



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1221 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ESTHER NYARUAI KABAU WANYOIKE.....CLAIMANT

VERSUS

GEORGE SICHANGI AND JOSEPHINE NJERI NAMASAKA T/A

SICHANGI PARTNERS ADVOCATES.....RESPONDENTS

RULING

On 2nd April 2019, the suit herein was dismissed for want of prosecution and non-appearance by the parties. Consequently, the Claimant filed this application seeking the following orders–

- a. That this Court be pleased to set aside the Order dismissing this suit for want of prosecution, which was made on 2nd April 2019.
- b. That further this Court be pleased to Order the immediate re-instatement of this suit.
- c. That simultaneously with prayer number 2 above, this Court do proceed to set a hearing date for the disposal of the main suit herein.
- d. That the costs of this Application be provided for.

The Application is supported by the grounds set out therein and the Supporting Affidavit of Edward Omulama Onditi sworn on 11th May 2020. The Respondent did not file any response to the application.

The Applicant avers that this matter was last in Court for hearing on 24th September 2019. However, the same was not heard and parties were advised to take a hearing date at the registry. That the Court diary for 2019 was closed and was re-opened in the last quarter of 2019. The Applicant fixed a hearing date at the Registry and was issued with a hearing date for 26th February 2020.

The matter appeared on the cause list for 26th February 2020 before the Deputy Registrar. However, all Deputy Registrars were away on seminar and parties were told to take fresh dates at the registry. That the Applicant was thereafter issued with a hearing date for 20th April 2020 but due to the COVID-19 pandemic, the hearing did not materialize.

The Applicant avers that she wrote to the deputy registrar on duty, seeking a fresh hearing date but was informed that the matter had come up on 2nd April 2014 and was dismissed for want of prosecution since there was non-appearance by both parties. The Applicant denies receiving the hearing notice that set the hearing date of 2nd April 2019. She attributes this to a mistake or oversight and avers that she should not be held liable for the same.

The Applicant urges this Court to reinstate the matter and issue a hearing date for the disposal of the main suit.

The Application was disposed of by way of written submissions with only the Applicant filing her submissions.

The Applicant submits that she was not laxed in prosecuting the matter. It is her submission that she sought a hearing date but was advised to

wait for a formal notice regarding the opening of the court diary.

It is submitted that Order 17 Rule 2(1) of the Civil Procedure Rules provides that a matter can only be dismissed if there has been a lapse of one calendar year without either party taking any step to prosecute the suit, and a notice to show cause why the suit should not be dismissed has been issued to them. She further submits that she never received a notice to show cause why the suit should not be dismissed. She relies on the case of **Ibrahim Athman Said v Ibrahim Abdille Abdullah & Another [2014] eKLR** where the Court set aside the orders that dismissed the Plaintiff's suit, as there was no evidence of service of the notice to show cause.

The Applicant submits that the Court should set the matter for hearing in view of the challenges the Applicant has faced in getting a hearing date at the registry and that there will be no prejudice occasioned to the Respondents.

Analysis and Determination

I have carefully considered the application, the evidence in support thereof together with the Applicant's submissions and find that the issue for determination before this Court is whether the Applicant is entitled to the orders sought.

Order 22(2) of the Employment and Labour Relations Court Rules provides as follows—

Subject to paragraph (1), where a party fails to attend Court on the day fixed for hearing, the Court may dismiss the suit except for good reason to be recorded.

The Applicant submitted that the parties never received the hearing notice setting the matter down for hearing on 2nd April 2019. This is corroborated by the fact that the Hearing Notice on record has no stamps affixed on to prove that the same was served upon the parties. Further, there is no Affidavit of Service on record showing that the parties were served with the same.

Order 17 Rule 2(1) of the Civil Procedure Rules, which is similar to Rule 16(1) of the Employment and Labour Relations Court (Procedure) Rules which the applicant has relied on is applicable to the application herein as it was not dismissed for want of prosecution but rather for failure to attend court on the hearing date. The relevant provision is Rule 22 of the Employment and Labour Relations Court (Procedure) Rules which provides –

22. Proceedings in the absence of either party

1. Where a hearing notice was served on the parties and an affidavit of service has been filed, the Court may proceed with the case before it in the absence of any party thereto if—

- a. the party has indicated that it does not wish to attend the hearing;**
- b. the party fails to appear for the hearing without providing any reasons; or**
- c. the Court is not satisfied with the reasons forwarded to it by that party for non-attendance.**

2. Subject to paragraph (1), where a party fails to attend Court on the day fixed for hearing, the Court may dismiss the suit except for good reason to be recorded.

I am satisfied that there is no evidence that the applicant was served with hearing notice of 2nd April 2019 when the suit was dismissed for nonattendance. In the circumstances the application succeeds. The orders of 2nd April 2019 dismissing the suit are set aside and the suit reinstated.

Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court 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