



**REPUBLIC OF KENYA**

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

**CAUSE NO. 124B OF 2017**

**AMOS MWANGI KIHARA.....CLAIMANT**

**VERSUS**

**SAIKABE CONSTRUCTION COMPANY LIMITED....RESPONDENT**

**RULING**

1. Before this Court is an Application *via* Notice of Motion brought Under section 16 of the Employment and labour relations Court Act through the firm of Muchiri Gathecha and company advocates for Orders that:

- 1) ***This Honourable Court be pleased to vary its orders dismissing the case and reinstate the suit herein.***
- 2) ***That if the court allows prayer 2 this cause be transferred to the chief magistrate employment and labour court division for hearing and determination.***
- 3) ***That the costs of this Application be provided for.***

2. The Application is based on the supporting affidavit of **Amos Mwangi Kihara** and on the following grounds:

- a) That a Statement of Claim dated 17<sup>th</sup> March, 2013 was filed against the aforesaid Respondent and Notice of Summons to enter appearance dated 17<sup>th</sup> March 2017 was immediately handed over to a process server to effect service.
- b) That the Respondent filed a Notice of Appointment dated 19<sup>th</sup> April, 2017 on the 20<sup>th</sup> April, 2017 and a memorandum of Response on the 9<sup>th</sup> of May, 2017.
- c) That this cause was listed for hearing of the main suit on 5<sup>th</sup> February 2020 but the same was dismissed by this court for non-attendance.
- d) That the advocate for the claimant arrived at the court at 9:15 am and the Claimant arrived a few minutes later at 9:30 am.
- e) That the cause herein was listed as number 36 (second last) in the cause list but the court called it out before the mentions listed for the days therefore resulting to the dismissal. He attached a copy of the cause list marked as **AMK-1**.
- f) The claimant presumed that the court would follow its cause list as is normal practice and that there was no direction that the hearing will be mentioned before the mentions listed for the day.
- g) That the claimant is desirous of pursuing his case to its logical conclusion and also that the case be heard on its merit.
- h) That the claimant has been attending court timeously and diligently and that the delay to arrive at the court at 9:00am was not intentional. Further that his advocate was not indolent.
- i) He avers that the application herein has been filed timeously and urged this court in the interest of justice to allow the same.
- j) He avers that he will be greatly prejudiced as he stands to lose a lot on his claim pending before this Court. Further that there will be no prejudice that will be visited upon the respondent if this application is allowed.

3. The Respondent has filed a Replying Affidavit sworn on 24<sup>th</sup> February, 2020, deposed upon by **Benard Kariuki Njenga**, the director of the respondent, via the firm of Rodi Orange & Company Advocates and states as follows:

a) In it they state that, the Claimant's application has been brought in bad faith and in essence meant to obstruct the course of Justice and deny it the right to enjoy its fruits of the ruling dismissing this suit.

b) That on 9<sup>th</sup> October 2019, Mrs Gathecha was present for the claimant when they mutually agreed that this suit would proceed for hearing on 5<sup>th</sup> February, 2020.

c) That the matter was listed as number 5 in the hearing for the day and that counsel was well aware of that hearing. Further that the reasons given for non-attendance is not sufficient.

d) That according to the Court's cause-list of 5<sup>th</sup> February, 2020, the matters listed therein were hearings and show cause matters and that there were no matters coming up for mentions as alleged by the claimant. Further that in the cause-list its indicated that court would begin at 9:00am. He equally attached the cause-list for 5<sup>th</sup> February, 2020 as annexure **BKN-1**.

e) It is averred that the advocate had professional obligation and the claimant ought to be in court by 9:00am and not work on presumptions. Further that counsel would have acted diligently and ask someone to hold his brief.

f) Finally, the respondent asked this court to dismiss the application herein for being an abuse of Court process.

#### **Submissions.**

4. In his submission, the Claimant state that the delay was of no fault of their own, but was occasioned by the fact that the Honourable court mentioned matters coming up for hearing before the mentions listed for the day as was the norm. Further that, his advocate was handling other matters at the chief magistrate court and presumed that since the matter was listed as second last in the cause-list she would manage to handle all matters thus never saw the need of asking someone to hold her brief.

5. He relied on the case of **Lia Gloria Makya –versus- Bridge international academics [2020] eklr** Where the court relied on the case of **Philip and Another –versus- Augustine Kibedo** and held that;

*“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merit. I mind the broad equity approach to this matter is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs.”*

6. He further cited the case of **Burhani Decorators and contractors –versus- morning foods limited and another (2014) eklr**. Where the court held that;

*“In my view, when a court exercises the inherent jurisdiction to dismiss a party's suit, this must be exercised in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality. It was not demonstrated that the appellant herein with its advocate had developed a habit of absconding from court.”*

7. To further reinforce his submission counsel cited the case of **Fredrick Otieno Gudo –versus- Apparel EPZ Limited (2018) eklr** where the court relied on the decision in **Transami (K) Limited Vs Sokhi International (K) Ltd** (Unreported) the learned Judge stated that;

*“To let the one lapse of failure to attend court on the 9th May, 2006 shut the plaintiff out from the seat of judgement would, I hold, occasion greater injustice than the convenience to be suffered by the defendant. The Court must always strive to dispose cases upon a proper hearing on the merits where possible.”*

8. It was submitted that this Court has inherent powers to vary and or discharge the order of this Court of 5<sup>th</sup> February, 2020 and reinstate the suit as empowered under Order 12 Rule 7 of the Civil Procedure Rules. Counsel urged this court to be guided by Article 159(2) of the constitution and administer justice without undue regard to procedural technicalities.

9. To buttress her argument counsel cited the case of **Utalii transporters Compant Limited –versu- NIC Bank & another [2014] eklr**. Where Gikonyo J. held that;

*“The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgment-seat. It is, therefore, a matter of discretion by the court. These principles are:*

a) *Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*

b) *Whether the delay is intentional, contumelious and, therefore, inexcusable;*

- c) *Whether the delay is an abuse of the court process;*
- d) *Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
- e) *What prejudice will the dismissal occasion to the plaintiff?*
- f) *Whether the plaintiff has offered a reasonable explanation for the delay;*
- g) *Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?*

10. Counsel submitted that, as much as this Court has inherent power donated by section 3A of the civil procedure Act to make any order necessary to make end of justice meet including dismissing a suit, they ought to exercise such powers judiciously and at all-time ensure to protect the integrity of the court process from abuse that would amount to injustice, and cited the case of **Richard Ncharpi Leiyagu – versus- independent electoral and boundaries commission & 2 others [2013] eklr.**

11. It was submitted that the respondent, has not shown that it stands to suffer any prejudice and defined what court consider as irreparable prejudice by citing the case of **Joshua Chelelgo Kulei -versus- Republic & 9 others [2014] eklr** that;

**“Irreparable prejudice must refer to something more than the disadvantage cause by the loss of evidence that can happen in trial. Thus, irretrievable loss of some evidence even if associated with delay is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability.”**

12. Finally, Counsel urged this Court to allow the application as prayed and further transfer the same to the magistrates’ court that now have jurisdiction to hear and determine employment matter as stipulated under section 9(b) of the Magistrates Court Act no. 26 of 2015.

13. The respondent submitted that the claimant has failed to give cogent reason for non-attendance on the fateful day. Further that in both cause-lists attached as evidence by both parties herein indicates that the Court was to start at 9:00 am which according to the respondent should have prompted the claimant and his advocate to be in court by that time. Further, that the claimant’s advocate had professional obligation to be in court by 9:00am.

14. It is the respondent’s submissions that the Claimant/applicant has not made out a case that would persuade this Court to exercise its discretion and allow the said application, but further that if the court is inclined to allow the application they be awarded throw away costs.

15. I have examined the averments of the parties herein. From the pleadings herein the applicant has demonstrated their intention to prosecute this case by being in court during all the time matter came up for mentions except on the 5/2/2020 when this case was dismissed for want of prosecution.

16. The applicant pursued this matter diligently thereafter and filed an application dated 6/2/2020 to reinstate the case.

17. In my view, this shows diligence and determination from the claimant to pursue his case to be heard on merit.

18. I find that disallowing this application will result in a miscarriage of justice, I therefore allow the application and reinstate this suit to be heard on merit.

19. Costs to be in the cause.

**RULING DELIVERED VIRTUALLY THIS 8TH DAY OF JUNE, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Kabalika for Respondent – present

Nyabuto holding brief Gathecha for claimant – present

Court Assistant - Fred