



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 47 OF 2017**

*(Before Hon. Justice Mathews N. Nduma)*

**PATRICK A. PAULO.....CLAIMANT**

**VERSUS**

**ABBYSINIA IRON AND STEEL LIMITED.....RESPONDENT**

**RULING**

1. The claimant/applicant filed a notice of motion application dated 3<sup>rd</sup> July 2019 praying for an order to set aside the orders of the court issued on 21<sup>st</sup> February 2018 dismissing the suit for want of prosecution and reinstate the suit for further hearing and determination on merits.
2. The application is premised on grounds set out on the face of the notice of motion to wit:
  - (i) Failure to attend court on 21<sup>st</sup> February 2018 was not deliberate.
  - (ii) Given the nature of the suit it is fair and just to have matter heard on the merits.
  - (iii) The claimant would not suffer loss that cannot be cured by way of costs.
  - (iv) The application is made in good faith
3. The application is buttressed by an affidavit of Maurice Carlos Ouma an advocate of the High Court of Kenya in which he deposes that the matter was fixed for hearing on 21<sup>st</sup> February 2018 and the claimant arrived late in court due to a crackdown of public transport vehicles. That the court ought to have closed the claimant's case and set the matter for defence hearing. That it is fair and just that the order issued on 21<sup>st</sup> February 2018 dismissing the suit for non-attendance be set aside and the suit be reinstated for hearing on the merits.
4. The respondent filed a replying affidavit on 4<sup>th</sup> December 2019 in which he deposes that it is not true that employment matters had been stayed throughout the country as the applicant deposes since only WIBA matters had been stayed.
5. That there is no explanation why the advocate for the claimant did not attend court if indeed the claimant was delayed in traffic crackdown. That in terms of *Rule 22 (2) of the Employment and Labour Relations Court (procedure) Rules 2016*, the court may dismiss a suit where a party fails to attend a hearing without explanation.
6. That the application was filed on 9<sup>th</sup> July 2019, one year and four months from the date the suit was dismissed for non- attendance. That the application was filed inordinately late and the court ought to dismiss it on this score alone.
7. That it is difficult to understand why the applicant did not check the status of the matter soonest possible and timeously file their application. That the court of equity should not indulge the indolent. That the justice of the case shall be defeated if the case is reinstated upon such inordinate delay. That the application be dismissed with costs.

**Determination**

8. The applicant has provided a false account of what transpired on 21<sup>st</sup> February 2018 in his grounds in support of the application.

9. The record discloses that on 21<sup>st</sup> February 2018, Mr. Adwar, Advocate held brief for Mr. Ouma Odhiambo for the claimant/applicant whereas Mr. Abande appeared for the respondent.

10. Mr. Adwar informed court that Mr. Ouma lost contact with the claimant and was unable to proceed. Mr. Abande opposed the application for adjournment for the reason that the hearing date was set by consent of the parties and counsel for the claimant did not communicate to Mr. Abande that he was no longer in contact with the claimant.

11. Mr. Abande insisted that matter to proceed as scheduled. Mr. Adwar having informed court that counsel had lost contact with the client and was unable to proceed with the hearing, the court dismissed the suit for lack of prosecution with no order as to costs.

12. It is inexplicable that it took the claimant/applicant one year and four months to bring an application to set aside the order made by the court dismissing the suit despite the fact that counsel for the claimant was represented in court by Mr. Adwar.

13. The delay by the applicant is unconscionable and the court is unwilling to exercise its discretion to condone this blatant indolence on the part of the applicant.

14. Reinstating the suit one year and four months down the line is prejudicial to the respondent and amounts to defeat of justice since justice delayed is justice denied.

15. All parties are entitled to expedient disposal of justice. *Rule 22 of the E&LRC (procedure) Rules 2016*, permitted the court to dismiss the suit for want of prosecution by the *dominus litis*, being the claimant.

16. The application lacks merit and is dismissed with no order as to costs.

**Ruling Dated, Signed and delivered at Nairobi this 13<sup>th</sup> day of May, 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 15<sup>th</sup> 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**

M.C Ouma for Claimant/Applicant.

M/S Otieno for Respondent

Chrispo – Court Clerk