



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2001 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 31st October, 2019)

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VERSUS

MASHARIKI MOTORS LIMITED.....1ST RESPONDENT

KARUNA HOLDINGS LIMITED.....2ND RESPONDENT

SIMBA COLT MOTORS LIMITED.....3RD RESPONDENT

RULING

1. Pending for determination before this Court are two Applications.

2. The First Application is the one dated 2nd May 2019. The Application was filed under a Certificate of Urgency through a Notice of Motion filed Articles 36(1) and 41 (1), (2) (b), (c) of the Constitution of Kenya, Sections 73 and 74 of the Labour Relations Act 2007, Section 12 of the Employment and Labour Relations Court Act and all enabling provisions of the Law.

3. The Application seeks the following Orders:-

- 1. THAT, this Application be certified urgent and be heard ex-parte in the first instance.***
- 2. THAT, the Court do reinstate the dismissed file (Cause No. 2001 of 2014) which was dismissed for want of prosecution by the parties.***
- 3. THAT, the Claimant be granted leave to file an extract showing directors and shareholders of the Respondents.***
- 4. THAT, the Claim be heard and determined on priority basis.***

4. This Application is premised on the grounds:-

- 1. THAT, the Claimant filed the dispute (Claim) on 11th November, 2014.***
- 2. THAT, the Advocate for the 1st and 2nd Respondents Antony Gikaria was stationed at the Old Mutual Building 4th Floor Kimathi Street Nairobi.***
- 3. THAT, the said Advocate relocated his office premises to an unknown destination therefore the Claimant could not locate them for service.***
- 4. THAT, in the last Court proceedings, the Claimant was present; the Advocate for the 3rd Respondent, Arwa & Associates was present. However, the Advocate for the 1st and 2nd Respondents, Antony Gikaria was not present because the Claimant did not locate them and serve them with the mention notice.***

5. **THAT, the Claimant sought leave of Court to locate and mention the matter soon thereafter which leave was granted.**

6. **THAT, the Claimant did all the best but could not locate them. As at the date of this Application, within google map Antony Gikaria & Co. Advocates still exists at Old Mutual Building 4th Floor as they have not updated their records.**

7. **THAT, the Claimant was not served with the show cause notice to appear in Court on 17th October, 2018 and thereafter was not aware and did not attend Court on that day when the matter was being dismissed for want of prosecution.**

8. **THAT, this matter was therefore dismissed unheard.**

9. **THAT, the Claimant finally located the office premises of Antony Gikaria & Company Advocates manually and wrote to the Court seeking to fix a hearing date.**

10. **THAT, the Deputy Registrar directed that the Claimant do file a formal application in view of the Court Order of 17th October, 2018.**

11. **THAT, the Claimant do request the indulgence of the Court to reinstate the file and a nearest available hearing date be fixed.**

12. **THAT, unless the Court grants the Orders sought, the Applicant and her members who were declared redundant and have not been paid will suffer irreparable damage in losing their terminal pay.**

5. The Application is further supported by the Affidavit of **BENJAMIN ONG'AMO** sworn on 18th October, 2018 in which he reiterates the averments made in the Notice of Motion Application.

6. The 3rd Respondent on its part filed an Application by way of Notice of Preliminary Objection dated 17th May, 2019 brought on grounds that:-

1. **The Court is functus officio and without jurisdiction to entertain or determine the Application dated 2nd May, 2019.**

2. **The said Application and the entire Claim is incompetent, bad in law and does not lie as it is premised provisions of the law that do not donate any power to grant the prayers sought.**

7. In addition to the above the 3rd Respondent filed a Replying Affidavit sworn on 26th June, 2019 by **GRACE MASAKI**, the Senior Legal Counsel of the 3rd Respondent herein in which she avers that the Notice of Preliminary Objection to the Application filed on 17th May, 2019 ought to be dispensed with before the Application.

8. She further avers that the Court is functus officio as a final decision has been rendered by this Honourable Court and the Court therefore lacks jurisdiction to entertain or determine the Application dated 2nd May, 2019. She further posits that the Court can only set aside its own decision on Application for review, which is not what the Applicant is seeking in its Application dated 2nd May, 2019.

9. The 3rd Respondent contends that it is in the interest of justice that the instant Application be dismissed with costs to the 3rd Respondent.

10. In response to the Notice of Preliminary Objection the Claimant filed its Response on the 24th May, 2019 in which it is admitted that this Court enjoys discretion of both dismissing and reinstating matters dismissed for want of prosecution.

11. The Claimant further contended that on the last date the matter was in Court, the Claimant sought and was granted stay of proceedings as it was unable to locate the Advocate on record for the 1st and 2nd Respondent.

12. The Claimant avers that the 3rd Respondent cannot hang on to or rely on a process it did not initiate as the Claim herein was dismissed by the Court on its own motion.

13. In conclusion, the Claimant urged this Honourable Court to dismiss the Preliminary Objection with costs to the Claimant and proceed to direct that the matter be fixed for hearing at the earliest opportune moment.

14. This Court directed that both Applications will be heard together and would be dispensed by way of written submissions.

Submissions by the Parties

15. The Claimant/Applicant submitted that the issue of the Court being *functus officio* does not arise in this case as this Court has jurisdiction/mandate to dismiss the Claim as it enjoys the same and/or equivalent jurisdiction/mandate if persuaded and convinced to reinstate a dismissed suit. The Claimant/Applicant urged this Honourable Court to exercise its discretion and proceed to reinstate the Claim for hearing and determination on merit.

16. The Claimant/Applicant further submitted that its members who were declared redundant by the Respondent herein are likely to suffer irreparable damage as they have not been paid their terminal dues at the time of separation.

17. The Claimant/Applicant contends that it was not served and/or issued with any notice to show cause why the claim should not be dismissed for want of prosecution yet the Court proceeded to dismiss the matter unheard.

18. It was on this basis that the Claimant urges this Honourable Court to allow its Application dated 2nd May, 2019 and reinstate the Claim for hearing and determination on merit.

3rd Respondent's Submissions.

19. The 3rd Respondent on the other hand submitted that the Preliminary Objection as raised meets the threshold as set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696 at 700.**

20. It is further the 3rd Respondent's submission this Court lacks the jurisdiction to determine the matter having determined the matter with finality through a dismissal by want of prosecution. For emphasis on the issue of jurisdiction the 3rd Respondent cited and relied on the cases of **The Owners of the Rive Rima (1987) 3 ALL ER 1; Roy Shipping S.A Agencies and all interested ship "Mama Otan" Vs Dodoma Fishing Company Limited (1995-1998) 2 EA 293 and The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil Kenya Ltd (1989) KLR.**

21. The 3rd Respondent contends that this Court having finalized the matter it becomes *functus officio* and therefore lacks any other authority to hear and determine the said suit. To buttress this argument the 3rd Respondent cited and relied on several Authorities among them **Raila Odinga & 2 Others Vs Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR** and **Telcom Kenya Limited Vs John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telcom Kenya Limited) (2014) eKLR.**

22. The 3rd Respondent further contended that the Claimant had no excuse of not attending the matter when the matter was scheduled for hearing during service week as the notices were well publicized in the Cause list and therefore the matter was rightfully dismissed and the decision was final. For emphasis the 3rd Respondent cited and relied on the case of **David Mwangi Mburu Vs Intercontinental Nairobi Limited (2018)** where it was held:-

"In my opinion, dismissal of a suit for want of prosecution is a final determination of the suit on merits because the Court does in such circumstances is to make a finding of the fact that the Claimant has tendered no evidence to prove his/her case in the required standards. Consequently, after such a decision the Court becomes functus officio save for the power to review if properly invoked."

23. In conclusion the 3rd Respondent submitted that the Application dated 2nd May, 2019 is defective and incompetent and therefore ought to be dismissed with costs to the 3rd Respondent.

24. I have considered the averments of the Parties. I note that the omission to attend Court by the Claimants on 17/10/2018 which led to dismissal of this suit is excusable and Claimants should not be made to suffer the mistake of their Counsel.

25. I exercise my discretion and allow the application and order claim reinstated for hearing expeditiously.

26. Costs in the cause.

Dated and delivered in open Court this 31st day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ochola holding brief Ondiege for Applicant – Present

Mr. Otieno holding brief Arwa for 3rd Respondent – Present