



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 147 OF 2015

(Formerly HCCC 385 of 2013)

Before Hon. Lady Justice Maureen Onyango

MARIA SHITANDI WANGARA.....CLAIMANT

VERSUS

EQUITY BANK LIMITED.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

The Claimant filed the instant application on 30th April 2019, seeking the following reliefs-

- a. Spent.
- b. That this Court be pleased to set aside the order to dismiss the Claimant's case which order was made on 4th December 2017.
- c. That an order be made by this Court to reinstate this cause for the inter partes hearing on a priority basis.
- d. That the costs of this application be provided for.

The application is based on the grounds set out on the face of the motion and the Applicant's Supporting Affidavit sworn on 29th April 2019. The Respondents have opposed the application vide the Replying Affidavit of Charles Gichangi sworn on 17th June 2019. The Applicant filed a Further Affidavit sworn on 29th July 2019, in response to the Respondents' Replying Affidavit.

The Applicant's Case

The Applicant avers that she has a valid claim against the Respondents. It is her case that the court file in Nairobi HCCC 385 of 2013 was transferred from the High Court to the Employment and Labour Relations Court, without any notice to her or her advocates.

She avers that due to the transfer, the Applicant's advocates could not trace the court file as it was missing at the High Court, Registry. It is further her averment that the suit was dismissed without her being served with any notice.

The Applicant states that her advocates on record became aware of the suit's dismissal only upon making a request to the Deputy Registrar to give a mention date for directions on the matter.

It is the Applicant's position that she stands to suffer irreparable loss or damage if the suit herein is not reinstated and that the Respondents will not be prejudiced by the reinstatement. She avers that she is ready to avail herself, at any time, for the hearing of the suit should it be set down for hearing.

The Respondents' Case

The Respondents contend that the Applicant is not being candid when she alleges that the matter was transferred without her knowledge. They aver that on 6th November 2014, the matter was scheduled for a pre-trial mention before Mabeya J. of the High Court. However, the Applicant's advocate requested for more time having not complied with pre-trial directions.

Consequently, the Applicant and the 1st Respondent were ordered to comply within 45 days and directions were given that the matter be mentioned on 20th January 2015, to confirm compliance. The matter came up on the said date before Aburili J. who directed that the matter be placed before the principal judge of the Employment and Labour Relations Court, for hearing and further directions. The Respondents aver that these orders were issued in the presence of Mr. Gathogo holding brief for the Applicant's advocate, Mr. Nyamweya.

It is the Respondents' position that the Applicant has not come to this Court with clean hands by being dishonest, hence undeserving of the equitable remedies sought. It is their further position that upon the transfer of this suit, it was upon the Applicant to prosecute the same. However, the Applicant took no such action for a period of three years prompting the court to issue the parties with a notice to show cause why the suit should not be dismissed for want of prosecution.

The Respondents aver that the matter came up on 4th December 2017, for the hearing of the notice to show cause. That the Applicant and her advocates were absent prompting the Court to dismiss the suit for want of prosecution pursuant to order 17 rule 2 of the Civil Procedure Rules. It is their position that from the foregoing, it is evident that the Applicant was not interested in prosecuting the suit.

The Respondents contend that the Applicant has not adduced any of her correspondences to the High Court complaining about the missing file.

They aver that there was undue delay in making the application and that they will suffer great prejudice if the suit is reinstated as litigation must come to an end. Finally, they submit that the application is an abuse of the court process and should be dismissed with costs to the 1st Respondent.

The Applicant's Rejoinder

In her further affidavit, the Applicant contends that though her advocate had been represented in Court on 20th January 2015, her advocates were not notified when the matter was transferred to this court.

The Applicant denies receiving the notice to show cause either personally or through her advocates. She contends that her advocates had been sending representatives to the registry to search for the court file and fix hearing dates. She urges that the mistake of an advocate should not be visited upon an innocent

litigant.

Parties agreed to dispose of the application by way of written submissions.

The Applicant's Submissions

- 4) Whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice *to the Defendant*;
- 5) What prejudice will the dismissal cause to the Plaintiff.

The Applicant has explained that the reason for the delay was because neither she nor her advocate had been issued with a notice that the matter had been transferred hence, they did not know the case number the matter was allocated. This was the reason for their inaction for the 3 years before the suit was dismissed for want of prosecution. This however is not true as the court record reflects that on 18th May 2015, Wanyoike and Macharia, Advocates for the claimant, through one Boniface, a Court Clerk, applied for perusal of the file and cited the correct court file number. The reason for perusal is given as the transfer of the suit to this court.

The Applicant has further not produced any document to prove that during the period she thought the court file was missing, she had done everything possible to trace the file. It is therefore my view that the 3-year inaction by the Applicant and her advocates has not been sufficiently explained or justified.

Further, the Application for reinstatement was brought one year and four months after the suit had been dismissed for want of prosecution. No evidence was adduced to justify the Applicant's reasons for the delay. The Applicant has contended that neither she nor her advocates were served with the notice to show cause. However, I am of the view that if the Applicant had been keen on following up on her matter, she would have realized this sooner.

By applying out the test in **Utalii Transport Company Limited & 3 Others vs. NIC Bank Limited & Another [Supra]**, that the court will not assist the indolent, but rather serve the interest of substantive justice on behalf of all the parties, it is therefore my considered opinion that the Respondents stand to be prejudiced if the suit is reinstated, since 1 year and four months have lapsed since it was dismissed; over and above the 3 years which had lapsed since the Applicant's last action. Further, the Applicant's conduct shows that she was not keen on following up on the matter and has also not been truthful hence does not deserve to benefit from this court's discretion.

As such, the Application is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of 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, 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 1B 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.

MAUREEN ONYANGO

JUDGE