



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 2058 OF 2017

STEPHEN LUGALIA.....CLAIMANT

VERSUS

HERITAGE INSURANCE COMPANY (K) LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant seeks through the Notice of Motion Application dated 22nd June 2021 for orders:

- i. THAT the Honourable Court be pleased to set aside its Orders issued on 11th March 2021 allowing the Respondent's Application dated 4th December 2020 to dismiss the suit herein.
- ii. THAT upon the grant of prayer 1 hereinabove, this Honourable Court be pleased to reinstate the suit for hearing on such terms as the Honourable Court may deem necessary for the ends of justice to be met.
- iii. THAT the costs of this Application be in the cause.

2. The Application is premised on the grounds that service of the said Respondent's Application dated 4th December 2020 was never effected upon the Claimant. That it is apparent from the record that the alleged service via email to *diroj24@gmail.com* was never delivered to the Claimant unlike for the 3 other recipients: Caxtone Kigata, Cedric Amulyoto and Lucas Sundra to whom the email was directed. That it is not clear why the said Application was never served on time until on or about 9th February 2021 when the said email was purportedly delivered to the said 3 recipients and that it is also not apparent whether one Peter Ngeno who purportedly effected the said service via email was a duly authorized process server of this Honourable Court. The Claimant/Applicant asserts that he has always been willing and desirous to have this matter set down for hearing and determination without delay but which could not materialize as the Court was giving priority to older matters as per notices fixed at the Court Registry from time to time. Further, there has been slowed acceleration of court cases and restriction of physical access to the Court rooms due to the Covid-19 pandemic. It is the Applicant's assertion that the Respondent equally had a duty to set down the suit for hearing instead of seeking to have the same dismissed. That unless the Orders sought herein are so granted the Claimant stands to suffer irreparably while the Respondent will not suffer any prejudice and that it is thus in the interest of justice that the application is allowed. The Application is further supported by the affidavit of the Claimant/Applicant's advocate, Mr. John Diro Advocate who depones that the suit herein entails a claim for substantial sum of money running into over Kshs. 50 million with high chances of success and for which the Honourable Court ought to decide upon on merit.

3. The Respondent filed two Replying Affidavits sworn by Mr. Peter Ngeno and Mr. Caxtone Kigata Advocate on 4th August 2021. Mr. Ngeno depones that he is a licenced court Process Server of the High Court of Kenya holding certificate number CPS04260. He avers that the Claimant was properly and sufficiently served with the Application dated 4th December 2020 via email in accordance with the provisions of Order 5 Rule 22B of the Civil Procedure (Amendment) Rules, 2020 and Section 1(B)(1)(e) of the Civil Procedure Rules, 2010. That he received through the email effecting service, a delivery notification from the destination of having been successful. Further, that the Claimant was served on 9th February 2021 which was more than a month to the Application's hearing date. He also contends that the Applicant has not denied accessing the said email and that the application herein ought to be dismissed with costs to the Respondent.

4. Mr. Kigata, the Respondent's advocate depones that the email in question was successfully sent to the email address of *diroj24@gmail.com* as it did not bounce. That as per the Affidavit of Service of Mr. Peter Ngeno deponed on 9th February 2021, delivery to all the receipts was complete and even though he printed the email before it had been delivered to the Claimant's advocates, the same does not mean that delivery was unsuccessful. That it is also instructive to note that the Claimant's Advocates have not denied that the said email

address does not belong to them. He further avers that the Court allowed the application dated 14th December 2020 and dismissed the suit for want of prosecution after certifying that service of the application had been made and there had been no response. That the allegation of slowed acceleration of court cases due to Covid-19 pandemic cannot be a reason for failure to take action for over 1 year and 5 months to have the suit prosecuted. That the overriding objective has been abused by the Claimant's indolence and inordinate delay in prosecuting this case while the Respondent continued to suffer prejudice and anxiety of having the claim pending against it. It is his averment that the Applicant has also not demonstrated to this court why the setting aside of these orders would be considered just.

5. In response, the Claimant/Applicant filed a Further Affidavit sworn on 28th September 2021 by Mr. John Diro Advocate who depones that the alleged Certificate held by one Peter Ngeno was not availed to the Honourable Court as required in the return of service for the application in question. He reiterates that the matter could not be fixed for hearing as the Court vide Notice dated 22nd November 2019, notified the general public that the 2020 diary opened only for 2016 matters and below from the date of the Notice. That he in the circumstances denies the allegations that the Claimant and/or his representatives have in any way been indolent and asserts that he seeks reinstatement of the suit for hearing and determination on merit.

6. The gravamen of the motion before the Court is that the Claimant seeks reinstatement of his dismissed suit. The power to reinstate a suit is predicated on the satisfaction of some threshold. In the case of **CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR** the Court of Appeal held that

We are fully aware that in an application before a court to set aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the Appellate Court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts.

7. The discretion to set aside is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice. In this case, the Claimant has completely missed the point. It was his case, he had an obligation to fix it for hearing and when the Respondent sought to dismiss the same, his failure to attend and the resultant dismissal of the suit for want of prosecution cannot be impugned on the basis that the process server did not annex his certificate to the affidavit of service. Service was proper and the Respondent is right in its surmise that the Claimant had been indolent in the prosecution of his claim leading to the dismissal order. It matters not what the sum sought in the claim is, if there is no basis to reinstate the Court would decline to do so as I hereby do. Application is dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2021

NZIOKI WA MAKAU

JUDGE