



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 2590 OF 2016**

**JOSEPHINE NDINDA KIMWELI.....1<sup>ST</sup> CLAIMANT**

**FLORENCE KYENGO KATUNGE.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**JAZZ WARAH.....1<sup>ST</sup> RESPONDENT**

**MINI WARAH.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> October, 2020)

**RULING**

The claimants filed the application on 14.02.2020 through Chwero & Company Advocates. The application was under Order 10 Rule 9, Order 12 Rule 7 of the Civil Procedure Rules, section 3A of the Civil Procedure Act, Cap 21 and other enabling provisions of law. The applicants prayed for orders:

- a) The Honourable Court be pleased to set aside its orders issued on 11.03.2019 dismissing the claimant's suit filed in Court on 16.12.2016 and dated 28.12.2016.
- b) Subsequent to prayer (1) above, the claimant's suit dated 16.12.2016 be reinstated and the same be listed for hearing in the normal manner or on such date as may be ordered by the Court.
- c) That costs be in the cause.

The application was based on the annexed affidavit Serah Njenga and upon the following grounds:

- a) The suit was dismissed with no reason whatsoever.
- b) The suit was not listed for notice to show cause why it should be dismissed for want of prosecution.
- c) The claimants have a good case which should be heard at trial.
- d) The respondent will suffer no prejudice and the suit be reinstated in the interests of justice.

The respondent filed grounds of opposition on 11.05.2020 through Kagwimi Kangéthe & Company Advocates. The respondent urged as follows:

- a) The application is fatally defective and the prayers cannot be granted.
- b) The application is filed after a long undue delay.
- c) The applicants have not established sufficient grounds to warrant exercise of the discretion to set aside.

d) After filing suit, the applicant took no step for over 2 years to prosecute the suit.

e) Reinstating the suit means continued burdening of the respondent with unnecessary litigation.

Parties have filed their respective submissions. The Court has considered the material on record. A mention notice (by the Deputy Registrar) on record dated 04.03.2019 addressed to the claimants in person and the respondent's advocates shows that the case was fixed for mention on 11.03.2019 before Ongaya J at 9.00am for further directions. There is no evidence that the mention notice had been served. The record shows that the case came up on 11.03.2019 before Ongaya J and both parties were not present. The Court then ordered, "**Is not clear why suit is listed. It appears withdrawn by reason of notice to withdraw filed 22.03.2017. Withdrawal upheld and recorded.**" The notice of withdrawal filed on 22.03.2017 is signed by the claimants in person and it states, "**WITHDRAWING CAUSE NO.2590 OF 2016 FROM M/S WANGARI NJUGUNA ADVOCATES AND WILL FILE A FRESH CASE BY THE CLAIMANTS THEMSELVES.**"

In view of the court record it is obvious that the application is misconceived as it was obviously made without extracting the order or obtaining the certified record of proceedings of 11.03.2019. The grounds of opposition are equally misconceived as far as they do not address the gist of the proceedings of 11.03.2019 which show that the case was never dismissed. The Court has considered that the notice of withdrawal is ambiguous as to whether the suit was being withdrawn or instructions were being withdrawn from claimant's advocates. The Court has also considered that there was no evidence of service of the mention notice for the proceedings held on 11.03.2019. The Court has further considered Article 159 of the Constitution that justice shall not be delayed, justice be administered without undue regard to procedural technicalities, and the purpose and principles of the Constitution shall be protected and promoted. The Court considers that to meet ends of justice, the parties should be given another chance to prosecute their respective positions and intentions including prosecuting the suit as may be appropriate. The application, the grounds of opposition and the submissions being misconceived, the Court will not further delve in the matter.

In the circumstances, the application dated 10.02.2020 and filed on 14.02.2020 is hereby determined as misconceived and with orders:

- 1) The Court proceedings and orders given on 11.03.2019 are hereby set aside with all consequential processes therefrom.
- 2) The parties to take expeditious steps towards disposal of the suit including applying as may be appropriate.
- 3) Each party to bear own costs of the application.

**Signed, dated and delivered** by the court at **Nairobi** by video-link this **Friday 16<sup>th</sup> October, 2020.**

**BYRAM ONGAYA**

**JUDGE**