



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1393 OF 2013**

**JOHN NJOROGI KAMANDE.....CLAIMANT**

**VERSUS**

**DELMONTE KENYA LIMITED.....RESPONDENT**

*(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> June, 2020)*

**RULING**

The claimant filed a notice of motion on 09.10.2019 through Muturi Njoroge & Company Advocates. The application was under Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules; Sections 1A, 1B, 3A and 63E of the Civil Procedure Act; and all other enabling provisions of law. The claimant prayed for orders:

- a) That the Honourable Court be pleased to set aside the orders made on 07.04.2017 dismissing the claimant's suit and all other consequential orders thereto.
- b) That the Honourable Court be pleased to reinstate the instant suit herein.
- c) That costs of the application be in the cause.

The application was based upon the following grounds:

- a) The suit was dismissed on 07.04.2017.
- b) The claimant's counsel had failed to prosecute because the court file had been missing since 2016.
- c) The notice to show cause why the suit should not be dismissed for want of prosecution had not been served upon the claimant's counsel and became aware of the dismissal on 24.09.2019 after perusal of the Court file.
- d) The claimant will suffer insurmountable damage and loss not curable with damages if the application is not allowed.
- e) In the supporting affidavit by John Muturi Njoroge annexed to the application it is stated that the suit was coming up for hearing on 26.11.2015 but the Court did not sit and by the letter dated 08.04.2016 the Advocate had written that the case be listed for recording consent.
- f) The supporting affidavit further states that the Advocate had been unable to prosecute the suit because the court file had gone missing.

The respondent opposed the application by filing on 16.12.2010 the replying affidavit of Muendo M. Uvyu Advocate. The grounds of opposition are urged as follows:

- a) The case was listed before the Judge on 24.11.2014 when parties agreed to mention the suit on 16.12.2014 to record settlement.
- b) On 16.12.2014 parties had not reached a settlement and the Court directed them to fix a hearing date at the registry. Thereafter the claimant took no steps to fix the date at the registry.

- c) The letters by the claimant's advocate dated 14.12.2017 and 24.09.2019 have not been stamped by the registry and were issued long after dismissal of the suit on 07.04.2017. Since 16.12.2014 when parties last appeared before the Judge the claimant had taken no steps to prosecute the suit.
- d) The suit was dismissed on 07.04.2017 and since then the application was not filed until 9.10.2019 and the applicant is guilty of laches.
- e) It is not true that the Court file was missing since 2016 and no application was made by the claimant for reconstitution of the court file.
- f) The Court can dismiss a suit for want of prosecution at its own motion and without serving the parties.
- g) The respondent will be prejudiced because its witness one Bernard Kinaga has since left employment and cannot be procured to testify in the case since there is bad blood between him and the respondent and has since sued the respondent in Cause 597 of 2019 at Nairobi.
- h) The application is incompetent and bad in law thus liable for dismissal with costs as is an abuse of court process.

Parties filed their respective submissions. The Court has considered the application, the affidavits filed for parties and the submissions and makes findings as follows:

- 1) As submitted for the respondent, the applicant has not provided evidence to show that indeed the Court file went missing as alleged for the applicant. The applicant has not exhibited correspondence duly received by the Court in that regard. The Court therefore finds that the applicant has failed to establish that the suit was not prosecuted because the court file was missing.
- 2) As urged and submitted for the respondent the Court finds that the applicant is guilty of inordinate and unexplained delay in filing the application to set aside the dismissal order. There is no demonstrated vigilance that the applicant was keen to prosecute the suit and the letters by the advocate alleging that the court file had gone missing were issued long after the suit had been dismissed for want of prosecution.
- 3) There is one pertinent issue that the applicant has raised and which in the Court's findings seriously mitigates the applicant's case. It is urged and submitted for the applicant that the notice to show cause before the dismissal was not served upon the respondent. The dismissal orders were on 07.04.2017. The notice to show cause dated 08.03.2017 on record shows that it was served at the office of the respondent's counsel and for the applicant's counsel it is endorsed "mailed". It is not clear from the record whether it was a registered mail or whether it was an ordinary mail and no affidavit of service has been filed to explain the service in issue. The Court finds that despite the failures on the part of the applicant as already found in this ruling, there is no evidence that the notice to show cause had been served upon the applicant's advocate and the Court finds that to be an overriding factor towards exercising discretion in favour of the applicant. The Court considers that had the notice been served the claimant would have had a good chance to show why the suit ought not to have been dismissed.
- 4) The Court has considered the respondent's case that the witness has since sued the respondent and returns that the evidence is that the witness is available and is compellable in accordance with the law and in any event the respondent may consider substituting or adding a witness as may be appropriate. Thus the alleged prejudice on the part of the respondent is clearly capable of being mitigated accordingly.
- 5) Looking at the nature of application and the parties' margins of success, the costs of the application shall be in the cause.

In conclusion, the application filed for the claimant on 09.10.2019 is hereby allowed with orders:

- 1) The orders by the Court given on 07.04.2017 dismissing the claimant's suit and all processes flowing therefrom are hereby set aside and the suit duly reinstated for hearing and determination on its merits.
- 2) The parties to fix a convenient and early hearing date at a mention before the Deputy Registrar within 30 days from the date of this ruling.
- 3) The costs of the application in the cause.

**Signed, dated and delivered in court at Nairobi this Friday, 26<sup>th</sup> June, 2020.**

**BYRAM ONGAYA**

**JUDGE**