



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2024 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

MATHEW GITAU MWAURA.....CLAIMANT

VERSUS

GELMAX POWER SOLUTIONS LIMITED.....RESPONDENT

RULING

By Notice of Motion filed under Certificate of Urgency dated 7th February, 2018 the applicant Matthew Gitau Mwaura, who is the Claimant in the main suit seeks the following orders;-

1. That this application is certified urgent and be heard in the first instance.
2. That pending the hearing and determination of this Application stay be and is hereby granted against the Orders issued on 30th January 2018 dismissing the Claimant's Claim for want of prosecution.
3. That this Court be pleased to set aside Orders issued on 30th January 2018 and reinstate the Applicant's Claim and the Applicant be granted leave to file replying affidavit and challenge/defend applicant's application dated 13th December, 2017.
4. That costs of this Application be in the cause.

This Application is premised on the grounds that:-

- i. The applicant was not properly served as required by the law.
- ii. It is fair that the Applicant be granted an opportunity to defend the Notice of Motion dated 13th December 2017 dismissing his Claim.
- iii. Applicant will suffer irreparable loss if the said Application is not allowed.

The Application is supported by the Affidavit of **DAVID ONSARE** sworn on 7th February, 2018 and on the grounds on the face of the motion.

The Application is filed under Section 3A of the Civil Procedure Act, Order 10 Rule 11 of the Civil Procedure Rules and all enabling provisions of the law.

The Respondent opposed this Application and filed Replying Affidavit dated 23rd February, 2018 and filed in Court on 26th February, 2018 in which he avers that the Application dated 13th December, 2017 was properly served upon the Claimant as required by the law.

It is further contended that the Application was thereafter dismissed for want of prosecution as the Claimant failed to prosecute this matter for a period of more than 1 year. It is contended that the suit was rightfully dismissed for want of prosecution.

The Claimant filed a Supplementary Affidavit dated 18th April, 2018 and filed in Court on 20th April, 2018 in which he avers that the instant

application was not served according to the law as the same failed to indicate the date the application was to come up for hearing.

He confirmed having been served with the said application by way of registered post and that the staff at the registry failed to advise the Claimant when the matter was slated for hearing.

The Claimant further contends that he is a lay person who does not understand Court procedures and had been having challenges which affected his ability to have the matter listed for hearing.

The Claimant avers that the Respondent's Director knows where he resides and he ought to have effected personal service of the application and not service by registered post which he contends was received on 22nd January, 2018.

The claimant urged the court to allow the instant application as he stands to suffer irreparable damage should the orders sought not be granted. He further urged the Court to accord him an opportunity to be heard.

The Respondent too filed a Further Affidavit dated 30th April, 2018 and filed in Court on 3rd May 2018 sworn by **SHADRACK MWALALI**, in which he avers that the instant application was properly served on the Claimant and was in accordance with the law.

He further avers that it was the Claimant's duty, once he filed suit, to progress the matter logically and not to wait to be prompted into action by the Respondent's move to dismiss the same following inaction by the Claimant.

The Respondent contends that the Claimant had a duty to confirm from the

Court registry what the matter was coming up for and that further he had not attached any proof to support the allegation that he was not aware that the matter was coming up.

The Respondent further contends that the Employment and Labour Relations Court has a customer care desk where litigants can go to get assistance on Court processes and the Claimant has not attached any evidence of any such action.

The Respondent states that a total of 29 months had lapsed since the instant suit was filed by the Claimant yet the same had never been fixed for either mention or hearing before any Court. The Respondent further contends that the Claimant will not suffer any loss should the instant Application be allowed.

The application was disposed of by way of written submissions which were highlighted in court on 9th October 2018.

