



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2138 of 2016

ELIJAH TORET KILAKOI.....APPLICANT

VERSUS

OLKEJUADO WATER & SEWERAGE COMPANY.....RESPONDENT

RULING

1. The Applicant has moved this Court vide a Notice of Motion application dated 13th August, 2021 filed under a Certificate of Urgency. The motion application is supported by the Affidavit of Khafafa Nancy Ndelema, Counsel for the Applicant.

2. The Application which is expressed to be brought under Order 17 Rule 2(2), Order 51 Rules 1 and 15 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Article 159 (2) (d) of the Constitution, seeks the following orders;

- 1. THAT the dismissal order of the Honourable Court issued on the 17th June, 2021 be set aside.**
- 2. THAT the suit herein be reinstated and admitted for hearing.**
- 3. THAT the costs of the Application be in the cause.**

3. The Application is premised on the grounds set out in the face thereof and in the Supporting Affidavit annexed thereto. Despite being served, the Respondent did not file any response to the Application.

4. The genesis of the instant Application is a Notice to Show Cause issued on 12th March, 2021, upon the Applicant by this Honourable Court. Vide the said Notice, the Applicant was required to Show Cause why the suit should not be dismissed for want of prosecution.

5. Counsel for the Applicant, Ms. Khafafa, filed a Replying Affidavit dated 4th June, 2021 in response to the Notice to Show Cause. Ms. Khafafa averred in the said Replying Affidavit, that the matter was scheduled for mention on 24th May, 2021 but the same was not listed on the days cause list. To this end, she annexed a letter dated 5th May, 2021, which was addressed to the Deputy Registrar, and through which she notified the court that the Notice to Show Cause was premature as the matter was slated for mention on 24th May, 2021. Ms. Khafafa further averred that the claimant was keen to prosecute the matter thus urged the Court to set down the matter for hearing.

6. The Notice to Show Cause came up for hearing on 17th June, 2021 and both parties were absent hence the suit was dismissed for want of prosecution.

7. It is that dismissal that has triggered the instant Application. The grounds in support of the Application are to the effect that;

- a) the matter has been active before court and was scheduled for mention on 24th May, 2021, hence the Notice to Show Cause issued on the 12th March, 2021 was premature.
- b) Counsel for the Applicant filed a Replying Affidavit in response to the Notice to Show Cause but the same was not considered as the matter was called out in her absence and an order of dismissal entered.
- c) that Counsel's absence from court was occasioned by the fact that she was appearing in **ELRC No. 2193 of 2017; Daniel Omwenga vs General Plastics Limited**, before Honourable Justice Nzioki wa Makau hence by the time she logged into the court virtually, the matter had been called and dismissed for want of prosecution.

d) That the claimant is keen to prosecute the matter hence the doors of justice should not be closed on account of default by counsel.

8. The Application came up for hearing on 15th November, 2021 and counsel for the Applicant submitted in support of the same wherein she reiterated the averments contained in her Supporting Affidavit. The Respondent was absent from court and as stated herein, did not file any response to the Application.

9. I have considered the grounds in support of the Application together with the documentary evidence annexed in support thereof. I have noted that the matter was to proceed for formal proof hearing on 6th February, 2020, when the court directed that fresh summons to issue and the Respondent be served as appropriate. I have also noted that there is an Affidavit of Service by Mr. Simon James indicating that the Respondent was served with the fresh summons.

10. Besides, I have taken note of the Applicant's letter of 5th May, 2021 indicating that the matter was slated for mention on 24th May, 2021 hence terming the Notice to Show Cause premature. It was Counsel's averment that the matter was not listed for mention on the said 24th May, 2021. It is also apparent that **ELRC No. 2193 of 2017; Daniel Omwenga vs General Plastics Limited**, was scheduled for hearing before Justice Nzioki Wa Makau on 17th June, 2021 when the Notice to Show Cause came up for hearing.

11. In view of the foregoing, I find that the Applicant has advanced plausible reasons to justify reinstatement of the suit. This finding has also been informed by the need to serve substantive justice and the fact that the Respondent will not suffer any prejudice consequently. In the case of **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR** the court held as follows:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

12. I fully concur with the findings in the above case to the effect that dismissal of a suit is a draconian order which drives away the litigant from the seat of justice. Therefore, and in the interests of justice I will order reinstatement of the suit and direct that the same be listed for hearing on a priority basis.

13. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

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STELLA RUTTO

JUDGE

APPEARANCE:

MS. KHAFafa FOR THE APPLICANT

NO APPEARANCE BY THE RESPONDENT

COURT ASSISTANT BARILLE SORA

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had 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 1B 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.

STELLA RUTTO

JUDGE