



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1434 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

DANIEL NJIRU NGAI.....CLAIMANT

-VERSUS-

FOUNTAIN CREDIT SERVICES LIMITED.....RESPONDENT

RULING

The claimant's suit herein was dismissed for want of prosecution on 16th October 2017. He has filed an application seeking the setting aside of the orders dismissing the claim and an order that the claim be fixed for hearing and be determined on merit. The application is made by way of notice of motion dated 5th December 2017. It is anchored on Order 48, Order 51, Rule 15 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act and all other enabling provisions of law. It is supported by the affidavit of DANIEL NJIRU NAGAI, the claimant/applicant and the following grounds –

- a. This suit was dismissed for want of prosecution erroneously as the same suit was before Justice Nduma on the 4th November 2015 when the court was not able to hear the matter even through the parties were ready for the hearing.
- b. When the matter was to be fixed for hearing the file was not able to be traced for fixing.
- c. The applicant will suffer double as the defendant will punish the applicant with costs when they were not present when the matter came up for dismissal for want of prosecution.
- d. The applicant had filed an elaborate affidavit to explain the circumstanced which affidavit was missing from the court file.
- e. It is fair and just that the suit be reinstated for hearing and determination on merit.

In the supporting affidavit, he deposes that the case was fixed for hearing on 4th November 2015 but was adjourned, as it could not be reached although the parties were ready to proceed. It was again fixed for hearing on 28th May 2017 when it was not listed.

The applicant deposes that when he was served with notice to show cause he swore an affidavit explaining the reasons why the case had not been fixed for hearing. He deposes that he was in court on the date the case was dismissed for want of prosecution but could not do much as the advocate sent by his counsel to hold brief was not in court. He prayed that the case be reinstated and heard on merit.

The respondent opposes the application and filed grounds of objection and a replying affidavit of ROSEMARY W. KURIA, an advocate practicing in the name and style R. W. KURIA & COMPANY ADVOCATES and on record representing the respondent.

The grounds of objection are that the application is misconceived, as there is no prayer to reinstate the notice to show cause, that no sufficient grounds have been given why the claimant's counsel failed to attend court on 16th October 2017 and that setting aside, would serve no reasonable purpose.

She deposes that she did not attend court on 16th October 2017 when the case came up for notice to show cause as her firm was not served. She deposes that the office had relocated and most probably, the process server was unable to locate the new office.

She deposes that the claimant did not explain the reason for failure to attend court or prosecute the claim. She deposes that setting aside the

orders dismissing the suit will serve no useful purpose as the claimant had not prayed for another chance to defend the notice and instead had prayed for the case to be fixed for hearing. She further deposes that the case was ripe for dismissal as the last record on the court file was on 15th March 2016 and the file had been dormant for over a year. She deposes that the averment by the claimant that the file had been missing was untrue and not supported by any evidence.

The application was by consent disposed off by way of written submissions.

Submissions

In the submissions for the claimant, it is submitted that he will suffer prejudice if the suit is not reinstated and that the respondent has filed a bill of costs even though it never attended court on the date of dismissal.

For the respondent it is submitted that the respondent will be jeopardised by reinstatement of the suit, as it would become difficult for the respondent to present a robust defence, as it may not be able to trace its witnesses or the memories of the witnesses may fade.

The respondent relied on the decision of Justice Abuodha in the case of **George Peter Mutiso -vs- Jimack Engineering Workshop [2017] eKLR** where in dismissing an application for setting aside a dismissal of the suit for want of prosecution the court stated –

*“The court agrees with the finding in **Utalii Transport Company limited and 3 Others -vs- NIC Bank & Another [2014] eKLR** where the Judge said, “It is the primary duty of the plaintiffs to take steps to progress their cases since they are the ones who dragged the defendants to court...” The court finds no justification to set aside the order of Justice Ongaya to dismiss the suit for want of prosecution.”*

The respondent urged the court to dismiss this suit in similar vein.

Determination

I have considered the grounds in support of the application for reinstatement of this suit, which was dismissed for want of prosecution on 16th October 2017. I have further looked at the court record and note that the claimant was in court on 25th May 2015 when the case was fixed for hearing on 4th November 2015, that he was present on the said hearing date but the case could not be reached and was rescheduled to 15th March 2016. I believe the claimant’s averments that the case was not fixed for hearing on 15th March 2016, as there is no entry in the file for the date.

I note that on the face of the notice to show cause, the firm of Osoro Juma and Company Advocates endorsed on the notice to show cause that it had ceased to act for the claimant. This may explain the reason why it did not fix the case for hearing after 16th March 2016 in spite of not having filed an application to cease acting.

I also note that although the respondent did not make any attempt to either fix the suit for hearing or apply to have the suit dismissed for want of prosecution or even file a notice of change of address after moving offices as deposed in the replying affidavit, it proceeded to file a bill of costs in a matter where the suit was dismissed without the court making any orders for payment of costs.

The principles for consideration in a matter like the present application were enunciated by the court in **Utalii Transport Company Limited and 3 Others -vs- NIC Bank & Another [2014] eKLR** that –

“When the Applicant states and correctly so, that: “It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court”.

Then exhorts that “Over one year has lapsed without the Plaintiffs taking any step to progress their case”.

And makes a strong conclusion that “The Plaintiffs’ inertia runs contra to the overriding objective of the court stipulated in section 1A, 1B and 3A of the CPA”.

The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgment-seat.

*It is, therefore, a matter of discretion by the court. See the opinions of Danckwerts, LJ in **NAGLE v FIELDEN [1966] 2 QBD 633** at page 648, and Lord Diplock in **BIRKET v JAMES [1978] A.C. 297**. A great number of cases in the Court of Appeal have adopted that approach but I do not wish to multiply them. Accordingly, I will discern the principles, which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:*

- 1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
- 2) Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- 3) Whether the delay is an abuse of the court process;*

- 4) *Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
- 5) *What prejudice will the dismissal occasion to the plaintiff"*
- 6) *Whether the plaintiff has offered a reasonable explanation for the delay;*
- 7) *Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court"*

Having considered both the court's record and the averments of the parties in the affidavits in support of and in opposition to the application and considering the fact that by dismissing this suit the claimant will forever be banished from court, I think it is in the interest of justice to give the claimant another opportunity to have his claim decided on merit. For these reasons, I make the following orders:-

1. That the orders made on 16th October 2017 dismissing the claimant's suit be and are hereby set aside.
2. That the claimant is directed to have the suit fixed for hearing on priority basis within three (3) months.
3. That should no action be taken by the claimant to fix the suit for hearing within three months, the same shall stand dismissed.
4. That there shall be no orders for costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE