



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT BUNGOMA
CAUSE NO. 7 OF 2018

CAROLYNE WANGOLO MISIATI

SARAH NEKESA ONDITI

PARAMENA BUTIKO LUMOLA

DAVID KATAKA LUBANGA

PHELISTUS OSIOLO

MARY NYAGUKA ACHERO

SALIM MURONO NYAROTSO

HUMPHREY MAKOKHA

GRACE KERUBO

IBRAHIM WAMBASI

WILLIAM ODHIAMBO

PHILIP ODHWONG'O

PAUL TAABU

VITALIS OCHIENG

BENTA AKELO

ZAINABU NABUKO.....CLAIMANTS

VERSUS

WEST GATE HOTEL LTD.....RESPONDENT

RULING

Application dated 15.8.2018 seeks to review and or set aside the order of the court dated 25th July, 2018 in which the suit was dismissed for want of prosecution. That the suit was filed in the Industrial Court of Kenya at Nairobi as Cause NO. 1213 of 2012 and was later transferred as Kisumu ELRC No. 148 of 2017 and later on as ELRC Cause No. 7 of 2018.

The application is supported by the grounds on the face of the application to wit that the suit was dismissed without giving the Claimants

chance to prosecute the suit.

That the Claimants are willing to prosecute the suit against the Respondent. That it is in the interest of justice that the Claimants be heard. That the Respondent would suffer no prejudice. That the Claimants did not receive the notice to show cause.

The application is further supported by an affidavit of Christine Kitui an advocate on record.

The counsel deposes that the Respondents have been served with the pleadings in this matter but have failed to enter appearance nor file any defence.

That counsel was in court on 25.7.2018 when directions were given by the judge.

That the dismissal of the suit was due to the non appearance of the counsel and mistake of counsel should not be visited on the Claimants.

That the Claimants are willing to prosecute the suit without any further delay.

The Respondent filed a replying affidavit on 25.9.2018.

The Respondent states that the advocate admits that he was negligent in not serving the Respondent in the previous suit for a period of five (5) years and no reasons have been preferred for the inordinate delay.

That the suit has been dismissed three (3) times since it was first filed as Misc Application No. 3 of 2013.

That the suit was lastly dismissed on 25.7.2018 and the Claimants filed this application on 15.8.2018.

The matter was set down for mention by the Claimant on 28.2.2018 in the absence of the Respondents and a hearing date for 25th July 2018 was granted by the court.

On 25th July 2018 M/s Kituyi appeared for M/s Ashioya for the Claimant and Charles Maana held brief for Mr. Namatshi for the Respondent.

Counsel for the Respondent Mr. Maana submitted that they had not been served with any documents in this suit and that Mr. Namatsi had a sick patient and was not available to appear in court on the day. That the application lacks merit and it be dismissed.

Determination

The suit filed on 18.7.2012 seeks payment of arrear salaries set out in the statement of Claim for the year 2010 and unremitted NHIF contribution and NSSF contribution for the same period.

To date the Respondents have not filed any statement of defence but the Claimants advocate have been unable to prosecute this matter to conclusion on various occasions.

On the date the suit was dismissed, the court noted that there was no proof of service of the summons to enter appearance and statement of claim in the file and that the suit was filed on 18th July 2012 more than 5 years ago. The file was then placed aside to await M/S Ashioya for the Claimant.

At 12.20 p.m. M/s Ashioya appeared and told the court that she had no proof of service of the summons to enter appearance and statement of claim.

The court dismissed the suit for want of prosecution in that summons and statement of claim were never served.

The Claimants have not in their application dated 15th August 2018 explained why they have not served the suit on the Respondents to date.

However, now that the advocates for the Respondent are properly seized of the matter and the failure to prosecute this matter appears to be due to the mistakes of counsel for the Claimants, the court is willing to give the Claimants the last chance to prosecute this suit to finality. The court is persuaded by the decision of **HCC of Nairobi Civil Case NO. 727 of 2012 Audrey Akaka Ismail –vs- Equity Bank Ltd** in which the court reinstated a matter dismissed due to mistake of counsel.

Accordingly, the orders issued on 25.7.2018 dismissing the suit for want of prosecution are set aside and the suit is reinstated on the following conditions:-

- (a) The Claimant to serve the Respondent with the statement of claim within 7 days of the ruling.
- (b) The Respondent to file a response to the claim within 21 days of service.
- (c) The suit to be set down for hearing on a date to be provided when the ruling is delivered.

(d) Costs in the cause.

DATED, SIGNED and DELIVERED at BUNGOMA this 26Th day of SEPTEMBER, 2019.

HON. M. N. NDUMA, JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA

Appearance:

M/s Ashoya for Claimant

Mr. Namati for Respondent

Joy: Court Assistant