an end. That state of affairs would be grossly unfair and unjust to the respondent unless corrected forthwith.

34. As suggested by the respondent in its submissions a proper application for substitution of the claimant on account of inability together with a prayer for reinstatement of the suit ought to have been filed many years ago. That is the only way life would have been put in the evidently dead suit.

35. The application as filed would otherwise be dismissed on account of inordinate delay alone and clear lack of capacity by the claimant to conduct the suit.

36. Clearly, the Advocates for the sick claimant have let him down.

37. However, on the date when the suit was dismissed for want of prosecution, no notice to show cause had been issued and served on the claimant or his advocates. The matter was set for hearing and the claimant, who was sick, unbeknown to the Court did not show up and Counsel for the claimant did not appear also.

38. Therefore on account of the authorities cited by Counsel for the claimant, to wit Eunice Soko and Kenya Power & Lighting (supra) this Court sets aside its order dated 13/11/2018 dismissing this suit for want of prosecution.

39. If no appropriate steps are taken to breathe life to the suit within the next 12 months the suit shall stand dismissed for want of prosecution.

40. Costs in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MAY, 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 15<sup>th</sup> March 2020, this ruling 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. Kang'ara for claimant

Awinja for Mr. Adala for Respondent

Ekale – Court Assistant