REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 619 OF 2016

CHARLES ORINA ONDIEKI.....CLAIMANT

VERSUS

MARIDADI FLOWERS LIMITED.....RESPONDENT

RULING

Introduction

1. The Application before me is the Claimant's Notice of Motion dated **17th May, 2019.** It is brought under Sections 3, 16, 20 of the Employment & Labour Relations Court Act No. 20 of 2011, Rule 33 of the Employment & Labour Relations Court Rules, 2016 and Articles 47, 50 and 159 of the Constitution of Kenya, 2010. It seeks the following Orders **THAT**:-

a) This Application be certified urgent and service dispensed with in the first instance.

b) The Court be pleased to set aside and/ or review and set aside the court orders made on 13th May, 2019 dismissing this suit for want of prosecution and do reinstate the suit.

c) This Court be pleased to Order that thereafter this matter be listed for hearing on priority basis.

d) In the alternative to prayer (3) above, this Court be pleased to order that thereafter this matter proceed to mediation forthwith.

e) Costs of this application be in the cause

2. The Motion is premised on the grounds set out in the body of the Motion and is Supported by the Supporting Affidavit sworn by **DAVID ONYANGO**, an Advocate practicing as such under the firm of **MWAURE & MWAURE WAIHIGA ADVOCATE**, on record for the Claimant herein on 17th May, 2019. In brief the claimant's case is that the failure to prosecute the suit before the dismissal was due to willful neglect. That he had attempted to fixed mention for direction and also to refer the same to mediation but in vain.

3. The Respondent on the other hand opposed the Application by filing a Replying Affidavit sworn by **STACEY KATILE SAMMY**, counsel on record for the Respondent herein on 29th May, 2019. In brief the respondent's case is that the pleadings closed 14th June, 2016 when the claimant filed his Reply to Defence but thereafter he took no steps towards prosecuting the suit prompting her to file Application for dismissal of the suit for want of prosecution on 12th April, 2019. That the Claimant failed to file a response to the said Application and as such it was allowed by this Honourable Court on 13th May, 2019. She contended that no sufficient reasons have been given to warrant the reinstatement of the suit and she will be prejudiced by the reinstatement because her witnesses have since left her employment and she cannot trace them. She therefore urged the Court to dismiss the same with costs.

Claimant/Applicant's Submissions

4. Mr. Mwaure, for the applicant submitted the failure to oppose the application for dismissal of suit was not intentional but due to service at the branch office of his Law firm as opposed to the head office where counsel sit. He further submitted that the Claimant tried to source for a date in writing (annexure "DO 1") but the same was not given owing to the shortage of Judges. That the only matters older than 2015 were able to get hearing dates according to notice by the court. He urged the Honourable Court to allow the instant Application contending that no prejudice will be occasioned on the Respondent herein. That it is in the best interest of justice that the matter be decided on merit.

Respondent's Submissions

5. M/s Katile for the Respondent submitted that the Claimant was not keen to prosecute this matter having failed to fix the matter for directions for about three (3) years after its institution. She further submitted that the letter dated 25th July, 2016 (annexure "DO 1") seeking mention date for directions was filed in Court on 23.5.2017, more than a year later. She observed that after the said letter, another year lapsed without any action being taken towards prosecuting suit. In conclusion, she submitted that service of the application for dismissal of the suit was properly done because both branch office and head office of the Claimant's Advocate belong to the same law firm and urged this Court to dismiss the instant Application with costs.

Analysis and Determination

6. After careful considered the motion, rival Affidavit and oral submissions by the parties the issue for determination is whether the Application dated 17th May, 2019 has met the threshold for the court to exercise discretion to review and set aside of the impugned order. The threshold for granting review is provided by Rule 33(1) of the ELRC Rules, thus:

> ***"33(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which an appeal is allowed, may with reasonable time, apply for a review of the judgment or ruling –***
>
> ***(a) If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;***
>
> ***(b) On account of same mistake or error apparent on the face of the record;***
>
> ***(c) It the judgment or ruling requires clarification; or***
>
> ***(d) For any other sufficient reasons."***

7. In a nutshell, the foregoing rule allows the court to review its order if:

(a) The order has not been appealed against.

(b) The application is made without inordinate delay.

(c) Any or all the grounds set out in Rule 33(1) (a) (b) (c) and

(d) above is proved.

8. The instant Application was filed on 17th May, 2019 while the suit was dismissed on 13th May, 2019. It follows therefore that the application was brought expeditiously and without delay. Secondly, no appeal was lodged against the impugned Order. The question that begs for answer is whether the applicant has proved any of the said grounds for review. From the contentions by the applicant, it would appear that the application premised is on Rule 33 (1) (d) aforesaid, that is, any other sufficient reason".

9. In the case of ***Gold Lida Limited v Nic Bank Limited & 2 others [2018] eKLR*** the Court ordered for a reinstatement of suit by observing that:

> ***"Section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte. The court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties.***

10. In **Shah v Mbogo and Another [1967] EA 116** the Court of Appeal of East Africa held that:

> ***"This discretion (to set aside ex parte judgment) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."*** *(emphasis added)*

11. Applying the foregoing principle to this case, I would find that the claimant has demonstrated that he never slept on his right to prosecute his suit. He has demonstrated that on 23.5.2017, his advocates wrote letter dated 25.7.2016 requesting for a mention date. Although the purpose for requested mention date was not revealed, I can only guess that it was for pre- trial or scheduling conference. The date was not given after the court received the request and no reason was cited. I therefore find that the claimant was not entirely to blame for the failure to prosecute the suit because as early as May 2017 he had applied for date in writing.

12. As regards the failure to respond to the respondent's application for dismissal of the suit, I must observe that the address for service given by the claimant's Advocate is the same one used by the respondent to serve the application. It was incumbent upon the advocate to update the court record with his new address for service otherwise the other party has only the address given by the initial pleadings at his disposal.

13. Finally, the respondent contended that she will be prejudiced by reinstatement of the suit because it will not be possible to trace her witnesses because they have since left he employment. The court must however balance the interest between the two parties and especially aim at achieving substantive justice. The foregoing view is fortified by **HCCC 467 of 2009 Fran Investments Limited Vs G4S Security**

Services Limited where it was held:-

> ***"…And I think, it is so especially when one fathoms the requirements of article 159 of the Constitution and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such a draconian act comparable only to the proverbial "sword of the Damocles".***

14. In conclusion, I find that on the basis of the material presented to the court by both parties, substantive justice herein demands that I exercise discretion in favour of the applicant and award costs to the respondent to remedy whatever prejudice is likely to be suffered by her. The claimant is directed to fix the suit for pre-trial directions forthwith to pave the way for hearing of the suit. In the meanwhile, the parties are to file witness statements and any documentary evidence they may wish to rely on during the hearing. I asses the costs of the application at Kshs.7,000 to be paid before the hearing of the suit.

Dated, Signed and Delivered in Open Court at Nairobi this 20th day of September, 2019

ONESMUS N. MAKAU

JUDGE