



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 626 OF 2014**

**JOHN ONDIEK OJWANG.....CLAIMANT**

**VS**

**EAST AFRICAN STORAGE COMPANY LIMITED.....RESPONDENT**

**RULING**

1. The Claimant's application brought by Notice of Motion dated 6<sup>th</sup> February 2020, seeks reinstatement of his suit dismissed by this Court on 7<sup>th</sup> May 2018, for want of prosecution.
2. The application is supported by the Claimant's own affidavit and is based on the following grounds:
  - a. That on 8<sup>th</sup> December 2014, the Claimant instructed the firm of M. Ananda & Co Advocates to act on his behalf in this matter;
  - b. That the said firm proceeded to file pleadings and the Claimant was confident that his claim would be prosecuted to the end and justice served to him for his claim of unfair termination against the Respondent;
  - c. That a long time passed and the Claimant's Advocates then on record did not update the Claimant on the progress of the matter, necessitating the Claimant to look for further assistance from a non-governmental organisation known as Human Rights Agenda (HURIA) on 29<sup>th</sup> February 2016;
  - d. That the Claimant's Advocates then on record filed an application to cease acting dated 15<sup>th</sup> May 2016;
  - e. That the said application was never served on the Claimant and all this time he knew he had an Advocate representing him in the matter;
  - f. That a notice of dismissal from the Court was served upon the Claimant's Advocate then on record who received it on 19<sup>th</sup> April 2018 but this information was not communicated to the Claimant;
  - g. That on 7<sup>th</sup> May 2018, the Claimant's Advocate then on record did not attend court and consequently the suit was dismissed;
  - h. That after a long period had passed and there being no communication about the matter, the Claimant went to the court registry and upon perusal of the court file, it became apparent that the suit had been dismissed by the Court on 7<sup>th</sup> May 2018;
  - i. That the suit was dismissed without proper notice issuing to the Claimant;
  - j. That the Claimant has always been ready and willing to prosecute the case and had taken all steps to procure all the necessary documents in support of his case;
  - k. That the Claimant has sufficient basis for seeking the orders sought in the application;
  - l. That it is in the interest of justice that the application is allowed so that the cause herein can be expeditiously determined on merit;
  - m. That this application is made in good time and in absolute good faith upon discovery that the suit had been dismissed;

n. That unless the orders sought are granted, the Claimant is bound to suffer irreparably as his claim of unfair termination from employment was never determined and he remains aggrieved as his family has continued to suffer.

3. The Respondent's response is contained in a replying affidavit sworn by its Human Resource Manager, Eunice Juma.
4. Juma depones that the claim herein came up in court on various occasions, culminating with a hearing on 2<sup>nd</sup> June 2016, and that in all those occasions it was adjourned at the instance of the Claimant.
5. Juma further depones that on 2<sup>nd</sup> June 2016, when the matter came up for hearing, the Claimant's Advocates had filed an application dated 1<sup>st</sup> May 2016 to cease acting for the Claimant, which application was granted on 6<sup>th</sup> July 2016.
6. Juma adds that on 2<sup>nd</sup> June 2016, the Claimant was present in court and was aware of the fresh hearing date of 6<sup>th</sup> July 2016.
7. The Claimant is said to have asked for time to get another Advocate, which request was granted and the hearing adjourned to 6<sup>th</sup> July 2016.
8. The matter did not proceed on 6<sup>th</sup> July 2016 which is the last time it was in court.
9. While addressing the Court on 14<sup>th</sup> July 2020, Counsel now on record for the Claimant, Ms. Arika submitted that the claim had been dismissed due to the mistake of the Claimant's former Advocates, which mistake should not be visited on the Claimant.
10. Ms. Arika further told the Court that the application by the Claimant's former Advocates to cease acting had not been served on the Claimant and had not been prosecuted.
11. The only issue falling for determination by the Court in this application is whether the Claimant has made out a case for setting aside of the order made on 7<sup>th</sup> May 2018, dismissing the claim for want of prosecution.
12. Under Order 17 Rule 2 of the Civil Procedure Rules, the Court may, either *suo moto* or by application by the opposing party, dismiss a matter in which no action has been taken for a year.
13. Prior to the dismissal order made by the Court on 7<sup>th</sup> May 2018, no action had been taken for close to two years.
14. In his affidavit in support of the application, the Claimant blames his Advocate for failing to update him on the progress of his case.
15. In its decision in ***Whycliffe Bundi v Flame Tree Africa Limited [2018] eKLR*** this Court reiterated the well-known principle that cases belong to the parties not their Advocates.
16. The Claimant himself states that as far back as 2016, he was dissatisfied with the way his erstwhile Advocate was handling the matter. He even sought assistance from a non-governmental organisation by the name Human Rights Agenda (HURIA).
17. The question is, after expressing dissatisfaction with the performance of his Advocate, what did the Claimant do? From the record, he did nothing. Even after his case was dismissed it took him close to two years to move the Court.
18. From his conduct, the Claimant presents himself as a disinterested litigant who dumped his case and went to sleep. The fact that the application by his former Advocate to cease acting was not served and was not prosecuted does not change this verdict.
19. Overall, the Claimant has failed to advance any credible reason as to why he failed to prosecute his case. His application is therefore declined and his suit stands dismissed.
20. Each party will bear their own costs.
21. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF JULY 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Arika for the Claimant

Miss Opolo for the Respondent