



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 54 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JACK MUKHONGO MUNIALO APPLICANT

-Versus-

KENYA SUGAR COMPANY LIMITED RESPONDENT

RULING

Before me for determination is the claimant's application by way of notice of motion dated 14th July 2017 and filed on 18th July 2017. It is premised upon Sections 1A, 1B, 31 of the Civil Procedure Act, Order 12 Rule and Orders 51 of the Civil Procedure Rules and Article 159 of the Constitution and all other enabling provisions of the law. The application seeks the following orders –

- a) That the court be pleased to set aside and/or review the court orders made on 7th April 2017 dismissing this suit for want of prosecution and the same be reinstated.
- b) That such further or other relief as the court may deem fit and just to grant.
- c) That costs of the claimant/applicant be provided for.

The grounds in support of the application as set out in the affidavit and grounds on the face of the application are that the failure of the claimant to attend court on 7th April 2017 when the case was dismissed for want of prosecution was that the advocate inadvertently failed to diarise the date in the office dairy, that the claim raises triable issues, that the claimant stands to be prejudiced as he has not been accorded an opportunity of being heard on merit and that the failure of the advocate to attend court ought not to be visited upon an innocent litigant.

In the affidavit THOMAS A. K. RUTTO (Advocate) deposes that he was served with notice to show cause but failed to diarise hence he did not attend court on 7th April 2017 when the suit was dismissed for want of prosecution.

The respondent opposes the application and has filed a replying affidavit of B. KHWATENGE, the respondent's Company Secretary in which he deposes that the claimant has not advanced any reasons to warrant the court exercising its discretion in his favour. MR. KHWATENGE deposes that no evince has been provided by the claimant to prove that the date of notice to show cause was not diarised due to inadvertence, that the claimant has not been diligent to fix his claim for hearing, that the only time the case was fixed for hearing was on 2nd November 2015 when it was adjourned upon the claimant's application as he had not complied with pre-trial procedures. That prior to that the claimant had served the respondent with an invitation to fix hearing date on 19th February 2015 to attend court on 20th February 2015 for fixing of hearing date.

It is further deposed by MR. KHWATENGE that the claimant had served the respondent with a fictitious hearing notice for 8th June 2017 with full knowledge that no hearing date had been fixed. It is deposed that the claimant is not deserving of orders as he has not come to equity with clean hands.

It is further deposed that the claimant has had ample opportunity to prosecute his case but failed to do so for more than 2 years, that he has not explained the reasons for failure to prosecute the case, that litigation must come to an end and further that the respondent will be prejudiced should the orders sought be granted as its witnesses may have left its employment.

The application was disposed of by way of written submissions.

Determination

The court has considered the grounds upon which the application is premised as set out on the face of the application and the affidavit in support thereof. The court has further considered the replying affidavit, the submissions of parties and the authorities cited.

The issues of determination are whether the applicant had valid grounds for failure to attend court on 7th April 2017 and if he has given justification for grant of the orders sought.

As admitted in the affidavit of THOMAS A. K. RUTTO the claimant was served with notice to show cause on 24th March 2017. The notice required the parties to appear in court and show cause on 7th April 2017 why the case should not be dismissed for want of prosecution under Rule 16 of the Employment and Labour Relations Court (Procedure) Rules 2016. The notice further warned parties that failure to attend court would lead to dismissal of the case.

Counsel for the claimant THOMAS A. K. RUTTO has in his affidavit in support of the application and in the further affidavit sworn on 6th December 2017 (for which leave of 14 days was granted on 26th September 2017) has not explained why no action was taken to prosecute the suit. He has not shown that there was sufficient cause for not fixing the suit for hearing for more than two years to warrant the court on its own motion to summon the parties by way of notice to show cause. He has not explained if should the court exercise its discretion in his client's favour, he will be able to show cause why the suit should not be dismissed for want of prosecution.

Counsel has in the affidavits in support of the application stated that the claimant stands to suffer irreparable harm yet there is nowhere in the affidavit where it is stated that the claimant is keen to prosecute the case. The claimant himself is absent in the application. He has not stated why he did not prosecute the suit, or that he is intent on prosecuting the suit.

There is no denial of the averments in the replying affidavit that the suit had in the past been fixed for hearing once on 2nd November 2015 but adjourned at the request of the claimant, or that the claimant deliberately served upon the respondent a fictitious hearing notice.

I have perused the file. Although the suit was filed on 18th January 2013, the first time the claimant attended court to take a hearing date was on 20th February 2015 more than two years after the suit was filed. The date taken was 2nd November 2015. On the hearing date, the case was taken out as the claimant failed to prove that service was effected on the respondent who was absent. No action was taken after that date until the suit was dismissed for want of prosecution on 7th April 2017.

I find no justification to set aside the orders of 7th April 2017 dismissing the suit for want of prosecution as the claimant has not demonstrated any seriousness in prosecuting this claim. The laxity has even been evident in the prosecution of this instant application. The claimant was granted leave to file a further affidavit within 14 days on 26th September 2017 but did not do so until 6th December 2017 without leave. Further, the application was on 26th September 2017 fixed for hearing on 16th October 2017 when the claimant did not attend court to prosecute the application.

For the foregoing reason the application dated 14th July 2017 is dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE