REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2012 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

CHRISTOPHER OTIENO...CLAIMANT

VERSUS

LOAD TRAILERS (E.A.) LIMITED....................RESPONDENT

RULING

The Claimant filed a notice of motion application dated 15th August, 2019 on 27th August, 2019 (the **Application**) which is expressed to be made under Section 1A, 1B and 3A of the Civil Procedure Act CAP 21 Laws of Kenya and Order 12 Rule 7 of the Civil Procedure Rules 2010 for orders:-

1. Spent

2. Spent

3. That the Court be pleased to set aside the Order of dismissal entered on 25th July, 2018 against the Claimant/Applicant.

4. That costs of this application in (sic) the cause

The Application is supported by an affidavit sworn by DAVID NYARERU BOSIRE on 15th August, 2019 (the **Supporting Affidavit)** and is premised on the grounds set out on the face of the Application and the Supporting Affidavit as set out briefly below.

The matter came up for hearing before this court on 25th July, 2018 but the Claimant's Advocate arrived in court late due to an emergency that arose in the morning. When he arrived, the Claimant's Advocate found that the matter had already been called out. Upon inquiring from the Court clerk the Claimant's Advocate was informed by the Court clerk that the matter was taken out and a new date should be taken at the registry.

The Claimant's Advocate proceeded to invite the Respondent for fixing of another hearing date at the registry where a new date was issued for 11th July, 2019 for which date the Claimant's Advocate prepared a hearing notice and served the same upon the Respondent.

It was only when the matter came up for hearing on 11th July, 2019 that the Claimant's Advocate found out that the matter had already been dismissed and not taken out as had been intimated to him.

It is the Claimant Advocate's deposition that the dismissal was based on mistake of counsel and ought not to be visited upon the Claimant who will suffer irreparable harm if the orders sought are not granted as the Claimant has a good case with triable issues and is praying for an opportunity to be heard.

The Respondent opposed the Application by way of a Replying Affidavit sworn by PAUL NGIGI KAROMO on 18th October, 2019 and filed on 22nd October, 2019 (the **Replying Affidavit**) on the grounds that:-

i. The application has been filed after inordinate delay without any or reasonable explanation justifying the same since the same was filed over one year since the order was made and one month after the Claimant allegedly discovered that the matter had been dismissed.

ii. The reasons advanced by the Claimant's Advocate in an attempt to explain his absence on 25th July, 2018 are not sufficient or persuasive.

iii. On 25th July, 2018, the deponent being the Respondent's Advocate on record attended court for hearing of the matter before Abuodha J. and it was only after the Court was through with its extensive cause list that the court dismissed the suit for non-attendance on its own motion.

iv. The application is devoid of merit with no sufficient grounds to warrant this Court to exercise its discretion in favour of the Claimant and allowing the application at this juncture would be gravely prejudicial to the Respondent who had since archived its file pertaining the suit and would suffer great difficulty in retrieving evidentiary material and suitable witnesses in support of its case.

Submissions

The parties appeared before Hon. N. M Kyanya (Deputy Registrar) on 30th October, 2019 and agreed to dispose of the Application by way of written submissions.

The Claimant/Applicant filed undated and unsigned submissions on 30th January, 2020. It identified the issues for the court's determination as:-

1. Whether the failure to attend Court by the Advocate or the Claimant/Applicant constituted an inadvertent excusable mistake.

2. Whether the Orders given on 25th July, 2018 should be set aside.

3. Whether the Respondent will suffer any prejudice when the matter is reinstated.

In summary, the Claimant/Applicant made submissions that:-

i. The Claimant/Applicant's Advocate not attending Court constituted a mistake that was not meant to deliberately delay the course of justice. In support of this submission, the Claimant relied on **BELINDA MURAI & OTHERS VS AMOS WAINAINA [1979] EKLR** in that:-

> *"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."*

ii. The Claimant relied on **EDNEY ADAKA ISMAIL vs EQUITY BANK LIMITED CIVIL CASE NO. 727 OF 2012** in support of the submission that the Advocate's mistake ought not to be visited upon the Claimant.

iii. Since the Claimant's Advocate was not aware of the orders issued on 25th July, 2018 the suit ought to be reinstated. In support of this submission, the Claimant relied on the case of **GOLD LIDA LIMITED vs NIC BANK LIMITED AND JOSEPH M. GIKONYA T/A GARAM INVESTMENT AUCTIONEERS ELC CIVIL SUIT NO. 177 OF 2017** where the Court found that the inconvenience caused in the matter to the Defendant upon reinstatement of that suit could be adequately remedied.

