



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 173 OF 2013**

**JAMES KARIUKI MWANGI.....CLAIMANT**

**VERSUS**

**BENVER ESTATE LIMITED.....RESPONDENT**

**RULING**

1. The Claimant's claim was dismissed for want of prosecution on 18<sup>th</sup> October 2018.
2. The present application dated 2<sup>nd</sup> June 2021 seeks reinstatement of the claim.
3. The application is supported by an affidavit sworn by the Claimant's Counsel, Mildred K. Gakoi and is based on the following grounds:
  - a) That the order of dismissal made on 18<sup>th</sup> October 2018 was due to non-attendance of the Claimant's Counsel;
  - b) That this application has been brought without inordinate delay;
  - c) That the non-attendance was due to the fact that the Claimant's Counsel was indisposed and could not make it to court;
  - d) That the Claimant is keen on and very interested in prosecuting the matter as he is aggrieved by the decision of the Court;
  - e) That the Claimant has a very strong and arguable case;
  - f) That in the interest of justice, the said order ought to be reviewed, set aside and the Claimant's suit filed on 18<sup>th</sup> October 2013, be reinstated for hearing and final determination;
  - g) That no prejudice will be occasioned on the Respondent if the application is allowed;
  - h) That unless the order sought is granted, the Claimant stands to suffer irreparable loss that cannot be compensated by way of damages;
  - i) That it is tandem with the overriding objectives of the Court and in the interest of substantive justice to allow this application.
4. In response to the application, the Respondent filed a replying affidavit sworn by Purity Wambui Mwangi on 26<sup>th</sup> October 2021.
5. Mwangi points that this is an old matter having been filed on 7<sup>th</sup> February 2013. She adds that the present application filed on 2<sup>nd</sup> June 2021, was brought two years and 4 months after the dismissal order of 18<sup>th</sup> October 2018.
6. Mwangi states that the Claimant had not pursued his claim diligently and was therefore indolent.
7. Mwangi further states that the Claimant's Advocates have not demonstrated sufficient cause to warrant the exercise of discretion in their favour.
8. She takes the view that while the Claimant's Counsel may have been indisposed on the date the matter came up in court on 18<sup>th</sup> October

2018, it would have been prudent for Counsel to send a representative to court or thereafter promptly inform the Court and opposing Counsel of the predicament.

9. Mwangi further notes that the hearing date of 18<sup>th</sup> October 2018 was given pursuant to an adjournment granted on 1<sup>st</sup> October 2018 at the Claimant's request.

10. The single issue for determination in this application is whether the Claimant has made out a case for reinstatement of his claim, which was dismissed on 18<sup>th</sup> October 2018.

11. I have had occasion to look at the court record, which reveals the following:

a) The matter came up for hearing before **Wasilwa J** on 1<sup>st</sup> February 2018 but was adjourned on the ground that the Claimant's Counsel was unwell;

b) The matter came up for hearing before **Makau J** on 19<sup>th</sup> April 2018 but did not proceed on the ground that the Claimant's Counsel was attending to her sick father;

c) The matter came up again on 1<sup>st</sup> October 2018 when **Makau J** gave the last adjournment and directed the Claimant to pay court adjournment fees of Kshs. 400;

d) After the dismissal order of 18<sup>th</sup> October 2018, the Claimant took more than two (2) years to move the Court for reinstatement of the claim.

12. In her affidavit in support of the application, the Claimant's Counsel depones that she only learned of the dismissal of the claim on 12<sup>th</sup> April 2021, when her Court Clerk went to the Court Registry to fix the matter for hearing. Counsel further depones that the office file had been missing since 2018 and was found in April 2021.

13. As held by **Omondi J** (as she then was) in *Wargan Wekesa Okumu v Dima College Limited & 2 others [2015] eKLR* once delay in prosecuting a matter is established it must be well explained and if it is not explained, then it becomes inexcusable.

14. In this case, the Claimant and her Advocates went to sleep and for over 2 years were not even aware that the matter had been dismissed. This is the hallmark of a disinterested litigant and the opposing party should not be made to live with the prolonged burden of litigation.

15. On the whole, the Claimant has failed to make a case for reinstatement of his claim.

16. The application dated 2<sup>nd</sup> June 2021 is therefore disallowed.

17. Each party will bear their own costs.

18. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER 2021**

**LINNET NDOLO**

**JUDGE**

Appearance:

Ms. Mideva for the Claimant

Mr. Kamunda for the Respondent