



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

**AT NAIROBI**

**CAUSE NO. 692 OF 2013**

**PETER MUENDO KIILU.....CLAIMANT**

**-VERSUS-**

**SURVO GENERAL WORKS.....RESPONDENT**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 4<sup>th</sup> February, 2019)**

**RULING**

**1.** The Application before the Court is dated 5<sup>th</sup> September, 2018, brought under Section 3A of the Civil Procedure Act (Cap 21) Order 51, Rule 1 and 15 of the Civil Procedure Rules and all other enabling provisions of the law. The Applicant seeks Orders that:-

***1. An Order do issue setting aside the proceedings, Ruling and Orders of the Court given on 24/7/2018 dismissing the case.***

***2. That costs of this application be in the cause.***

**2.** The Application is premised on the grounds that:-

***a. The matter was dismissed without hearing the applicant.***

***b. That the mention notice to show cause why the matter should not be dismissed for want of prosecution was served on them on 25<sup>th</sup> July, 2018 a day after the Orders of dismissal were issued.***

***c. That the suit was coming up for hearing on 26<sup>th</sup> June, 2017 when the trial Court was not sitting.***

***d. That the schedule for fixing dates for the year 2013, where the matter fell was slated for 12/6/2013 – 23/6/2017.***

***e. That the matter was therefore overtaken by the schedule.***

***f. That a letter was written to the Deputy Registrar Employment and Labour Relations Court Nairobi to give directions that the matter be fixed afresh date at the registry.***

*g. That a subsequent letter was sent to the advocate on record for the Respondents inviting them to meet our representatives at the Employment and Labour Relations Court registry at Milimani Civil Registry on 13/6/2018 in order to fix a suitable hearing dated.*

*h. That the file could not be traced at the registry thus the Advocates on record were unable to fix a hearing date.*

*i. That the Claimant has all the intentions to prosecute the matter to conclusion.*

*j. That the Respondents do not stand to suffer any prejudice if the Orders sought are granted as they will be heard.*

3. The Application is supported by the Claimant's affidavit wherein he reiterates the grounds on the face of the Application. He avers that if the Orders sought are not granted he will suffer irreparable loss and prays for the application to be allowed.

4. The Respondent has filed a Replying Affidavit through their Advocate on record wherein he states that the Applicant is disinterested in the matter and as such the Application should be dismissed with costs.

#### **Applicant's submissions**

5. It is submitted on behalf of the Applicant that Article 47 of the Constitution of Kenya 2010 provides for fair administrative action and as such the Court ought to consider the said provision and ensure fairness to both parties by hearing and determining this matter expeditiously. They cite the case of **Vita Vs Kyumbu (1984) KLR 44** where it was held:-

*“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. 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. Thus, even if delay is prolonged if the Court is satisfied with the Plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”*

6. That the Claimant has demonstrated that the delay in prosecuting this matter was not because he was indolent but rather occasioned by circumstances beyond his control. They pray for the matter to be allocated a date at the earliest possible time. That if the matter is dismissed he would have no other avenue to ventilate his issues.

#### **Respondent's submissions.**

7. The Respondent submit that 5 years is a long time and all litigation must come to an end. That the Court was right in dismissing the matter and they cite the case of **HCCC 467 of 2009 Fran Investments Limited Vs G4S Security Services Limited** where it was held:-

*“...And I think, it is so especially when one fathoms the requirements of article 159 of the Constitution and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such a draconian act comparable only to the proverbial “sword of the Damocles”. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under*

***Article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the Plaintiff. This is the test I shall apply here.***

***...Such delay is not inadvertent as alleged by the Applicant; it is deliberate as a party is expected to prosecute their cases without delay. The delay has not been satisfactorily explained and is a source of prejudice to the Respondent as well as to the fair administration of justice. These are sufficient reasons to refuse to reinstate a suit and let it lie in peace in judicial grave. The amount of time which has passed by will not allow any and is not conducive to having a fair trial in this matter... Accordingly, and with a lot of trepidation, I dismiss the application.”***

**8.** They pray for the Application to be dismissed.

**9.** I have examined all the submissions of the parties. The Claimant/Applicant contends that this case was scheduled for hearing on 26/7/2018 when this case was dismissed for want of prosecution but that they were served on 25<sup>th</sup> July 2018 after the case was dismissed.

**10.** From the records however, the affidavit of service indicate that the hearing notice shows that the case was for mention on 24/7/2018 for a Notice to show case (NTSC) why the case should not be dismissed for want of prosecution. It is indicated on the said NTSC that the Claimant’s Counsel was served through EMS to P.O. Box 1064 Machakos. The certificate of posting by EMS is however not attached as proof of the said service. Without such proof that the Claimant was indeed served as alleged, it would be an injustice to have the Claimant condemned unheard.

**11.** I therefore find the application to reinstate the dismissed case as merited and I allow it. However, the Applicant should set down this case for hearing within 90 days. In default, this case will stand dismissed for want of prosecution again.

**12.** Costs in the cause.

**Dated and delivered in open Court this 4<sup>th</sup> day of February, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Chego holding brief Muisya for Claimant – Present

Respondent – Absent