iv. Every person has the right to have any dispute that can be resolved by the application of law and decided in a fair and public hearing before a court and since the Claimant has a good case with triable issues, he will suffer prejudice if he is not heard and should therefore be given an opportunity. In support of this submission, the Claimant/Applicant cited the case of **JOHN NAHASHON MWANGI vs KENYA FINANCE BANK LIMITED (IN LIQUIDATION) [2015] eKLR** and **TRANSAFRICA ASSURANCE CO. LTD vs LINCOLN MUJUNI** cited in the case of **PHILIP MUTUTI NDARUGA vs GATEMU HOUSING CO-OPERATIVE SOCIETY LTD CIVIL APPEAL NO. 73 OF 2013.**

v. The Respondent has not shown that it stands to suffer any prejudice and has not provided any documentary evidence to prove that it will suffer difficulty in retrieving evidentiary material and suitable witnesses. In support of these submissions, the Claimant/Applicant relied on **JIM RODGERS GITONGA NJERU vs AL HUSNAIN MOTORS LIMITED & OTHERS CIVIL SUIT NO. 131 OF 2009.** Further in support, the Respondent also relied on the case of **JOSHUA CHELELGO KULEI vs REPUBLIC & 9 OTHERS [2014] eKLR** where it was held:-

> *"Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability."*

vi. The Claimant finally relied on this Court's decision in **ISAAC GAKUA MWANGI vs CHIEF EXECUTIVE OFFICER WOMEN ENTERPRISE FUND CAUSE NO. 526 OF 2016** that:-

"*I am satisfied that it would not be in the interest of justice to dismiss this case for want of prosecution in the circumstances that the respondent will not suffer substantial prejudice if the case is fixed for hearing while the dismissal of the case would completely banish the claimant from having his case decided on the merits.*

It is a cardinal rule of justice that dismissal of cases should be resorted to by courts sparingly and only in cases where the delay is inordinate and there is no justifiable explanation of the same, or if the suit is an abuse of court process or where the interest of justice dictates so. I do not find the delay herein inordinate or inexcusable. I do not find any evidence of abuse of court process and I am satisfied that the claimant has satisfactorily demonstrated his interest to prosecute the case."

On the other hand, the Respondent filed written submissions dated 17th February, 2020 and filed on 18th February, 2020. In its submissions, the Respondent identified the issues for this Court's determination as follows:-

a. Whether there has been inordinate & excusable delay on the part of the Plaintiff?

b. Whether the reasons advanced by the Claimant in the application are sufficient/persuasive to warrant vacation of the orders of 25th July, 2018.

c. Whether it would cause grave injustice to the defendants if the case were allowed to proceed.

In summary, the Respondent made submissions that:

a. The dismissal of the Suit was premised on Order 12 Rule 3(1) of the Civil Procedure Rules which states that if on the day fixed for hearing after the suit has been called on for hearing outside the court, only the Defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court.

b. The Applicant herein failed to attend the hearing scheduled by consent of both the parties as a result of which court, upon application by the Defendant, exercised its discretion and dismissed the suit as evidently, the Applicant was not interested in prosecuting the matter.

c. The conditions which must be proved before a suit is dismissed were set out in the case of **Ivita vs Kyumbu [1984] eKLR** where Chesoni J as he then was held:

"*The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the Defendant satisfies the Court that there has been prolonged delay and the Plaintiff does not give sufficient reason for the delay, the Court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed.*"

d. There has been inordinate delay in setting this suit down for hearing. The suit was at first dismissed for want of prosecution on 25th July, 2018. The Claimant has taken up another year to file the application seeking to re-instate the suit that was dismissed for want of prosecution. Neither the delay in prosecuting the main claim nor the subsequent delay in the filing of the application to vacate the orders for dismissal has been explained. In support of this submission, the Respondent relied on the case of **NILANI v PATEL [1969] EA 341** was cited in the case of **GOVERNORS BALLION SAFARIS LIMITED vs SKYSHIP COMPANY LIMITED & COUNTY COUNCIL OF TRANSMARA [2013] eKLR**

e. The hearing date when the suit was dismissed had been fixed pursuant to a mutual understanding by the parties that the date was convenient. We humbly submit that a delay in excess of two years from date of filing the cause and one year from the date of the same being dismissed points to the fact that the Claimant had/has lost interest in the matter. The loss of interest to prosecute the matter would explain the Claimant's failure to attend Court.

f. The Claimant's Advocate's claim that he was late to attend court is not excusable. No explanation whatsoever has been given as to why he could not deputize any other Advocate and neither was there an explanation as to why the Claimant did not attend court in person. Further had the Claimant attended court for this matter on 25th July, 2018, and ordinary perusal of the file would have shed light on the true position of the matter and led him to act promptly.

g. The Respondent relied on the Court of Appeal case of **Rajesh Rughani v Fifty Investments Limited & another [2016] eKLR** where it upheld the High Court's finding that rejected the Plaintiff's argument that delay and inaction on the part of counsel should not be visited on the innocent client.

h. The Claimant has the primary role to take steps to progress their case since they are the ones who dragged the Respondent to Court in the first place. In every civil suit, it is the Plaintiff who is in pursuit of the remedy and as such should take all the necessary steps at his disposal to achieve an expeditious determination of his claim.

i. The Respondents continue to be vexed by the pendency of this suit which has now denied them their constitutional right to a fair trial. The Respondents have suffered prolonged anxiety over this mater and risk the unavailability of witness, loss of documents crucial to this matter and increase in costs.

j. The continued pendency of the suit is contumelious and has not been justified and its existence indefinitely without prosecution is becoming oppressive and a denial of justice to the Defendants which impinges of fair hearing. In support of this submission, the Respondent relied on the case of **Ramji Ratna and Company Limited v Attorney General [2019] eKLR** and **Anthony Kaburi Kario & 2 Others v Ragati Tea Factory Company Limited & 10 Others [2014] eKLR** where it was held:-

> *"Needless to say, unreasonable delay in concluding a case breeds injustice whether the delay has been occasioned by the plaintiff or by the defendant. Equally, I am alive to the demands of the overriding objective of the law that parties should assist the court to attain an expeditious, proportionate, just and affordable resolution of disputes. The Respondent has acted contrary to the said constitutional desire and has, thus, infringed upon the legitimate expectation of the Applicant that this dispute will be resolved timeously. In the circumstances, the court is not persuaded to exercise its discretion leniently or at all in favour of the Respondent; for such would be a lavish exercise of discretion, and I do not think it is permitted in law."*

Determination

The principles for reinstatement of cases dismissed for non-attendance are well captured in judicial authorities some of which have been relied upon by the parties in their opposing submissions. The case of **Birket v James [1978] A.C. 297** elaborately set out the principles that the Court ought to consider in an application for reinstatement when it was held:-

> *"… I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:*
>
> *i. Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
>
> *ii. Whether the delay is intentional, contumelious and, therefore, inexcusable;*
>
> *iii. Whether the delay is an abuse of the court process;*
>
> *iv. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
>
> *v. What prejudice will the dismissal occasion to the plaintiff*
>
> *vi. Whether the plaintiff has offered a reasonable explanation for the delay;*
>
> *vii. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?"*

The Claim in this matter was filed by the Claimant/Applicant on 11th November 2015 by way of a Memorandum of Claim dated 9th November, 2015. The suit came up for hearing on 25th July, 2018 by consent of the parties appearing before Hon. D.C. Mutai (Deputy Registrar) on 14th December, 2017.

The Court record reflects that on the said 25th July, 2018, there was no appearance either by the Claimant or his Advocate. The suit was thus dismissed for non-attendance by Abuodha J. with costs to the Respondent. The Court record shows that the next entry was made on 2nd May, 2019 by the registry for fixing of the matter on 11th July, 2019 for hearing. It is unclear why the same was fixed for hearing when the suit had already been dismissed. However, the same was raised by the Respondent's Advocate and noted by Wasilwa J. who confirmed that the matter stood dismissed.

It is the Claimant's case supported by an Affidavit sworn by his Advocate that the reason for non-attendance was that the said Advocate was late to court on account of an emergency. Further, that upon the said Advocate's arrival, he found that the matter had been called out and was informed by the Court clerk that the matter was taken out of the cause list and was advised to take a date at the registry by the said clerk. In the supporting affidavit sworn by the Claimant's Advocate, it has not been disclosed to this court the nature or particulars of the said emergency or the name of the Court Clerk that allegedly informed him that the matter was taken out of the day's cause list.

The foregoing notwithstanding it was reckless for counsel to fail to instruct another counsel to hold his brief and inform the court that he was indisposed and have the matter placed aside or at the very least to peruse the court file to confirm the orders of the court.

The Claimant's Advocate sought to invite the Respondent's Advocate for fixing of a date for hearing 5 months later on 3rd December, 2018. The instant application for reinstatement was filed on 27th August, 2019, a month after the last court attendance of 11th July, 2018 when the Claimant's Advocate alleges to have discovered that the suit was dismissed. Both instances of which I find, amount to inordinate and inexcusable delay.

In the Application, the Claimant pleads that he has a good case with triable issues and is praying for an opportunity to be heard yet he has not sworn an affidavit in support of the application or even alluded to his whereabouts on the material date that the matter was scheduled to come up for hearing of his case.

I find that the Claimant has not personally expressed any interest in prosecuting his case.

I have had occasion to read the Memorandum of Claim dated 9th November, 2015 which is premised on the Claimant's claim wrongful and unfair termination by the Respondent. I have also seen the two supporting documents filed thereto one of which is a probation letter dated 5th May, 2015 appointing the Claimant as a SAP Administrator for a period of 3 months from the date of the letter with an option to sign a contract if both parties wish to do so. The other is the Claimant's payslip for the month of August 2015.

In the Memorandum of Claim, the Claimant pleads that the contract was terminated on 1st September, 2015 which the Respondent has referred to as the date of termination of the contract in the witness Statement by Dominic Ogera Nyakundi. There is no mention by either of the parties of a renewal or extension of the probationary contract and it would follow that the contract abated naturally.

I do not see any triable issues for the court's determination that would necessitate the reinstatement of this suit. Needless to say, the conduct of the Claimant alludes to his lack of faith in the claim and blatant disinterest in pursuing it. To reinstate this suit would only serve to prejudice the Respondent to have the suit hanging over its head which the Claimant as its proponent is not keen to pursue.

In view of the foregoing, I find no merit in the application and hereby dismiss the Claimant's application with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

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, the 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 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the 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.

MAUREEN ONYANGO

JUDGE