



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 158 OF 2013

(Before Hon. Justice Mathews N. Nduma)

NEWTON MAKUTWA.....CLAIMANT

VERSUS

MAKOKHA ODENDE GODRICK.....1ST RESPONDENT

KABAKA PERMENAS OENDO.....2ND RESPONDENT

WILFRED BOSIRE.....3RD RESPONDENT

JOHN OWINO.....4TH RESPONDENT

TEACHERS SERVICE COMMISSION.....5TH RESPONDENT

ATTORNEY GENERAL.....6TH RESPONDENT

RULING

1. The suit was filed on 13th June 2013 seeking compensation for unlawful dismissal from employment, costs and interest.
2. Statement of defence was filed on 27th February 2014 by the 1st, 3rd and 5th respondents.
3. Notice of Motion dated 8th July 2015 was filed on 8th July 2015 seeking to serve 2nd and 4th respondents by substituted service. The application was granted on 27th October 2016.
4. Notice to show cause why the suit should not be dismissed for want of prosecution was issued by the Deputy Registrar on 14th May 2018. The same was served on both parties. The Notice to show cause was set for hearing on 6th June 2018. None of the parties attended court and the court noted that the last step in the matter was taken on 27th October 2016 and dismissed the suit for non-prosecution.
5. Application dated 10th October 2018 and filed on 18th October 2018 seeks to set aside the order dismissing the suit for want of prosecution in terms of *Sections 3A and 63 (e) of the Civil Procedure Act and order 10 rule 11, order 17 rules 2 and order 51 rule 1 of the Civil Procedure rules.*
6. The application is on the grounds set out on the face of the application that the delay in setting the claim down for hearing was caused by the non-availability of some defendants to be personally served with summons. That the claimant was unable to raise funds in good time to pay for the ordered newspaper advertisement.
7. That the claimant intends to withdraw the suit against the respondents who have so far not been served and therefore not entered appearance and fix it for hearing.
8. That the notice to show cause reached counsel for the claimant after the court had made its orders.
9. The application is further supported by the affidavit by advocate Moses Wanyama for the claimant.

10. M/S Kaluai for the 1st, 3rd and 5th respondents filed grounds of opposition to the application to wit that the application is bad in law, frivolous, vexatious and is a gross abuse of the court process.

11. That the application violates the spirit of Section 3 of the Employment Act and the overriding objective of administrative of justice.

12. That the applicant is guilty of unreasonable and in excusable delay in prosecuting this matter. That the respondent will suffer great prejudice as it may not be able to trace any witnesses to defend this matter. The application comes more than five years since the cause of action arose.

13. The claimant relies on the case of ***Eunice Soko Mlagui vs Suresh Parume and others (2010) eKLR*** in which Justice Maureen A. Odero cited with approval the case of ***Kenya power and lighting company limited vs Kenya Cold Storage 1964 Limited HCCC NO. 387 of 2002*** in which Hon. Lady Justice Hannah Okwengu (as she then was) held as follows.

“Nevertheless dismissal of a suit under OXVI Rule 2(1) of the Civil Procedure rules requires that notice be given to the parties to appear before the court to show cause why the suit should not be dismissed before any order of dismissal is made”.

14. In the present case the undisputed evidence is that the claimant received the notice to show cause after the date the claimant was meant to show cause on 6th June 2018 when the order for dismissal was granted in the absence of both parties.

15. Accordingly, the application to set aside is meritorious and same is granted. However, the claimant is directed to cause the suit to be set down for hearing on the date of this ruling and the claimant shall prosecute the matter on the date set by the court failing which the suit will stand dismissed for want of prosecution unless the lack of prosecution on such set date is not attributed to the claimant. Costs in the cause.

Ruling Dated, Signed and delivered this 8th day of July, 2019.

Mathews N. Nduma

Judge

Appearances

Mr. Wanyama for the claimant

M/S Kaluai for the Respondent

Chrispo – Court Clerk