REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 145 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

ANTHONY MURIGI KIARIE.....CLAIMANT

VERSUS

BIDCO OIL REFINERIES LIMITED.....RESPONDENT

RULING

The application before me for determination is the Applicant/Claimant's Notice of Motion dated 5th December, 2019 seeking the following orders:

1. The Court do exercise its discretion in favour of the Claimant and set aside or review its Orders issued on the 25th of February 2019 dismissing this case and thereby reinstate the case and set it down for hearing on merit *inter-partes*.

2. Costs of this application be in the cause.

The application is based on grounds that:

1. This case was dismissed on 25th February, 2019 for want of prosecution.

2. The Notice to Show Cause why the case should not be dismissed for want of prosecution was picked by a clerk from the Claimant's Advocates office from the court registry in the evening but the Clerk mistakenly failed to diarise the case for 25th February, 2019 being the scheduled date in the Notice to Show Cause.

3. As a result, the case was unattended on 25th February, 2019 hence its unfortunate and regrettable dismissal.

4. The Applicant has remained keen on the hearing of his case and has been available save that the case had no earlier hearing date due to case backlog.

5. No prejudice will be suffered by the Respondent as they will have a chance to defend the suit.

The application is supported by the affidavits of Namada Simoni, an Advocate of the High Court of Kenya practicing under the firm Namada and Company Advocates, Peter Ngeno a clerk working in the firm of Namada and Company Advocates and Anthony Murigi Kiarie the Applicant herein, all sworn on 5th December, 2019.

Counsel Namada depones that in November 2019, he brought up all his 2016 matters to confirm whether they had been fixe for hearing. He advised his court clerk Peter Ngeno that the 2015 matters were about to be concluded and 2016 matters were due for fixing.

The affiant deposes that Mr. Ngeno advised him that the Court record indicated that they had been issued with a Notice to Show Cause on 22nd February, 2019 and in their absence on 25th February 2019 the case was dismissed for non-attendance.

He deposes that the registry officials issued directions in 2017 and 2018 that they were only fixing matters which are 5 years old and above

and as such 2016 cases were not being given hearing dates in January, 2019.

He advised the Claimant that he had to wait for the fixing of the hearing of his case as he had advised him to be patient until when the Court would allow them fix the 2016 cases for hearing.

Peter Ngeno deposes that on 22nd February, 2019 he picked the Notice to Show Cause (NTSC) from the court registry in respect of this case which he placed amongst his documents.

He avers that he concentrated on his duties and completely forgot about the NTSC which remained in one of the files he had been working on, on 22nd February, 2019. He avers that in November 2019, when he was sent to Court with 2016 files, upon perusing the Court file he discovered the same had come up on 25th February, 2019 when it was dismissed.

He deposes that he regrets and apologises for his omission and error which cost the dismissal of the client's suit.

Anthony Kiarie deposes that from the date of filing the case, he has been available for the hearing of the case save for the backlog of cases. He avers that he was surprised to learn that the case had been dismissed for non-attendance. He contends that his advocates did not advise him of the hearing date and that he should not be punished for no mistake of his own. He deposes that it would be unfair to dismiss his case on the only date the Court fixed it for hearing.

Respondent's case

The Respondent filed a Replying Affidavit sworn by Judy Momanyi, its Head of Legal sworn on 28th February 2020. She deposes that on 25th February, 2018 neither the Claimant nor his advocate was present in Court and in the presence of the Respondent's advocate, the Court dismissed the claim for want of prosecution.

She deposes that the Applicant does makes no reference in his affidavit of the failure to diarise the date as deponed by the advocate but instead points out to the possibility that the Notice To Show Cause was served upon his advocate. She deposes that it is her belief that the Claimant is not being candid on the reasons for not attending Court on 25th February, 2019.

She deposes that it is the primary duty of the Claimant to take steps to progress and follow up on his case but he failed to do so. She avers that there is no evidence to show that the Claimant followed up on his case during the period between 25th February, 2019 and 5th December, 2019.

She deposes that the Claimant filed this application 9 months after the suit was dismissed, further demonstrating disinterest in the claim.

She avers that reinstating the suit would cause the Respondent to suffer great prejudice having to continue to prosecute a matter that was filed 4 years ago and that most witnesses have left the Respondent's employment.

Applicant's submissions

The Applicant submitted that the failure to attend and address the court was a mistake on the part of counsel and himself. He further submitted that this was inadvertent and it ought not to be visited upon an innocent litigant.

He submitted that the principles governing reinstatement of a suit were restated in the case of **John Nahashon, Mwangi v Kenya Finance Bank Limited (in liquidation) [2015] eKLR** where the Court held that Article 50 and 159 of the Constitution constitute the defined principles which should guide the court in making a decision on reinstatement.

He further cited the decision in **Joseph Kinyua v GO Ombachi [2019] eKLR** that dismissal is a draconian order which drives a litigant from the seat of justice and justice would be served on reinstating the appeal with strict conditions.

He submitted that save for the challenges in fixing dates at the registry, the claimant wishes to prosecute his case on merit. He submits that it is only towards the end of 2019 and the beginning of 2020 that the registry started issuing dates for the matters filed in the year 2015 hence hampering the chances of the claimant to secure a date.

He submitted that section 3A of the Civil Procedure Act gives the court inherent powers to make such orders as may be necessary to meet the ends of justice. He therefore submitted that this suit should be reinstated to meet the overriding objective of the Constitution and the Civil Procedure Rules.

Respondent's Submissions

It submitted that the Applicant has not satisfied the conditions for setting aside the dismissal orders issued on 25th February, 2019. It submitted that in **James Yanga Yeswa v Bob Morgan Services Limited [2019] eKLR** the Court cited the case of **Birket v James [1978] AC 297** where the court set out the principles that ought to guide the Court when considering an application for reinstatement of a suit dismissed for want of prosecution. The principles include whether there was inordinate delay on the Plaintiff's part and whether the delay is intentional and inexcusable and whether the delay is an abuse of the court process.

It was its submission that filing the application 9 months after the dismissal is a clear indication of inordinate delay and disinterest in the case. It further submitted that the case in **Ivita Kyumbu [1975] eKLR** the court held that when an inordinate delay is established it is inexcusable until a credible excuse is made.

It argued that though the Applicant and his counsel aver that the Applicant has been keen on being heard on merits, the Applicant never attempted to fix the matter for hearing or pre-trial directions. It submitted that, as per its record, the matter has never been issued with any date nor has the Claimant ever made any request for a mention date.

In conclusion, it submitted that the Applicant's application is not merited and has been made inordinately without substantial evidence.

Determination

The issue for determination is whether the Court should reinstate the Applicant's suit.

In **Utalii Transport Company Limited and 3 Others v NIC Bank & Another [2014] eKLR** the Court held:

> **"***When the Applicant states and correctly so, that:*
>
> *"It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court''….*
>
> *Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:*
>
> *1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
>
> *2) Whether the delay is intentional, contumelious and, therefore, inexcusable;*
>
> *3) Whether the delay is an abuse of the court process;*
>
> *4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
>
> *5) What prejudice will the dismissal occasion to the plaintiff?*
>
> *6) Whether the plaintiff has offered a reasonable explanation for the delay;*
>
> *7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?"*

The Applicant avers that the suit was dismissed for want of prosecution because his advocate's clerk failed to diarise for the hearing that had been scheduled on 25th February, 2019 and had been dismissed.

The clerk, Peter Ngeno, swore an affidavit in which he avers that he collected the Notice to Show Cause which remained in the file but forgot about after placing it amongst his files. The Applicant avers that he has been keen on pursuing a hearing date that he has awaited for since 2015. The Applicant's counsel also stated that the Applicant has been keen on having the matter heard.

The Respondent avers that it is the Applicant's primary duty to follow up and take steps on the progress of his case and that there is no evidence that the Applicant has been following up on his case.

As stated by the Respondent, the Applicant has not produced any evidence to show that he has sought a hearing date and that a date was not issued due to case backlog. Notably, the Applicant stated that since 2015, he has been keen on having the matter heard yet the suit had not been filed in that year. The suit herein was filed on 5th February, 2016, therefore the Applicant cannot state that he was keen on having the suit heard even before it was filed.

Further, the Applicant in his affidavit deposes that *"… if my advocates were served they never advised me…"* His advocate confirmed that he did not notify the Applicant. The common ground is that the Applicant's advocate received the notice to show cause and that it was not until November 2019 when they realised that the suit had come up on February, 2019.

The Applicant's Counsel stated that the registry officials issued directions in 2017 and 2018 to the effect that only matters that were 5 years and above were to be issued with dates. Therefore, matters filed in 2016 were not given dated in January 2016. There is no evidence adduced to that effect. Even if this was the position, the Applicant did not produce any evidence of the action he took any steps after service of the Notice to Show Cause in January 2019 to fix the matter for hearing. In addition, there is no letter on record seeking to set the suit for hearing since pleadings closed following the filing of Memorandum of Reply on 4th October 2016. Not even directions had been taken from October 2016 to January 2019 when the Notice to Show Cause was issued, a period of over two years. Even after being reminded of the lapse by the Notice to Show Cause, no action was taken for more than 9 months until the instant application was filed on 5th October 2019.

I have however considered that should this application not be grated the Claimant would forever be banished from the corridors of justice. I have further considered that the Claimant's Counsel has admitted that it was the firm that was at fault in not recording the date of the Notice to Show Cause in the diary. Against this I have considered that the Respondent will have an opportunity to defend the claim on the merits and can be compensated by way of costs for the delay.

> **For these reasons I allow the application and set aside the orders of 25th February 2019 dismissing the suit and reinstate the same, but with costs to the Respondent which I assess at Kshs.20,000/- to be paid within 14 days failing which these orders will lapse**. **The Claimant is further directed to fix the case for hearing within 6 months.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER 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