REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 817 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JAMES AKOYO MBIRIKA.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF KITUI.....RESPONDENT

RULING

The claim herein came up for hearing on 18th December 2017 when both the claimant and his counsel failed to attend court. The case was dismissed for non attendance by claimant. The hearing date had been fixed by the claimant in the absence of the respondent. The claimant thereafter served hearing notice on the respondent.

By notice of motion dated 1st December 2017 filed under certificate of urgency, the claimant seeks the following orders –

1. That the court be pleased to review and set aside its orders of Hon. Lady Maureen Onyango made on 29th November 2017 dismissing the claimant's suit for want of prosecution on such terms and conditions as the court may deem just and expedient.

2. The costs of this application be provided for.

The application is supported by the affidavit of ARNOLD MAGINA and the grounds on the face thereof. In summary, Arnold Magina states that the claimant failed to attend court because his advocates were involved in election Petitions numbers 4 of 2017 in Kerugoya, 5 of 2017 in Nairobi and 4 of 2017 in Busia. That it was through an oversight that counsel forgot to schedule the case and make adequate arrangements to attend court. It is contended that the claimant had up to the date of dismissal been prosecuting his case diligently with speed and alacrity. That it is equitable to grant the orders sought and the claimant was willing to abide by any conditions that the court may set.

The respondent opposes the application and filed the following grounds of opposition –

1. The application lacks in merit and is otherwise an abuse of the court process.

2. There are no sufficient grounds placed before the court to justify the prayers sought.

3. Contrary to the averments by the Claimant's advocates, the Claimant has not been regularly attending the honourable court.

4. There is no explanation as to why the Claimant failed to attend the court on 29th November 2017**.**

5. The Claim has been pending in court for more than 3 years and the Claimant has never taken tangible steps to have the same prosecuted.

The parties applied and were granted leave to dispose off the application by way of written submissions.

In the claimant's submissions filed on 12th February 2018 it is contended that the court should make a determination on whether there was delay in prosecuting the suit, that the clamant is interested in prosecuting the suit as evidenced by his continuous and timely court attendances prior to the date of dismissal of the suit and that the court should look into the conduct of the parties. The claimant relied on the decision in the case of **AUSTIN SECURITIES -V- NORTHGATE** and **ENGLISH STORES LIMITED [1969] I WLR**.

It is submitted that the failure of the claimant to attend court on 29th November 2017 was unfortunate and the court should pardon him. It is submitted that the law prohibits a court of law from the impulsive inclination to dismiss such cases without further inquiries under the guise of defined legal principles, that dismissal of suits without hearing is draconian and that it is within the discretion of the court to grant the orders. The claimant submits that the court should be guided by the following principles –

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?

It is submitted that the test for inordinate delay is an amount of time which lead the court to an inescapable conclusion that it is inexcusable as was stated in the case of **ALLEN -V- ALFRED MCALPHINE & SONS [968[1 ALL ER** where a delay of 14 years was considered ordinate and inexcusable. The claimant further relied on the case of **AGIP (KENYA) LIMITED -V- HIGHLANDS TYRES LIMITED [2001] KLR 630**, **SAGOO -V- BHARI [1990] KLR 457** and **IVITA -V- KYUMBU [1984] KLR 441** where Chesoni J. as he then was observed as follows –

> *"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiffs excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."*

The claimant submitted that the cause of action herein is quite substantial and raises serious issues of breach of contract of employment, that prolonged delay alone should not prevent the court from granting the orders sought.

The respondent filed submissions on 6th April 2018 in which it is stated that the claimant has miserably failed to convince the court to exercise it discretion in favour of the claimant and set aside the orders of 29th November 2017. It is submitted that there is no evidence that the claimant had been attending court dutifully as alleged. The respondent contends that most instances have been by counsel alone.

It is further submitted that there is no evidence that counsel for the claimant were involved in any election petitions and attended to the said petitions on 29th November 2017. It is further submitted that ignoring this court to attend to election petitions would be tantamount to demeaning this court and amount to contempt of court.

It is further submitted that no reason has been advanced as to why the claimant did not attend court, that there is no affidavit by the claimant stating that he was prevented from attending court on the material date or that he is still interested in prosecuting the case. It is submitted that the supporting affidavit by counsel for the claimant is not enough to dislodge this crucial requirement.

Determination

I have considered the application, the grounds of opposition to the applications, the submissions by counsel and the authorities cited.

Rule 22 of the Employment and Labour Relations Court Rules provides for proceedings in the absence of either party in the following terms –

> **22. Proceedings in the absence of either party**
>
> **(1) Where a hearing notice was served on the parties and an affidavit of service has been filed, the Court may proceed with the case before it in the absence of any party thereto if—**
>
> **(a) the party has indicated that it does not wish to attend the hearing;**
>
> **(b) the party fails to appear for the hearing without providing any reasons; or**
>
> **(c) the Court is not satisfied with the reasons forwarded to it by that party for non-attendance.**

(2) Subject to paragraph (1), where a party fails to attend Court on the day fixed for hearing, the Court may dismiss the suit except for good reason to be recorded.

The implication of sub rule (2) is that unless there is good reason to be recorded, the court ought to dismiss the suit. This is what the court did. The claimant on its own motion fixed the case for hearing, served hearing notice upon the respondent, then failed to attend court on the hearing date. The claimant has not filed an affidavit in support of the application to explain why he did not attend court on the material date or to express his willingness to prosecute the case. Only counsel for the claimant filed an affidavit in support of the application.

Counsel contends that it had three election petitions that the firm was prosecuting in Nairobi, Busia and Kerugoya but there is no proof of the same by way of annexure of either pleadings or cause lists.

Further the application is premised on delay to prosecute the case which was not the reason for dismal of the claimant's suit. All the cases referred to by the claimant in the submissions being on delay in prosecution of suit are not relevant to the present application. It has further not escaped the court's attention that the claimant did not file a list of authorities or file copies of the authorities or avail them to the court.

For the foregoing reasons I find no merit in the application with the result that it is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE