



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1533 OF 2011**

**(Before Hon. Justice Hellen S. Wasilwa on 16<sup>th</sup> September, 2020)**

**YUSUF OMONDI.....1<sup>ST</sup> CLAIMANT**

**CLARIS ATIENO.....2<sup>ND</sup> CLAIMANT**

**TIMOTHY AYIEKO.....3<sup>RD</sup> CLAIMANT**

**ROSE KATUMBI.....4<sup>TH</sup> CLAIMANT**

**MESHACK AMARIATI OKOTI.....5<sup>TH</sup> CLAIMANT**

**VERSUS**

**MAKINI SCHOOLS LIMITED.....RESPONDENT**

**RULING**

1. Before this Court is the Claimants' Application dated 20/1/2020 seeking the following orders:-

**a. THAT the Order of the Honourable Lady Justice Wasilwa made on 27/6/2019 dismissing the suit herein for want of prosecution under rule 16 of the Employment and Labour Relations Court Rules (2016) be set aside and the suit herein be reinstated.**

**b. THAT the costs of this application be provided for.**

2. The Application is based on the grounds set out therein and the 4<sup>th</sup> Claimant's Supporting Affidavit sworn on 20/1/2020. The Respondent has opposed the Application vide the Replying Affidavit of Silas Wafula sworn on 11/3/2020.

**The Applicants' Case**

3. The Applicants aver that they had initially instructed the firm of Ong'uti & Company Advocates and not Wesonga, Mutembei, Kigen & Associates Advocates hence the notice to show cause why the suit should not be dismissed for want of prosecution, was inadvertently served upon the latter Advocates instead. As such, they were never accorded an opportunity to be heard.

4. It is their case that they perused the Court file and realized that a hearing notice had been issued to Wesonga, Mutembei, Kigen & Associates Advocates who were on record for the Claimants in ELRC 1533 of 2013, filed against Riara Group of Schools.

5. The Applicants aver that they have since withdrawn their instructions from the firm of Ong'uti & Company Advocates and instructed the firm of Onesmus Githinji & Company Advocates, for effective and expeditious disposal of the claim.

6. It is averred that the Applicants are keen on prosecuting the matter and the delay in prosecuting the same was occasioned by their previous Advocates who misled them to believe that the matter was progressing well. It is their position that if the suit is not reinstated, they stand to suffer the prejudice of losing their rightful dues for services rendered to the Respondent for over 15 years.

**The Respondent's Case**

7. The Respondent avers that since 20/4/2016 when their Advocates took the conduct of this matter, the Applicants have not made any effort to set the matter down for hearing despite the show cause notices having been served on the wrong firm of Advocates.

8. The Respondent avers that the Applicants are guilty of laches having filed this Application on 27/9/2017, two years after the suit had been dismissed. The Respondent further avers that since the Applicants were aggrieved by its actions, they ought to have noted that their case was not progressing and should have been diligent in pursuit of their matter.

9. It is the Respondent's position that a party whose suit is dismissed and does not move the Court for more than 3 years, cannot be afforded an opportunity to indicate their interest in prosecuting the matter.

10. The application was disposed of by way of written submissions with both parties filing their submissions.

#### **The Applicants' Submissions**

11. The Applicants submit that the notice that was issued was defective for referring to a different suit and was not served upon the Applicants' Advocates, hence, there was no notice. As such, the orders issued were misdirected and amount to condemning the Applicants unheard. They rely on the cases of **MK vs. MWM & Another [2015] eKLR** and **Mbaki & Others vs. Macharia & Another [2005] 2 EA 206** where it was observed that a person ought to be accorded a hearing if they are likely to be adversely affected by the decision.

12. Additionally, the Applicants submit that the delay in prosecuting the case was occasioned by the mistake of their Advocate who also deceived them that he was attending to the matter while in actual sense no action was being taken. They rely on the case of **Lucy Bosire vs. Kehancha Div. Land Dispute Tribunal & 2 Others [2013] eKLR** where it was held that the mistakes of an advocate should not be visited upon their client.

