



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT MOMBASA**

**CAUSE NO. 148 OF 2017**

**THOMAS OTIENO OGUNGO.....CLAIMANT**

**VERSUS**

**ST. KEVIN GROUP OF SCHOOLS .....RESPONDENT**

**R U L I N G**

1. The Application before me is the Claimant's Notice of Motion dated 3<sup>rd</sup> August 2021 and filed in court under a certificate of urgency on 12<sup>th</sup> August 2021. The following orders are sought in the said Application.

- a. That the Honourable court be pleased to certify the matter urgent and to hear it *ex-parte* in the first instance.
- b. That upon hearing the application, the court be pleased to set aside and vacate the *ex-parte* orders issued on 21<sup>st</sup> July 2021 dismissing the cause for want of prosecution.
- c. That the court be pleased to reinstate the cause herein, *ELRC No. 148 of 2017*, for hearing on merit.
- d. That costs of the application be in the cause.

2. The Application is predicated on a supporting affidavit sworn by **Gerald Muchiri Wambugu Advocate** on 3<sup>rd</sup> August 2021, and to which copies of the following documents are annexed.

- a. First page of the Memorandum of Claim filed herein.
- b. A letter by **Omollo Onyango & Co. Advocates on ELRC Cause No. 158 of 2017 (Stephen Odeke Omukade –vs- Living Ton Security)** asking the Deputy Registrar to fix the matter before the judge for fixing that matter for formal proof. The letter is dated 17<sup>th</sup> May 2017.
- c. A Notice of Appointment of Advocates dated 15<sup>th</sup> March 2017 and shown to have been filed by Mogaka Omwenga & Mabeya Advocates.
- d. A letter by Wangira Okoba & Company Advocates (the Claimant/Applicant's Advocates) to the court dated 22<sup>nd</sup> march 2018 requesting for a mention date for pre-trial directions.
- e. This court's Cause List for 21<sup>st</sup> July 2021.

3. The Application was on 13<sup>th</sup> August 2021 placed before the vacation Judge at Nairobi who certified the same as urgent and directed that the application be mentioned in this court on 20<sup>th</sup> September 2021 for purposes of taking a suitable hearing date.

4. Both parties did not attend court on 20<sup>th</sup> September 2021. The court fixed the application for hearing on 27<sup>th</sup> September 2021, and directed that the Deputy Registrar serves notices in that regard.

5. When the application came up for hearing on 27<sup>th</sup> September 2021, counsel for the Claimant/Applicant told the court that the application had not been opposed as he had not been served with any response thereto. He urged the court to allow the application as prayed.

6. Other than the letter dated 22<sup>nd</sup> March 2018 asking for a mention date for pre-trial directions, the Claimant never took any action towards prosecution of the suit herein. Over three years down the line, the Court issued a Notice to Show Cause calling upon the parties herein to attend court on 21<sup>st</sup> July 2021 and show cause why the suit could not be dismissed for want of prosecution under Rule 16 of the Employment and Labour Relations Court (Procedure) Rules 2016.

7. None of the Parties filed any response to the Notice to Show Cause, and none of them attended court to show cause on 21<sup>st</sup> July 2021. The suit was dismissed for want of prosecution.

8. Rule 16(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides:-

**“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”.**

9. There being no cause shown on 21<sup>st</sup> July 2021, either to the court’s satisfaction or at all, the court dismissed the Claimant/Applicant’s suit herein for want of prosecution.

10. The Claimant now wants this court to set aside and to vacate its orders made on 21<sup>st</sup> July 2021, and to reinstate the Claimant’s suit, on reasons set out in the supporting affidavit referred to in paragraph 2 of this ruling.

11. Paragraph 3 of the said supporting affidavit states as follows:-

**“upon the lapse of 21 days absent a Response, the then firm on record made a request for Judgment and requested for formal proof date on 22<sup>nd</sup> May 2017. Attached and marked “T00-2” is a copy of the Request.”**

12. I have carefully looked at the said letter/request dated 22<sup>nd</sup> May 2017 referred to at paragraph 3 of the said supporting affidavit, and I have noted the following:-

**a. That the letter is shown to have been written to this court by Omollo Onyango & Company Advocates, a firm that is not shown to have represented the claimant in the suit herein at any given time.**

**b. That the said letter is shown to have been written in respect of a suit other than the suit herein, being Employment Cause No. 158 of 2017(Stephen Odeke Omukade –vs- LivingTon Security).**

13. The court has not been told why the claimant would present to this court a document filed on a totally different cause, and go even further to have an untrue statement made on oath to the effect that the document was indeed filed in the suit herein, and in respect thereof.

14. I have considered the application and all the matters deponed to in the affidavit sworn in support of the same. It is my finding that no reason has been given on the basis of which the court can set aside, vacate or vary its orders dated 21<sup>st</sup> July 2021. The identity of counsel alleged to have unsuccessfully attempted to log into the court’s virtual session on 21<sup>st</sup> July 2021 is not given, and no affidavit has been sworn by the counsel in that regard. No good and/or plausible reason has been given as to why no action was taken towards prosecution of the suit for a period exceeding three years.

15. The practice by parties and/or litigants of filing suits in courts and leaving those suits to lie unprosecuted in the court registries for years, becoming daily statistics of case backlog in the Judiciary, is to be discouraged.

16. The Application is without merit, and it is hereby dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF OCTOBER 2021**

**AGNES M.K. NZEI**

**JUDGE**

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**AGNES M.K. NZEI**

**JUDGE**

Appearance:

Mr. Muchiri for the Claimant

No Appearance for the Respondent