



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1163 OF 2015

CONSOLATA WILEGA LUSENO.....CLAIMANT

VERSUS

DENNIS GOULD MUSGRAVE.....RESPONDENT

(Before Hon. Lady Justice Maureen Onyango)

RULING

The Claimant/Applicant, Consolata Wilega Luseno filed a Notice of Motion Application dated 31st August 2018 brought under Rules 16 and 28 of the Employment & Labour Relations Court (Procedure) Rules 2016, Order 12 Rule 7 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act against the Respondent, Dennis W. Could Musgrave. She seeks reinstatement of this suit (ELRC Cause 1163 of 2015) and setting aside of the Order given on 23rd January 2018 dismissing the said suit and further, leave to prosecute this suit. The Application is based on the grounds that:-

1. The Claimant/Applicant has a good case.
2. The Court herein dismissed the said suit for want of prosecution on its own motion on 23rd January 2018 without notice to the Claimant/Applicant.
3. The Court did not consider the efforts made by the Claimant/Applicant since 2006 to have this suit heard and determined without delay.
4. The Claimant/Applicant has no control of the employees of the Judiciary and could not fix the suit for hearing as the file was not availed at the Registry.
5. The inability of the Claimant/Applicant to prosecute the case was a result of measures that were beyond the Claimant/Applicant's control.
6. The Claimant/Applicant will suffer irreparable and unwarranted loss if the Order dismissing the suit is not set aside

The Application is supported by the Affidavit dated 31st August 2018 sworn by the Applicant's advocate, Herbert Ashiruma who avers that the Applicant was condemned unheard without due regard to her efforts to have the suit heard and determined as shown in the bundle marked HJA-1. That the Applicant had filed Misc. Application 71 of 2014 for the said suit to be set down for hearing before this court and that the same was allowed and the orders issued on 8th May 2014 as shown in the attachment marked HJA-2. That the said suit CMCC No. 3228 of 2006 bearing the parties herein had still been at the Chief Magistrate's Court even after the application to transfer the said file to this Court had been allowed and that it was only after a year when this court received a letter dated 11th June 2015 transferring the said file. Further, that the file was not availed at the registry for purposes of taking a date until 20th June 2018 at which time the suit had already been dismissed. He refers this court to the attachment marked HJA-3.

He continues to aver that there has not been any effective communication of the transfer of the file to this Court for hearing and determination and that the notice of intention to dismiss the suit was never served on the Claimant/Applicant or her Advocates. That they were therefore not aware the file had been transferred to this Court, that they diligently sought it out themselves until 20th June 2018 when it was traced in the Registry. That it is in the interest of justice that this Court considers this Application for reinstatement. That the Respondent shall not suffer any prejudice if the same is granted.

Respondent's Case

The Respondent filed his Replying Affidavit dated 31/10/2018 sworn by his Advocate, Anthony Kinuthia who avers that this Application is grossly misconceived, gravely misplaced, mischievous, frivolous, scandalous and vexatious and constitutes an abuse of the court process. That the week of 23rd January 2018 was adequately communicated to court users and the general public to be a service week in respect of matters filed in 2015 and that the said matter was further listed on the day's cause list as coming up for a Notice to show cause as shown in the annexure marked AK-1. That the Claimant/Applicant has not made efforts at all to have the matter fixed for hearing since 11th June 2015 when the parties were served with the Notice annexed in the Application as HJA-3. That the letter dated 4th August 2017 produced by the Claimant wherein she seeks a mention date was clearly only received at the registry on 20th June 2018 after the matter had been dismissed and that this is very peculiar.

He avers that if indeed the file had been missing as alleged by the Claimant, then she should have produced communication between her and the court registry in that regard and that this allegation is an afterthought to conveniently explain away the failure to prosecute this matter. That this was not the first instance the Claimant had been caught out for failing to prosecute the matter as seen in the Application dated 11th October 2018 marked AK-2 when the Respondent applied to have the matter dismissed for want of prosecution but which was later on dismissed. That it is evident the Respondent continues to suffer unnecessary anxiety and uncertainty due to the delay of this suit while the Claimant is content with clogging this Court's process. That no plausible justification has been tendered to warrant the reinstatement of this suit and as such, this Application should be dismissed with costs.

Determination

The main issue for determination is whether this suit should be reinstated and the order dismissing the suit set aside and whether the Applicant should be granted leave to prosecute this matter.

The claimant avers that the notice of intention to dismiss suit was never served on the claimant. This is the only valid argument in the claimant's application. All other averments to the effect that the court did into consider the efforts of the claimant to fix the suit for hearing or that the file was missing or that no communication was made of the transfer of the file from the Magistrate's Court cannot avail an excuse for the claimant as the reason for the court issuing the notice to show cause was because the claimant had not been diligent in pursuing her case which has been pending in court since 2006.

The court however has wide discretion in restating dismissed suits. In the instant application, I have noted from the file that there is no affidavit of service confirming service of notice to show cause upon the claimant. I will therefore grant the claimant the benefit of doubt and reinstate the suit.

The claimant will however pay the costs of this application to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE