



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 2159 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**GODFREY GITAU KIMANI.....CLAIMANT**

**VERSUS**

**EASY COACH LIMITED.....RESPONDENT**

**RULING**

The claimant's case herein was on 7<sup>th</sup> February 2019 dismissed for want of prosecution following the failure of the parties to appear in court after being served with a notice to show cause.

By notice of motion dated 14<sup>th</sup> February 2019 and filed on 15<sup>th</sup> February 2019, the claimant/applicant seeks orders as follows-

- a) That the orders made herein on 7<sup>th</sup> February 2019 be reviewed and set aside.
- b) That the claim be reinstated for hearing.
- c) That the costs of this application be provided for.

In the grounds in support of the application and in the supporting affidavit of JOHN KAIRIE NJUGUNA, Counsel for the applicant, he states that the Advocates of the claimant were served with notice to show cause why the suit should not be dismissed for want of prosecution on 23<sup>rd</sup> January 2019. The notice required the claimant to appear in court on 1<sup>st</sup> February 2019.

Counsel deposes that he attended court on 1<sup>st</sup> February 2019 but the case was not in the cause list. He inquired at the registry and was informed the date was erroneous as the correct date for hearing of the notice to show cause was 11<sup>th</sup> February 2019. That when he went to court on 11<sup>th</sup> February 2019 the matter had again not been cause listed. Upon inquiry at the registry, he was informed that the case came up for notice to show cause on 7<sup>th</sup> February 2019 and was dismissed.

He states that the claimant is keen to prosecute his claim, that the prosecution was held back to await an out of court settlement which has since failed to materialise.

The application was heard on 14<sup>th</sup> May 2019 when Mr. Nyakeri holding brief for Mr. Kiarie, reiterated the averments in Mr. Kiarie's affidavit.

I have perused the file. I note that since the claim was filed on 7<sup>th</sup> December 2015 no action has been taken to prosecute the same. There is no evince that summons and statement of claim were ever served upon the respondent. The application herein was also not served upon the respondent.

Although counsel states in the affidavit that the non-prosecution was as a result of attempts at out of court settlement, no evidence of the same has been submitted to court. The claimant himself has not sworn an affidavit to express his interest in prosecuting his claim.

The first entry on the file by way of proceedings is the 7<sup>th</sup> February 2019 when the claim was dismissed for want of prosecution.

I agree with the claimant's counsel that there appears to have been some confusion in the service of notice to show cause as there are two notices on the court file, one dated 17<sup>th</sup> January 2019 requiring the parties to appear in court on 11<sup>th</sup> February 2019 which has an alteration on the dates, and the other dated 28<sup>th</sup> January requiring the parties to appear in court on 7<sup>th</sup> February 2019. The one attached to the affidavit in support of the application is dated 17<sup>th</sup> January 2019 but has a date of 1<sup>st</sup> February 2019.

Had there been proof of action taken to prosecute the claim, or had the claimant even demonstrated that the summons were actually served upon the respondent, I would have given him the benefit of doubt. As it were, there is no claim to reinstate as the one on record lapsed upon failure of the claimant to serve the same on the respondent.

There is further no evidence of attempts to settle the matter out of court, which again would have demonstrated that there was engagement of the respondent.

Further, the letter of summary dismissal of the claimant which is part of his documents on record, is dated 16<sup>th</sup> July 2012 while the claim was filed on 7<sup>th</sup> December 2015, which would make it time barred as the claim should have been filed latest by 16<sup>th</sup> July 2015.

Whichever way one looks at the claim, it is not capable of being salvaged. It was dead on arrival, a stillbirth.

For these reasons, the claimant's application dated 14<sup>th</sup> February 2019 is dismissed.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**