



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO.561 OF 2015**

**JOSEPH ANGWENYI ONGORO.....CLAIMANT**

**VERSUS**

**REGAL PHARMACEUTICALS LIMITED.... RESPONDENT**

**RULING**

The claimant filed application dated 8<sup>th</sup> March, 2021 under the provision of section 1A, 1B, 3A and 6 of the Civil Procedure Act, Order 51 of the Civil Procedure Rules and seeking for orders that;

The court be pleased to set aside the orders made on 26<sup>th</sup> February, 2019 dismissing the claimant's suit and all other consequential orders thereto.

The court be pleased to issue an order reinstating the claimant's suit.

The application is supported by the Affidavit of Wangira Okoba Advocate for the claimant and on the grounds that the claimant filed the suit herein on 10<sup>th</sup> April, 2015 and upon taking pre-trial directions a hearing date was secured for 19<sup>th</sup> January, 2016 but was adjourned. Several other hearing dates were allocated but the matter could not be heard for various reasons.

On 26<sup>th</sup> February, 2019 the court issued a Notice to Show Cause why the suit should not be dismissed for want of prosecution but on this date the advocate in the firm seized of the matter had been summoned at the High Court Mavoko whereby he sent a representative Mr Otieno to hold brief but the matter was dismissed as no affidavit of service had been filed. The claimant was not in court as he had left the law firm to conduct the matter on his behalf and seek that the suit be reinstated and orders of 26<sup>th</sup> February, 2019 dismissing the suit for want of attendance be set aside.

In reply, the respondent filed the Replying Affidavit of Rohin Vora the director of the respondent company and who avers that the application by the claimant is in bad faith and no evidence that there was effort to defend the show cause notice or attendance in court for hearing and renders the application subject for dismissal.

The claimant is an indolent litigant, no explanation is given why the matter was not diarised when due in court and there is nothing to demonstrate that the claimant is interested in this suit. a suit which stays inactive for over a year is ripe for dismissal under Order 17 Rule 2(1) of the Civil Procedure Rules. The court issued Notice to Show Cause why suit should not be dismissed for want of prosecution on good basis and nothing tangible is presented to set aside the order dismissing the suit with costs.

Both parties attended and made oral submissions.

**Determination**

The court has elaborate procedures and processes before a Notice to Show Cause as to why a suit should be dismissed for want of prosecution can issue. Under Rule 16 of the Employment and Labour Relations Court (Procedure) rules, 2016 where a party fails to attend to a matter, either party can move the court to have the mater dismissed and where there is continued inaction, the court can issue notice for the parties to attend and show good cause why the suit should not be dismissed.

16. (1) In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.

2. If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.
3. Any party to the suit may apply for dismissal as provided in paragraph (1).
4. The court may dismiss the suit for non-compliance with any direction given under this rule.

By notice dated 13<sup>th</sup> February, 2019 the court notified the parties to attend on 26<sup>th</sup> February, 2019 to show cause why the suit should not be dismissed for want of prosecution.

A Mr Otieno attended and held brief for the claimant's advocate and submitted that the advocate was held up at Marsabit High Court and the court directed that the matter was last in court on 19 January, 2016 and there was no affidavit in response to the Notice to Show Cause and the claim that the advocate stated to be in Marsabit High Court was without evidence or the matter he was attending to confirm the necessity for absence. The claimant was also absent. There was no good cause shown and the suit was dismissed.

On the affidavit of Mr Wangira in support of the instant application, the averment is that the claimant's advocate was held up at Mavoko High Court. such directly contradicts representations made in court on 26<sup>th</sup> February, 2019 by Mr Otieno. Further, there exists no High Court at Mavoko known in law or in fact. Such representations are misleading and most fundamentally the Mr Otieno attending on the material day on 26<sup>th</sup> February, 2019 affidavit to confirm facts as stated in court is not attached.

Even where the court was persuaded to allow the instant application, which is not the case here, upon the claimant and his advocate being appraised by advocate attending on 26<sup>th</sup> February, 2019 Mr Otieno that the matter had been dismissed for want of prosecution, it has taken a total of 25 months and 10 days to file application seeking to set aside the orders dismissing the suit for want of prosecution. The obvious delay is not addressed. The absence of the claimant as the right-holder of the suit or his affidavit with regard to any interest in the matter is apparently clear.

Once a court has delivered its decision on a matter, it ceases to be seized of the same and it stands *functus officio* and it cannot re-open it for any purpose whatsoever except in appropriate and exceptional cases such as when the order was obtained by fraud or deceit; was given under a mistake or there is a fundamental irregularity. These ingredients are all absent in this instance.

Accordingly, application dated 8<sup>th</sup> March, 2021 by the claimant is in abuse of court process and is hereby dismissed with costs to the respondent.

**DELIVERED IN COURT AT NAIROBI THIS 10<sup>TH</sup> DAY OF JUNE, 2021**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....