



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2589 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 21st May, 2020)

EDWARD OCHIENG.....CLAIMANT

VERSUS

DAN OKUMU.....RESPONDENT

RULING

1. The Ruling before Court is in respect of the Applicant's Notice of Motion filed on 7/8/2019 seeking the following orders:

1. ***THAT this suit be dismissed with costs for want of prosecution.***

2. ***THAT the costs of this application be awarded to the Defendant.***

2. The Application is premised on grounds that:

1. ***The Claimants have neglected and/or otherwise failed to set down the suit for hearing and/or otherwise failed to take any steps to prosecute the same for a period of over 12 months.***

2. ***The suit was last in Court on 22/6/2019 for a mention and the Court directed that a hearing date be taken at the registry.***

3. ***The Claimant has since, not made any effort to set the matter for hearing.***

3. The Application is supported by the Affidavit of Kairu Mbuthia, an advocate of the High Court, sworn on 7/8/2019. He reiterates the grounds set out in the application.

4. In response to the Application, Edward Ochieng the Respondent herein filed a Replying Affidavit sworn on 5/11/2019. He depones that matter was certified ready for hearing on 22/6/2017 but the Court diary for the year 2017 had been closed.

5. He avers that in the month of February 2018, he visited his then advocate who informed him that the file could not be traced at the registry and they were endeavouring to look for the Court file. He further avers that his advocate informed him that the matter was listed for hearing on 23/1/2018 but the file could not be traced and apologised for failing to notify him of the date.

6. He avers that he personally went to the Registry to enquire on the progress of the matter but could not be assisted as he did not know the case number. He avers that he instructed the present counsel who upon perusal of the Court file, found out that the current application had been filed and that the file was last in Court on 22/6/2016.

7. He avers that due to communication barrier and the lack of truth between him and his former advocate, he was not in a position to obtain the right information on the progress of his case. He urges the Court to grant him an opportunity to amend his claim and prosecute his claim.

8. The application proceeded by way of written submissions.

Applicant's Submission

9. The Applicant submits that the statutory underpinnings on dismissing a suit for want of prosecution are laid out under Order 17 Rule 2 of the Civil Procedure Rules. He submits that the Court in ***Ivita v Kyumbu [1984] eKLR*** held that each case must be decided on its own facts but the court will frown on inexcusable delay and do everything possible to enforce expedition of trial.

10. He relies on Section 107 of the Evidence Act and submits that the Respondent has failed to produce any evidence in support of his attempts to rectify the allegations of missing files and miscommunication with his advocate.

11. It is his submission that the respondent's allegations are mere excuses made in an attempt to delay the matter. He avers that the Court should consider whether in allowing this application, it will be advancing the overriding objective the provisions of Article 159 (2) (b) of the Constitution. He therefore urges the Court to allow its application.

Respondent's submission

12. The Respondent submits that a perusal of the grounds of the application and Supporting Affidavit shows that the Applicant has failed to explain how the delay is inexcusable. In support of this, he relies on the case of **Kenya Power & Lighting Co. Ltd v London Distillers (K) Ltd [2014] eKLR**. He also relies on the Ivita case cited by the Applicant.

13. He submits that he has stated the attempts he made in following up on the matter to have his case prosecuted through his former counsel. He relies on the decision in **Ngong Hills Supermarket Limited v Bidco Oil Refineries Limited [2017] eKLR** where the Court held that when an advocate is said to have failed his client, it is necessary for the Court to ascertain if the party had demonstrated the steps taken by the client in the matter. He submits that he should be granted a chance to prosecute his case.

14. I have examined all the averments of the Parties herein. I note that this matter was before Court on 22/6/2017 when the Court ordered that the parties should set down this case for hearing. This was not done and so the Respondents were prompted to file this application on 7/8/2019.

15. The Claimant contends that the failure to set down this case for hearing was due to an omission on the part of his counsel for which he should be pardoned.

16. I do agree that the Claimant was inordinately late in setting down this case for hearing as ordered by Court. This however was due to the failure on the part of his counsel and which should not be vested against him.

17. The Claimant is willing to set down the case for hearing. In order to avoid miscarriage of justice, I will reject this application and order that this matter be set down for hearing within 90 days. In default the matter to stand dismissed.

Dated and delivered in Chambers via zoom this 21st day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties