



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1159 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ABDI HASSAN.....CLAIMANT

-VERSUS-

OLDONYO LARO ESTATE LIMITED.....RESPONDENT

RULING

Vide an application by way of notice of motion dated 23rd October 2017, the claimant/applicant seeks orders reinstating his claim which was dismissed for non-attendance on 6th April 2017. The grounds upon which the application is anchored are that –

The non-attendance by the applicant's advocate was occasioned by the following: -

- a) The advocate who was initially on record for the matter together with the assisting advocate and the advocates' firm secretary departed from the firm of Garane & Associates at different dates in the third and fourth quarters of the year 2016 without properly diarizing the matter.
- b) The notice to show cause why the suit should be dismissed that was sent out by the court on or around 8th March 2017 before the subsequent dismissal of the suit on 6th April 2017 was not received by the Firm of Garane & Associates which was on record as the advocates of the applicant.
- c) The advocates firm of Garane & Associates changed their postal address from 52189 – 00100 Nairobi to 20617 – 00100 Nairobi in mid-2016 and the notice to show cause sent out by the court may have been mistakenly posted to the former postal address of the advocates' firm.
- d) The advocates' firm of Garane & Associates changed their physical address in June 2017, from Hughes Building along Kenyatta Avenue in Nairobi to Pitman House in Hurlingham within Nairobi. This change of physical address and the movement of files, office assets and equipment and the logistics involved may have caused correspondences within and/or with the firm not to be properly harmonized.
- e) The above many changes at the firm of Garane & Associates may have collectively contributed to the applicant's case to be dismissed for non-attendance.
- f) The firm of Garane & Associates found out from the court's registry upon perusal of the file that the matter was dismissed 6th April 2017.
- g) The applicant has always been willing to prosecute his case, especially since he has not found an alternative employment following his termination by the respondent and in the interest of justice seeks the court to exercise its discretion which is unfettered to reinstate his suit and avoid injustice and hardship to the applicant.
- h) Granting this application will not cause the respondent any prejudice.

The application is supported by the affidavit of CYNTHIA W. NJAGI, advocate for the claimant practicing as such in the firm of GARANE & SOMANE ADVOCATES in which she states that the firm changed both offices and postal address in mid-2016 and mid-2017 respectively, that counsel previously handling this case left the firm and that the said counsel did not properly diarise the case. She deposes that as a result the claimant's advocates did not receive the notice to show cause.

The respondent opposed to the application and filed a replying affidavit of DAMEC KIRAGU, an advocate practicing in the firm of LJA ASSOCIATES who has the conduct of the case on behalf of the respondent. The respondent also filed written submissions.

The application was disposed of by way of written submissions.

Claimant/Applicant's Submissions

In the submission filed on behalf of the claimant/applicant it is submitted that the applicant has been keen to prosecute his claim, that the claimant/applicant being an amateur and never having been in court before, entrusted the suit to his advocates and went back to his rural home in Garissa County but kept in touch with his advocates by telephone communication.

It is submitted that dismissal without consideration of the substance of the claim is an affront to the overriding objectives as envisaged in Section 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution.

The claimant relied on the decision of the **Court of Appeal in Kasturi Limited -vs- Nyeri Wholesalers Limited [2014] eKLR** in which the court held that failure to diarise a date is an advertent mistake of counsel that should not be visited upon the client. The claimant/applicant further relied on the case of **Shah -vs- Mbogo (1967) EA. 116** in which it was decided that the decision to reinstate a dismissed suit is a discretionary matter to be granted if the court is satisfied that there is sufficient reason for reinstatement.

Respondent's Submissions

The thrust of the respondent's submissions is that under Order 17, Rule 2 of the Civil Procedure Rules there is no mandatory requirement for notice to the parties before a suit is dismissed for want of prosecution. It is further the respondent's argument that the application as filed is a non-starter, incurably defective and unsustainable for not stating under which law it has been made and because it lacks a prayer to set aside the dismissal orders of 8th April 2017.

The respondent further submits that no sufficient reasons have been advanced by the applicant for the non-attendance or prolonged delay in prosecuting the case. The respondent relied on the decision in **Trust Bank -vs- Portway Stores (1993) LTD [2001] 1 EA**. The respondent further relied on the decision in **Fitzpatrick -vs- Batger & Co. Ltd. (1967) 2 ALL ER 37** wherein **Lord Denning**, citing his decision in **Regentine -vs- Beechholme Bakeries Ltd (1967)** stated—

“It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition... the delay is far beyond anything we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution.”

Determination

The record of the court shows that the memorandum of claim herein was filed on 16th July 2014. The respondent filed statement of response on 18th September 2014. No action was taken until 30th January 2015 when the claimant fixed the case for hearing on 19th November 2015. On the hearing date none of the parties attended court. The claimant was condemned to pay court adjournment fees of Kshs. 1,000 for failing to attend court after fixing a hearing date. The same has never been paid to date.

No further action was taken in the file until it was dismissed for want of prosecution following the service of the notice to show cause at the court's own motion.

The claimant has therefore not demonstrated any interest to prosecute the case. There is no demonstration that the case was fixed for hearing and not diarised as alleged by the Claimant's counsel in the supporting affidavit. The only time the case was fixed for hearing was on 19th November 2015 when the Claimant did not attend court to prosecute the case. The change of both physical and postal address which is alleged to have occurred in 2016 and 2017 respectively could not have affected the hearing of 19th November 2015. The fact that the application herein is supported by affidavit of counsel and not the claimant/applicant has also not escaped the court's attention and goes to demonstrate further that the claimant is not in touch with his case. The arguments that he travelled to his village are but averments by counsel without any evidence.

As was stated in all the cases referred to by both parties cited herein above, the court will only exercise its discretion in favour of a party where the party can demonstrate that there is good cause to do so. The claimant has not demonstrated any cause to warrant the exercise of this court's discretion in his favour.

He is guilty of laches for failing to prosecute his case from 30th January 2015 when the hearing date of 19th November 2015 was taken in the registry to 6th April 2017 when the case was dismissed for want of both prosecution and attendance, a period of more than two years.

I find no merit in the application and dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE