



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 16 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 3rd April, 2019)

VERONICA MUTHINICLAIMANT

VERSUS

MILLYSPOT RESTAURANT.....RESPONDENT

RULING

1. The Application before Court is the one dated 22nd October, 2018. The Application was filed through a Notice of Motion filed under Article 159 (2) (d) and (e) of the Constitution, Section 80, 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Order 12 Rule 7 and Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules.

2. The Application seeks the following Orders that:-

- 1. The Application be certified urgent and service of the same be dispensed with in the first instance.**
- 2. The Order of the Honourable Justice H. Wasilwa made on 24th September, 2018 dismissing the suit filed herein on the 9th January, 2013 be reviewed, and set aside.**
- 3. The Suit filed herein on 9th January, 2013 be reinstated for hearing.**
- 4. The costs and incidentals of this application be provided for.**

3. This Application is premised on the grounds that:-

- a. The Order of dismissal made on 24th September, 2018 was made suo moto by this Honourable Court for non-attendance of the Claimant's Counsel.**
- b. The Claimant's Counsel sent another Advocate one Mr. Chacha to hold her brief as she was attending another hearing ELRC No. 632 of 2010 before Honourable Onesmus Makau at the Employment Court.**
- c. The Claimant was not in Court as she is currently working in the Middle East in the Kingdom of Saudi Arabia.**
- d. That Mr. Chacha did not communicate this fact to the Court hence the matter was given time allocation of 11.00 am and eventually dismissed for non attendance of Counsel.**
- e. The mistakes of the Advocate who was holding brief in this matter ought not to be visited on the Claimant.**
- f. The Claimant has been ready and willing to prosecute this matter and in the interest of justice he is seeking the exercise of this Court's discretion which is unfettered and aimed at curing errors by a party to avoid injustice or hardship.**
- g. It will not be in tandem with the over ridding objective of this case to sustain the Orders issued suo moto dismissing this matter for want of prosecution.**

h. The Application has been brought without any inordinate delay.

i. It is in the interest of justice, the said Order be reviewed, set aside and this matter be reinstated for hearing and final determination.

j. No prejudice will be occasioned on the Respondent that cannot be compensated by way of costs if the Application is allowed.

4. The Application is supported by the Affidavit of **LOURINE L. OCHOGO** sworn on 31st October, 2018, in which she reiterates the averments made in the Notice of Motion Application.

5. In disposing of the instant Application, the parties agreed to file written submissions.

Claimant/Applicant's Submissions

6. The Claimant/Applicant in his submissions urged the Court to allow the instant Application as the Claimant is very interested and is willing to prosecute this matter to its conclusion.

7. The Claimant's Counsel further submits that she was unable to proceed for hearing on 24th September, 2018 as the Claimant was out of the Country, a fact that was not brought to the Court's attention by the Counsel who held her brief when the matter was called out for hearing on 24th September, 2018.

8. It is further submitted that the Claimant has religiously attended Court even during mentions and has no intentions to delay the matter. They further ask the Court to invoke its inherent power as provided under Section 3A of the Civil Procedure Act and allow the instant Application. For emphasis, the Claimant relied on the case of **Professor Mwangi S. Kimenyi Vs The Attorney General & Another HCCC No. 790 of 2009.**

9. The Claimant further relied on the Authority of **Transami (K) Limited Vs Sokhi International (K) Limited (unreported)** where it was held that:-

“To let the one lapse of the failure to attend Court on the 9th May, 2006 shut the Plaintiff out from the seat of judgment would, I hold, occasion greater injustice than the convenience to be suffered by the Defendant. The Court must always strive to dispose cases upon proper hearing on merits where possible.”

10. The Claimant further contends that she is very keen to prosecute this matter as evidenced by expeditiously taking the file through pre-trial process and subsequently having the same certified ready for hearing.

11. In conclusion, the Claimant urged the Court to exercise its discretion and allow the instant Application to ensure justice is served to all parties hereto. The Claimant urged the Court to be guided by the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 which provides:-

“Justice should be administered without undue regard to technicalities.”

Respondent's Submissions.

12. It is submitted on behalf of the Respondent herein that the Claimant has failed to proceed with the hearing of this matter despite the same having been filed on 9th January, 2013 over five years and the matter is yet to be concluded.

13. It is further submitted that Counsel for the Claimant failed to turn up for the hearing which was allocated to proceed at 11.00 am on 24th September, 2018 deliberately as the witness was not available to attend Court despite previously indicating that they were ready to proceed.

14. The Respondent avers that in the circumstances the instant Application is an abuse to the Court process as Counsel blatantly disobeyed Court Orders to proceed at the designated time allocation.

15. The Respondent further avers that the instant Application is mischievous, vexatious and an abuse to the Court process as the Claimant in this matter works abroad with no travel documents to come back to the Country to attend to the hearing of this matter.

16. The Respondent contends that the Claimant has not given a good reason why she failed to attend Court for the hearing that was scheduled to proceed at 11.00 am on 24th September, 2018 despite having indicated that she was ready to proceed as Counsel who held her brief indicated as such and the Court directed that the matter must proceed.

17. The Respondent further contends that disobedience to the Court Order is not a mere technicality for Article 159 (2) (d) of the Constitution as submitted by the Claimant's Counsel.

18. The Respondent proceeded to distinguish authorities relied on by the Claimant/Applicant and averred that the said Authorities do not support the Claimant's case for reinstatement of the dismissed case.

19. In conclusion, the Respondent urged the Court to dismiss the instant Application, as Counsel for the Claimant/Applicant has not given any plausible excuse for her failure to attend Court at the time allocated by the Court despite having indicated that she was ready to proceed for the hearing.

20. I have examined all the averments of the Parties. From the record, this case was filed on 1/1/2013. There was no action on the file until close to two years on 5/2/2014 when the Claimant sought a mention. On 29/10/2015, on the day the matter was fixed for mention, the Parties did not attend. The case was finally fixed for hearing on 26/10/2016. The case was not able to proceed because the Court was informed that the Claimant was out of the Country. The Court ordered fresh hearing dates to be taken at the registry.

21. This case was again fixed for hearing on 26/4/2017 and 14/9/2017 and on both dates, the case was not set down for hearing. The Claimant had taken the dates ex parte and was to serve the Respondents with a hearing notice. There is no indication that this ever happened.

22. On 31/5/2018, the case was fixed for mention to take a hearing date. This Court gave 24.9.2018 as the hearing date. Again, this case never proceeded and it is then that this Court dismissed this case for want of prosecution as the Claimants failed to attend Court at 11 a.m the time the case was to proceed.

23. It is therefore evident that the Claimant had delayed prosecution of this matter for over 6 years. Litigation must ordinarily come to an end. Given that this case has been in Court for the last 6 years with little or no action, the last straw of failing to attend Court by Counsel cannot cure the inordinate delay occasioned by the Claimant. I do not find the application in Court merited. This case stands dismissed.

Dated and delivered in open Court this 3rd day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Namasake for Respondent

Applicant – Absent