



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 1258 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**SAMUEL KABUI MUNYIRI.....CLAIMANT**

**VERSUS**

**PIONEER PLUMBERS LIMITED.....RESPONDENT**

**RULING**

The Claimant/Applicant, Samuel Kabui Munyiri filed a Notice of Motion Application dated 18<sup>th</sup> December 2018 brought under Article 159(2)(d) and (e) of the Constitution, Sections 80, 1A, 1B and 3A of the Civil Procedure Act and Order 12 Rule 7 of the Civil Procedure Rules. He seeks Orders that the law firm of Mwaniki Njuguna and Company Advocates be granted leave to come on record on his behalf and that the order of the Court made on 25<sup>th</sup> January 2018 dismissing this suit be reviewed and set aside. Further, that the suit herein be reinstated for hearing and that the costs of this application be in the cause.

The Application is based on the grounds that –

1. The Claimant/Applicant was being represented by the firm of Gakoi Maina and Company Advocates and it is now necessary for the firm of Mwaniki Njuguna and Company Advocates to seek leave of the court to come on record for the Applicant in its place.
2. This matter was dismissed for want of prosecution on 25<sup>th</sup> January 2018.
3. This application has been brought without any inordinate delay.
4. The Claimant/Applicant is keen on and very interested in prosecuting this matter as he is aggrieved by the decision of the Judge.
5. The Claimant/Applicant has a very strong and arguable case.
6. In the interest of justice, the said Order be reviewed, set aside and the Claimant's claim filed on 20<sup>th</sup> July 2015 be reinstated for hearing and final determination.
7. No prejudice will be occasioned on the Respondent if the Application is allowed.
8. Unless the Orders sought are granted, the Claimant/Applicant stands to suffer irreparable loss that cannot be compensated by way of damages.
9. It is in tandem with the overriding objectives of this case and in the interest of substantive justice to allow this application.

The Application is supported by the Affidavit dated 18<sup>th</sup> December 2018 sworn by the Applicant's advocate, Mwaniki Njuguna who avers that the Summons to Enter Appearance were never extracted and that consequently, the Claimant's previous advocates did not take any step towards prosecuting this matter to its final determination. That when the Claimant got in touch with the said former advocates on the status of his case, he was informed that the suit had been dismissed for want of prosecution. That this would not have happened had Gakoi Maina and Company Advocates been diligent. That the delay was therefore not occasioned by any act of the Claimant/Applicant and mistakes of Counsel should not be visited upon the client. That Article 159(2)(d) of the Constitution of Kenya provides that substantive justice be administered without undue regard to technicalities and that the said dismissal would occasion a miscarriage of justice.

The application was heard on 14<sup>th</sup> May 2019. Mr. Mutoro who was holding brief for Mr. Mwaniki argued the application.

## **Analysis and Determination**

The claim herein was dismissed for want of prosecution on 25<sup>th</sup> January 2018. At the time of the dismissal, the claimant/applicant had done practically nothing with regard to setting the suit down for hearing. The claimant filed suit on 20<sup>th</sup> July 2015 but did not even bother to take out summons.

The application for reinstatement of the suit is supported by the affidavit of Mwaniki Njuguna, Counsel who is not yet on record. Part of the prayers in the application is for the said Counsel to come on record.

The question this begs is “Where was the claimant/applicant?” Where has he been since July 2015 when he filed suit? Where was he between July 2015 and January 2018 when the suit was dismissed for want of prosecution? Where was he between January 2018 when the suit was dismissed and December 2018 when the present application was filed? Why did he not swear the affidavit in support of the application?

There are several issues for determination. The first is whether there is a suit capable of being reinstated in view of the fact that no summons were taken out and the memorandum of claim has never been served upon the respondent.

Secondly, whether the claimant/applicant has met the threshold for grant of the orders sought.

On the first issue which is the validity of a suit where no summons have been taken out, the Employment and Labour Relations Court (Procedure) Rules 2016 provide as follows –

### **11. Service of summons**

**(1) The Court shall issue summons in Form 2 set out in the First Schedule.**

**(2) A claimant shall serve the summons issued under paragraph (1) to the respondent together with the statement of claim.**

**(3) Summons shall be valid in the first instance for a period of six months beginning on the date of its issue and the Court may extend the validity from time to time if satisfied that it is just to do so.**

**(4) A respondent who files any pleading in response to any suit filed in Court shall have the pleadings served on the claimant or the appellant by a qualified process server within fourteen days of filing.**

**(5) A party shall, upon effecting service of pleadings on any other party, prepare and file in Court an affidavit of service in Form 3 set out in the First Schedule.**

**(6) An affidavit of service shall be accompanied by evidence of acknowledgement of receipt of the served document signed by the recipient, respondent, claimant or appellant as the case may be or the persons accepting service on their behalf.**

**(7) If for any reason the signature of the recipient cannot be secured, the process server shall state so in the affidavit of service.**

**(8) Where service of pleadings under these Rules is effected through registered carrier, the affidavit of service shall be accompanied by the certificate of mailing.**

**(9) The Court may effect service on behalf of any party upon request in writing made by the party in Form 4 as set out in the First Schedule and upon payment of the prescribed fee.**

The Rules thus do not provide for a situation as herein, where no summons are taken out. Order 5, Rule 1 of the Civil Procedure Rules is more explicit and provides as follows –

### **ORDER 5**

#### **ISSUE AND SERVICE OF SUMMONS**

**[Order 5, rule 1.] Issue of summons.**

**(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.**

**(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.**

**(3) Every summons shall be accompanied by a copy of the plaint.**

**(4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:**

**Provided that the time for appearance shall not be less than ten days.**

**(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.**

**(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.**

**What then is the fate in a case where no summons have been issued?**

In **Abdulbasit Mohamed Ahmed Dahman and Another -V- Fidelity Commercial Bank Limited (2016) eKLR** the court held that the suit had abated where no summons were served upon the defendant.

In **Kialeken Ole Kiolonka Orumoi -V- Mellech Engineering and Construction Limited and 2 Others (2019) eKLR** where summons were never collected by the applicant for service, the court held that the application to extend summons was a non-starter.

In the case of **Nicholas Kiptoo Arap Koriri Salat -V- IEBC and 6 Others (2013) eLRC**, Kiage JA observed that courts must never provide succour and cover to parties who exhibit scant respect for rules and timelines which make the process of judicial adjudication and determination fair, just, certain and even-handed.

Again in the case of **Raila Odinga and 5 Others -V- IEBC and 3 others (2013) eKLR**, the Supreme Court held that Article 159(2)(d) of the Constitution is not a panacea for all procedural shortfalls. "... it is plain to us that Article 159(2)(d) is applicable on a case to case basis."

It the application herein, the applicant has not applied for issue, or re-issue of summons. The applicant has indeed not even mentioned that the summons in this suit was never taken out and that the memorandum of claim which was filed on 20<sup>th</sup> July 2015 has never been served.

Having not served the summons, the suit has abated there is therefore no suit to be reinstated.

For these reasons the application fails and is accordingly dismissed.

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

**MAUREEN ONYANGO**

**JUDGE**