REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1367 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JAMES YANGA YESWA.....CLAIMANT

VERSUS

BOB MORGAN SERVICES LIMITED.....RESPONDENT

RULING

The Claimant filed a Notice of Motion Application dated 24th April 2017, brought under sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Industrial Court Act and all other enabling provisions of law. He seeks the following orders:

a. That the dismissal of the claim on 20th April 2017 be reviewed and set aside.

b. That the claim be set down for hearing forthwith.

c. That costs be in the cause.

The Application is supported by the Affidavit of Wilberforce Khalwale sworn on 24th April 2017 and filed on 19th June 2017. It is based on the grounds as set herein below.

The Claimant is keen and anxious to have his day in court and has made several futile attempts to have the matter set down for hearing.

It is the Claimant's case that the matter was dismissed on 20th April 2017, during service week. The advocate was engaged in several other cases before different judges of this court and which matters were listed in priority to this case. The Claimant attended court on short notice and was outside the door when the case was called out. The Claimant avers that the failure by the Advocate to attend court on time was not deliberate.

The parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

The claimant submitted that on 20th April 2017 this matter was listed for hearing and the claimant was in attendance. That counsel had several matters and arrived in court when the matter had just been dismissed. That the claimant is keen to prosecute the case as reflected in numerous invitations for fixing the case for hearing as annexed to the affidavit.

That Article 159(2) of the constitution provides that in exercise of judicial authority, the courts shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities.

The claimant submitted that the dismissal of the suit was on account of nonattendance. The claimant was in court on the material day. The claimants Advocates have written several letters to the registrar seeking for a hearing date. A just making a determination of a suit entails hearing what the litigants have to say and judgment on merit. In the instant, none of the parties was heard by the court.

Failure to attend court in goodtime has been explained by the Advocate.

That it was a mistake on the part of the Advocate and such mistake should not be visited upon a litigant. That Section IB of the Civil Procedure Act Cap 21 of the laws of Kenya provides that for the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining(a) the just determination of the proceeding.

The claimant further submits that Section 12(1)(a) of the Industrial Court Act provides that the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes relating to or arising out of employment between an employer and an employee.

It is further submitted that a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal relying on the words of Madam J.A in the celebrated case of ***D.T. Dobie & company (Kenya) Limited -vs- Joseph Mbaria Muchina & Another in Court Appeal No. 37 of 1978***.

That in the case of ***HCCC 2050 OF 1993, Consolata Ndunda Owira -vs- Bannnelboris Omumbia*** B.P. Kubo J. as he then was held that the case warranted to be heard on the basis of substantive justice and that procedural omissions ought to take a back seat, that the appellant is merely standing on bare technicalities. Nobody has a vested right in procedure and a court must at least at the present day strike to do substantial justice to the parties, undeterred by technical procedural rules.

That if the court were to disallow the application there would be one bonafide litigant who will blame the judiciary for denying him justice.

It is further submitted for the claimant that he has demonstrated the actions taken to prosecute the claim. The claimant through his Advocates has moved the court very many times. The Respondents Advocates are well aware of the efforts made by the Claimant to set down the case for hearing. That in the circumstances it is only fair and just that the case be registered for hearing forthwith.

On 23rd August 2018 the Respondent filed its written submissions dated 15th August 2018 objecting to the reinstatement of the suit.

It is the Respondent's submissions that the Claimant's act of filing the Application 2 months after it was dismissed indicates that the same was an afterthought. The Respondent further submits that the reasons for the two months delay have not been explained.

It is the Respondent's submissions that they will suffer prejudice if the suit is reinstated because they will have been denied the right to call witnesses since some of them are no longer in the employ of the Respondent.

Determination

After considering the parties' arguments and the evidence adduced, I am of the opinion that there is only one issue for determination being whether the suit should be reinstated.

The principles that courts ought to consider in an application for reinstatement of a suit after dismissal for want of prosecution are set out elaborately in the case of **Birket –V- James** *[1978] A.C. 297*. The Court in this case stated as follows:

> *"... 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 Respondent has submitted that it will suffer prejudice because it will have been denied the right to provide witnesses. On the other hand, it is the Claimant's case that the reason for non-attendance was because his advocate was before different judges on matters listed in priority to this case. No evidence has been adduced to prove this fact. In the supporting affidavit sworn by the Claimant's advocate, a cause list for that material date is purportedly annexed. However, there is no such annexure.

Furthermore, the claimant who is alleged to have been in court and keen to prosecute this case has not filed any affidavit to plead the said facts. The court's record does not show that the claimant was in court when the matter was called.

The foregoing notwithstanding it was reckless for counsel to fail to instruct another counsel in the same court to hold his brief and inform the court that he was in other courts.

I have also looked at the record and it reflects that before 6th April 2014, no attempts had been made by the claimant to fix this suit for hearing. The record further reflects that the suit was dismissed on 6th April 2014 when the claimant was absent while the respondent was represented by counsel.

This would mean that the claimant is guilty of inordinate delay in bringing this application, the application having been filed on 19th June 2017 when the suit was dismissed on 6th April 2014, a lapse of more than of 3 years. A party whose suit is dismissed and does not move a court for 3 years cannot be heard to state that they are still interested in fixing the suit for hearing.

In the case of ***Azhar Mohammed Sheikh & 8 others v Velji Narshi Shah & Another [2017] eKLR***, the High Court relied on the decision of the Court of Appeal in *Ivita vs. Kyumbu* ***[1975]*** where it was held that a party must satisfy the Court on the prejudice it stands to suffer if a suit is dismissed. The Court stated that;

> "Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the Judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution."

Consequently, this application lacks merit since it has not met the threshold set out in law. As such it is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE