



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 320 OF 2016

(Before Hon. Justice Mathews N. Nduma)

HENRY WARUKU.....CLAIMANT/APPLICANT

VERSUS

PRIDE KINGS SECURITY.....RESPONDENT

RULING

1. The suit filed on 27th October 2016 was dismissed for want of prosecution on 3rd December 2018. The applicant filed the application to set aside, review and/or vacate the order issued on 3rd December 2018 dismissing the suit on 19th February 2019. The application is based on grounds set out on the face of the application to wit:
2. That the delay to prosecute the case was not intentional, and the claimant has the desire to prosecute the case. The claimant has a strong case against the respondent. The respondent will not suffer prejudice if the orders to set aside are granted. Application is made in good faith.
3. The application is further supported by affidavit of the Advocate for the claimant Mr. Alfred Kipkirui Chepkwony. He deposes that he had on 3rd December 2018 sent an advocate named M.M. Omondi to file an affidavit of service on his behalf but the said advocate did not file it. The affidavit of service was subsequently filed on 4th December 2018 after the matter had been dismissed on 3rd December 2018. That the respondent had been served with the mention notice for 3rd December 2018 on 5th November 2018. That the claim be reinstated. That the claimant would suffer great loss if the case is not reinstated.
4. The application is opposed vide grounds of opposition filed on 11th June 2019 to wit that the application is totally defective and that the summons and statement of claim were never served upon the respondent. That no proper grounds to review the decision of the court have been advanced.

Determination

5. The suit was filed by Chepkwony and Company Advocates on 27th October 2016. The claimant did not serve summons to enter appearance and statement of claim on the respondent at all. On the 11th October 2018 Mr. Kobe for Mr. Chepkwony for the claimant appeared in court for mention to set a hearing date of the matter. The court directed the claimant to file proof of service of summons and memorandum of claim on the respondent on 3rd December 2018.
6. On 3rd December 2018, the claimant was represented by Mr. Adwar who held brief for Mr. Chepkwony for the claimant. Mr. Adwar informed the court that the suit was never served on the respondent. The court proceeded to dismiss the suit for lack of service on the respondent.
7. The court notes the dismissal was more than two (2) years from the date of filing suit.
8. There has been no explanation at all by the applicant why the suit was not served on the respondent more than two years down the line.
9. The applicant has not disclosed any justifiable reason for the court to reinstate the suit against the respondent. Reinstating the suit would amount to vexation and an injustice against the respondent. The respondent is entitled to a fair hearing of the suit against it without undue delay in terms of *Article 50(1) of the constitution of Kenya 2010*. Undue delay undermines ability of the defendant to effectively defend the suit.

10. The inordinate delay by the claimant to serve the suit amounts to defeat of the overriding objective of the courts to hear and determine suits expeditiously. **See Stephen Bernard Oduor vs Atwo Forwarder (2002) eKLR.**

11. Application lacks merit and is dismissed with no order as to costs.

Ruling Dated, Signed and delivered at Nairobi this 30th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 has 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 18 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.

Mathews N. Nduma

Judge

Appearances

Mr. Chepkwony for Claimant/Applicant.

Bruce Odeny for Respondent

Chrispo – Court Clerk