



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 734 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 20th May, 2019)

LILIAN SYOMBUA NDETEMA.....CLAIMANT

-VERSUS-

SANA INDUSTRIES COMPANY LIMITED.....RESPONDENT

RULING

1. The Claimant filed a Notice of Motion on 29th October 2018 under Order 12 Rule 3 (i) of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act. She seeks the following orders:-

1. That the application be certified as very urgent.

2. That the Honourable Court be pleased to set aside and, or vary the orders made on the 22nd day of April 2016 dismissing this suit.

3. That this Court be pleased to reinstate this suit and set it down for hearing.

4. That the cost of this application be in the cause.

2. The application is supported by the Affidavit of Lilian Syombua Ndetema, the Claimant herein, sworn on 25th October 2018 in which she reiterated the grounds in her application. The application is premised on the following grounds:-

1. THAT this Court dismissed the matter herein on the 22nd of April 2016 due to non-attendance by the Claimant and her advocates.

2. THAT the non-attendance by both the Claimant and her advocates was not intentional, although the Claimant's advocates forgot to diarise the claim in their diary. They were therefore not aware of the hearing.

3. THAT the Claimant has a good case against the Respondent with high chances of succeeding on merit and the Claimant wants her claim to be reinstated to enable her have an opportunity to be heard on merit.

4. THAT no prejudice will be occasioned to any party if the orders sought herein are granted.

3. In response to the application the Respondent filed its Grounds of Opposition on 4th February 2019 wherein it avers that the matter was dismissed by Court on 22nd April 2016 and that the Claimant was not bothered as it has taken more than two and a half years to raise the issue of reinstatement which was completely an afterthought as a party seeking to reinstate a suit must demonstrate good faith.

4. It avers that the Claimant cannot blame her advocates having shown no interest in her case. Further, prior to the dismissal of the case the Claimant's advocates were served with a Hearing Notice by the Court but they failed to attend the hearing. The Claimant's advocates had been informed in the hearing notice that adverse orders would be issued.

5. It avers that the Claimant having attached the notice to their Application is confirmation that the notice was received but the Claimant was no longer interested in the case hence their failure to attend Court.

6. It avers that an unexplained delay and failure to prosecute the matter cannot be described as resulting from accident, inadvertence or excusable mistake on the Claimant's part. It therefore prayed that the Application be dismissed.

7. The Application was heard by way of written submissions and each party duly filed its respective submissions.

Claimant's submissions

8. The Claimant argued that her advocates unintentionally failed to attend Court consequently the matter was dismissed for non-attendance. They submitted that the mistake of Counsel should not be visited upon the Claimant.

9. The Claimant submitted that her advocates did write letters to the Deputy Registrar to have the matter mentioned, however each time the file could not be traced and that this was the reason the letters were not placed in the Court file. Further, that it was after searching through the Court records that they discovered that the claim was dismissed on 22nd April 2016.

10. The Claimant therefore urged the Court to indulge her and give her an opportunity to be heard. She further urged the Court not to condemn her unheard.

Respondent's submissions

11. The Respondent submitted that the Claimant argued that the mistake of Counsel cannot be visited upon the Claimant but that Kimaru J in **Alice Mumbi Nganga v Danson Chege Nganga & another [2006] eKLR** held:-

“This Court has unfettered discretion to set aside any order which was entered exparte. This discretion however, has to be exercised judicially. The Applicant must satisfy this Court that she has good reasons why she failed to attend court when the said application for dismissal was heard and determined in her absence...In the first place, she can not blame her counsel who was then on record for failing to attend Court when the said application was listed for hearing. This Court has ruled in several cases that a civil case once filed, is owned by a litigant and not his advocate. It behoves the litigant to always follow up his case and check its progress.”

12. The Respondent submitted that the Claimant in her submissions argued that they made attempts for the matter to be mentioned before the Deputy Registrar but not a single letter was attached to the application except the letter dated 8th October 2018 which was 2 years after dismissal.

13. The Respondent submitted that the application for reinstatement was filed 30 months after the dismissal of the suit and this was illustration of the Claimant's indolence and lack of interest in her suit. The Respondent submitted that the Claimant has not furnished any plausible reason under Order 12 Rule 3 (1) of the Civil Procedure Rules. The Respondent relied on the decision in **Mary Chelimo v Mutinda Ngari [2014] eKLR** and **J.D Builders v Plan International.**

14. In conclusion, the Respondent urged the Court to dismiss the application.

15. I have examined the averments of both parties. As stated by my learned brother J Kimaru, though there was a delay on the Claimant's Counsel to apply for reinstatement of this suit, the Claimant also had a duty to follow up her case. This case was dismissed in 2016. The Claimant never followed up her case with her Counsel hence the inordinate delay in bringing up this case.

16. It has taken the Claimant 30 months to file the application, which is an inordinate delay even on her own part, which this Court cannot entertain.

17. I find the application is not merited as litigation must come to an end. I dismiss the application accordingly with no order as to costs.

Dated and delivered in open Court this 20th day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Captain Miss Mjomba holding brief Kimondo for the Respondent – Present

No appearance for the Claimant