13. It is submitted that the Respondent never filed an application to have the suit dismissed for want of prosecution and that its opposition to their application is unfair and an afterthought. It is further submitted that the Respondent has not demonstrated the prejudice they are likely to suffer if the orders sought are granted, whereas, the Applicants stand to suffer irreparable damage.

14. It was their position that they were intent on scheduling the matter for hearing at the earliest opportune time hence urged this Court to allow the application as prayed, with costs.

#### **The Respondent's Submissions**

15. The Respondent submits that there is no mandatory requirement under rule 16 of the Employment and Labour Relations Rules 2016 that a written notice should be given to the Applicants before the matter is dismissed for want of prosecution, and relies on the case of **Mwangi S. Kimenyi vs. Attorney General & Another [2014] eKLR** to support this position. They submit that it is wrong for the Applicants to hide their wrongdoing on account of wrong issuance of notices, as the notice for dismissal was issued through the Court's website in the cause list of 27/9/2017.

16. It is the Respondent's submissions that the Applicants have not attached any correspondences to show that they had followed up on the matter and relies on the case of **Julius Marete vs. Tom Ayora & 3 Others [2018] eKLR** where the Court stated as follows:-

**“A case belongs to the Plaintiff and it is its duty to take steps to progress it. Leaving a case to the Advocates without checking on its progress is also negligence on the part of the Plaintiff.**

17. The Respondent submits that the Applicants took two years three months to file an application for reinstatement which is an indication that they were not keen on following up on the matter, hence article 159 (2) (d) of the Constitution cannot aid them as sections 1A, 1B and 3A of the Civil Procedure Act requires just, expeditious, proportionate and affordable resolution of disputes.

18. It is the Respondent's submissions that the Applicants ought to have noted that their matter is not proceeding and exercised due diligence on their pursuit of the matter and relies on the case of **Barnabas Maritim vs. Manywele Korgorwen & Another [2016] eKLR** to fortify this position. It is their further submissions that the reasons given for the delay in filing the Application have not been justified and the same is an afterthought. The urged this Court to dismiss the Application with costs.

19. I have considered the averments of the Parties herein. From the record of this Court, this suit was scheduled to be heard on 27/9/2017. On the set date, no party appeared in Court hence this suit was dismissed for want of prosecution.

20. The Claimant/Applicant have contended that their initial advocates were Ong'uti & Company Advocates. It is true that the advocates for Claimants were replaced by Wesonga, Mutembei, Kigen and Associates who filed a Notice of Change of Advocates dated 13<sup>th</sup> February 2015.

21. It is also true that having filed a change of advocates, on 8/9/2017, Wesonga, Mutembei, Kigen & Associates were served with a notice to show cause to appear in Court on 27/9/2017 to show cause why this suit should not be dismissed for want of prosecution.

22. The service was effected by the Court and the stamp of receipt of the Notice is indicated on the face of the Notice.

23. On 27/9/2017, the Applicants nor their advocates failed to attend Court hence the dismissal of the suit.

24. From the record however, I note that the Notice of Change of Advocates was in relation to Cause No. 1533 of 2013 and not in relation to this Case 1533 of 2011.

25. The Parties were also different and therefore it was in error for the Court to assume that the correct counsels had been served when infact the firm of Wesonga, Mutembei, Kigen and Associates were the ones served.

26. That notwithstanding, this application was dismissed on 27/9/2017. The Applicants chose to file the current application on 20/1/2020, which is about 3 years after their suit was dismissed.

27. The delay in filing this application cannot be explained. The Applicants assign the delay to their previous counsel who misled them into believing that the case was progressing well when infact it was not.

28. The show cause letter having been filed upon the wrong counsel, I will exercise my discretion and allow the application and reinstate this suit for hearing. The Applicants should move with speed and set the suit for hearing within 30 days. In default this matter will stand dismissed again.

29. Costs in the cause

**Dated and delivered in Chambers via zoom this 16<sup>th</sup> day of September, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Khayesi for Respondent – Present

Applicants – Absent