Claimant/Applicant's Submissions

It is submitted on behalf of the Claimant/Applicant that the instant Application ought to be allowed for the following reasons:

- a) Undated summons to attend Court was to M/s Nyaberi and Company Advocates and Francis Ngigi Ngugi to attend Court on 11th January for directions on this matter.
- b) The Respondent's Application dated 14th December 2017 seeking to dismiss this Claim for want of prosecution came up for hearing on 11th January 2018
- c) That the said Application was served by way of registered post as opposed to personal service yet the Respondent's director is aware of the Claimant's place of residence
- d) That the notice of motion served upon the Claimant did not indicate the date of the hearing of the Application.
- e) That the hearing of the Respondent's Application on 30th January, 2018 proceeded without the Claimant as he was not aware of the date and thus the Claim was dismissed for want of prosecution prompting filing of the instant Application.

The Claimant/Applicant further submitted that it is in the interest of justice that the instant Application be allowed as prayed.

Respondent's Submissions

It is submitted by the Respondent that this suit was lawfully dismissed by this Court under the provisions of Order 17 Rule 2 of the Civil Procedure Rules, 2010 which provides:

"In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and, if cause is not shown to its satisfaction, may dismiss the suit."

Order 17 Rule 2(3) goes on to state:

"Any party to the suit may apply for its dismissal as provided under sub-rule 1."

Further the Respondent submitted that they proceeded to apply to have the suit dismissed for want of prosecution the Claimant having failed to fix the same for either mention or hearing for a period of over one year. The Respondent relied on the Authority of **Utalii Transport Company Limited & 3 others vs NIC Bank Limited & Another (2014) eKLR** where the Court held that:

“It is the primary duty of the Claimants to take steps to progress their case since they are the ones who dragged the Respondent to Court”

The Respondent further submitted that an Application for dismissal of a suit is primarily based on the conduct of the Claimant and his failure to take necessary steps to have his matter heard. The Respondent further relied on the opinion of Gikonyo J, in the case of **Utalii Transport Company Limited & 3 others vs NIC Bank Limited & Another (2014) eKLR** where the Learned Judge held 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 Claimants 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 Respondent;*
- 5) What prejudice will the dismissal occasion the Claimant;*
- 6) Whether the Claimant 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 further submitted that the delay in prosecuting this matter has been inordinate and further that the Claim ought not to be reinstated for the said reason. The Respondent relied on the Authority of **Moses Mwangi Kimari Vs Shammi Kanjirapparambil Thomas & 2 Others (2014) eKLR**.

It is the Respondent's submission that the Claimant has failed to explain to the satisfaction of this Court the reasons behind his delay in prosecuting his claim. Further the Respondent submitted that the Claimant is estopped from claiming he does not understand court procedures and that this is what affected his ability to set down the matter for hearing as he would have sought assistance from the customer care desk for guidance.

It is further submitted that it is trite law that a party who elects to act in person is deemed fit to understand the law and procedures. The Respondent relied on the Supreme Court Authority of **Yusuf Gitau Abdallah Vs Building Centre (K) Ltd & 4 Others (2014) eKLR** where the Court stated:

“The Court is also alive to a judicial practice, doctrine to the effect that a Court of law is a Court of Justice and not a Court of sympathy. Further that when a litigant chooses to litigate on his own human he should be taken to be competent to comprehend the Court procedures and be able to conduct his/her proceedings smoothly and at no time should the standard required to be met by such litigants' papers be less than that required of a litigant assisted by legal advice. That both stand on equal footing before the feet of justice.”

The Respondent further submitted that failure by the Claimant to set down his matter for hearing is an abuse to Court process and is in blatant disregard to the rules and procedure of the law. It is further submitted that despite the fact that Article 50 of the Constitution of Kenya grants each individual the right to a fair trial, this right must be exercised within the confines of the law. Thus a Claimant who fails to take initiative to prosecute his Claim has abused his/ her right. The Respondent referred to the case of **Shiphila Wairire Gakaara Vs Industrial & Commercial Dev Corporation (2016) eKLR**.

