



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.811 OF 2010

CAMYLITA ADHIAMBO.....CLAIMANT

VERSUS

NATION STAFF CONSUMER SOCIETY.....1ST RESPONDENT

NATION STAFF CONSUMER CO-OP SOCIETY.....2ND RESPONDENT

NATION STAFF SAVINGS AND CO-OP SOCIETY....3RD RESPONDENT

RULING

1. The claimant, through application and Notice of Motion dated 1st August, 2017 is seeking for orders that;

1. Spent

2. This court be pleased to set aside, vary, modify, discharge the order or *discharge the dismissal along with any adverse orders made against the applicant on 1st March 2017.*

3. The court be pleased to reinstate the claimant/applicant's claim herein.

4. Subject to Order 3 above being granted, this Court be pleased to direct the amended Memorandum of Claim dated 7th April, 2016 for hearing.

5. Costs of this application be provided for.

2. The application is supported by the affidavit of the claimant and on the grounds that the claim herein was filed in 2010 through M/s BM Wamalwa & Company Advocates which firm was unable to continue with this matter and the claimant instructed the firm of Amolo & Kibanya Advocates to take up the same. The failure to attend court and thus the dismissal of the case was not deliberate or intentional on the part of the claimant but rather due to the advocates on record who kept the claimant uninformed despite constant follow up. The claimant became aware that the suit had been dismissed at the end of 2017 upon being advised by a member of staff from the law firm. Upon perusal of the file the claimant realised the suit had been dismissed for want of prosecution.

3. The claimant has now sourced the assistance of new advocates, the firm of Kibungei & Company Advocates now on record. There is an Amended Memorandum of Claim dated 7th April, 2016 which has merit and in the interests of justice it should be heard the mistake of advocate should not be visited upon the claimant.

4. In reply, the respondent filed Grounds of Opposition and a Replying Affidavit sworn by Naomi Wandia Njenga, advocate for the respondent and who avers that the claim was filed in 2010 and defence filed on 26th September, 2012. Efforts to settle the matter out of court were fruitless. When new advocates were appointed by the claimant, similar communications were held. Parties were in court on 3rd April, 2014 and agreed to file witness statements but the claimant's advocate submitted that they were having problems with their client and required to apply to cease acting for her. Notice of Change of Advocate was thus filed and served on 28th May, 2014. Parties agreed to file written submissions but the claimant failed to comply.

Ms Wandia also avers that the claimant filed application dated 9th May, 2015 to amend claim but on the hearing date the claimant and

advocate failed to attend on 24th May, 2016. The court issued notice dated 18th January, 2017 for hearing of the matter on 7th February, 2017 as the same had been pending for over a year. The parties did not attend and the court gave a further mention date for 1st March, 2017 and no party attended. The matter was dismissed for want of prosecution.

6. Both parties filed written submissions.

7. I have carefully considered the arguments advanced by both parties in this case and the relevant law and authorities as enumerated later in this ruling.

8. The claimant in her ground supporting the application sets out that;

The applicant filed suit in Civil Case 811 of 2010, which suit was filed before this Honourable Court in 2013 through M/s B.M Wamalwa & Company Advocates.

9. These averments are not correct. The record of the court is clear to the extent that the claimant filed this matter on 16th July, 2010. Defence was filed on 26th September, 2012.

10. On 7th October, 2011 the matter was in court where the Judge issued hearing directions. Parties proposed a settlement and mention was allowed for the 6th June, 2012. The matter came up in court on several other dates but parties had not reached a settlement and on 26th February, 2013 the court directed the parties to take a hearing date at the registry. Parties then moved court to file further documents, filed witness statements, file written submissions and whereupon the court would write judgement. The claimant failed to oblige. There were no written submissions filed for the respondent to be able to respond. More time was added for the claimant to be able to comply on 17th February, 2014 and when the matter came up in court again on 1st October, 2014 the claimant had not complied. During the year 2016 parties went round the issue of filing new pleadings, the court allowed, gave timelines and a hearing date for 24th May, 2016. There was no compliance. No party moved the court since.

12. Under Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2016 they provide that;

16(1) In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.

2. If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.

3. Any party to the suit may apply for dismissal as provided in paragraph (1).

4. The court may dismiss the suit for non-compliance with any direction given under this rule.

[Underline added]

13. On this basis the court issued summons to the parties to attend court to show cause why the suit should not be dismissed for want of prosecution. Parties were to attend court on 7th February, 2017. Both parties remained absent. Taking into account that parties may not have taken the notice seriously, the court allowed for another date for 1st March, 2017. The respondent was in attendance but the claimant remained absent.

14. The suit was dismissed for want of prosecution on 1st March, 2017.

15. The application is filed on 1st August, 2017. Such time difference is not explained. The fact of the claimant being advised by employees of her advocates and information that the suit had been dismissed and no action was taken for a period of over five months is nothing but indolence. Having filed suit way back in 2010, the duty was on the claimant to follow through with her advocates and to ensure the matter was scheduled for hearing. The various efforts and indulgence by the court to extend time to allow parties to file their pleadings, exchange statement and file written submissions has not been honoured to date. Such can only be described as having a litigant not keen on the case.

16. Where the claimant gave various advocates instructions and they failed to advise, there is cause in negligence.

17. The Rules of the court now allow the court to dismiss suit where parties fail to abide the court directions. Since 2014, the claimant has not taken any action to ensure the directions issued have been complied with. There is no explanation of any nature whatsoever as to why there is no compliance. To revive this suit will therefore not aid justice. Various indulgences granted to the claimant have not been honoured. There is no explanation.

Accordingly, Application dated 1st August, 2017 is hereby dismissed in its entirety. Each party to bear own costs.

Read in open court at Nairobi this 20th day of April, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistant:.....

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