It is the Respondent's further submission that it has been prejudiced by the litigation of this Claim hanging over its head for over one (1) year undetermined as well as anxiety that has been looming as a result of the pendency of this matter. The Respondent referred to the case of **Fredrick Kanyiri Weru Vs East African Building Society & Another (2015) eKLR** which cited the Authority of **Anthony G. Munene Vs British American Tobacco (K) Ltd (2005) eKLR** which held:

“...a Respondent goes through the mental torture and stress when the Claimant does not prosecute his/her case speedily and without any reason for such delay...”

The Respondent contends that proper service of the Application for dismissal was effected upon the Claimant herein and that the said Application did indicate the date when the same was scheduled for hearing.

The Respondent further contends that the Claimant ought to have visited the Court registry upon receipt of the said Application to verify the status of his matter.

The Respondent averred that the Claimant is guilty of being indolent as he has failed to show any vigilance or keen interest in prosecuting his

claim. It is further submitted the instant Application is an afterthought as the Court rightfully exercised its discretion in dismissing the Claim for want of prosecution. The Respondent relied on the case of **Benjoh Amalgamated Limited & Another Vs Kenya Commercial Bank Limited (2014) eKLR** where the Court in dealing with the issue of laches stated

“A Claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent’ or’ delay defeats equities’. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (‘Laches’).”

In conclusion the Respondent urged the Court to dismiss the instant Application for reinstatement of the Suit dismissed for want of prosecution as litigation must come to an end. The Respondent further prayed for costs of the Application.

Determination

After considering the parties’ arguments and the evidence adduced, the issue for determination is whether the suit should be reinstated.

The principles that Courts ought to consider in Applications for reinstatement of a suit after dismissal for want of prosecution are set out elaborately in the case of **Birket Vs James (1978) AC 297** in which case it is held that:

“...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 Claimants 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 Respondent;*
- 5) What prejudice will the dismissal occasion the Claimant;*
- 6) Whether the Claimant 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 Claimant on one hand has submitted that the delay in prosecuting this matter was not intentional and that the same was greatly attributed to by the fact that he was handling the Claim on his own behalf and was not aware of Court processes and procedures.

He further attributed the delay on the fact that the Respondent served him with the application without a hearing date vide registered post and the application was eventually heard and allowed on 30th January, 2018 in his absence as he was not aware of the date. He further averred that he did visit the Court registry but was not informed when the matter was scheduled for hearing.

The Respondent on the other hand has submitted that this suit was lawfully dismissed by the Court under Order 17 Rule 2 of the Civil Procedure Rules, 2010. The Respondent further submitted that the delay by the Claimant in prosecuting this Claim has been inordinate and is an abuse to the Court process.

It is further submitted that the Claimant’s Application lacks merit and the same ought to be dismissed with costs to the Respondent as the same is an afterthought that the Court ought not to entertain.

I have looked at the claimant’s copy of the application that was served upon him by registered post and I agree with him that it does not bear the date for hearing. On 11th January 2018 when the respondent appeared before the Deputy Registrar to take a date for hearing of its application dated 13th October 2017, there was an order that the respondent serves the application upon the claimant/applicant.

There is nothing on record to show that the respondent was granted leave to serve the claimant by registered post. It is my opinion that had the claimant been served with a hearing notice for the application he would have attended court for hearing and (perhaps) would have persuaded the court against dismissing the suit for want of prosecution.

The court has wide discretion to reinstate suits which have been dismissed. It is my view that this is one of the cases that qualify for such discretion to be exercised in favour of the applicant, his suit having been dismissed for want of prosecution without notice of the hearing date. The respondent shall suffer no prejudice as it will have the opportunity to defend the claim so that the suit is decided on the merits.

For these reasons I allow the application with no orders for costs. The claimant is directed to have this suit fixed for hearing on priority basis with 60 days. If no hearing date is taken with the said period the respondent will be at liberty to once again file an application for dismissal of the suit for want of prosecution.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE