



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 129 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 26<sup>th</sup> September, 2018)**

**EDWARD ADUNDO APOTO.....CLAIMANT**

**-VERSUS-**

**HELTZ DRIVING SCHOOL.....RESPONDENT**

**RULING**

1. The Application before Court is the one dated 14/5/2018 filed by the Claimant/Applicant herein seeking reinstatement of the Memorandum of Claim following dismissal of the Claim dated 4.2.2014 for want of prosecution.
2. The Applicant contends that this Cause was slated for hearing of Notice to Show Cause why the Cause should not be dismissed for want of prosecution on 20<sup>th</sup> April 2018. That the Applicant's Representative stepped aside briefly and on coming back, they found the file called out and orders issued. The Applicant avers that their non-attendance was excusable and hence this Application.
3. From their affidavits in support of this Application, the Claimant/Applicants tend to allude that their inaction to proceed and set this cause for hearing was caused by the unavailability of the Court file when they sought to fix this case for hearing vide their letters dated 13.2.2018 and 27.2.2018.
4. The Respondents opposed this Application. They filed their Replying Affidavit sworn by Elijah Mageto – Counsel for the Respondent herein and deponed to on 22/6/2018.
5. He has deponed that the Notice to Show Cause was prompted by the inaction by the Claimant who had been summoned to attend Court on 12.10.2017 but did not attend Court. They also aver that paragraph 5 of the Supporting Affidavit contains falsehoods as the annexed affidavit of service indicate that the mention notice was served upon their office at Rural Urban Credit Finance House yet their offices are situated at Reli Co-operative House as seen from their documents.
6. They also aver that the reason given as to why the Advocate who held brief did not attend Court is not convincing nor why he even walked out. The said Advocate is also not identified.
7. They also deny that the Court file ever went missing as there is no indication that the Claimant's Counsel wrote to Court about the missing file and there is no reason as to why the Cause has been pending since 2014.
8. They therefore aver that it is clear that the Claimant lost interest in this case long time ago and has not been keen to dispose of it. They therefore want the Application dismissed.
9. The Parties agreed to dispose of this Application by way of written submissions.
10. I have considered the averments of the Parties herein. It is imperative to note that this case was filed before this Court in February 2014. The Respondents promptly entered appearance on 14.3.2014 upon service. The Respondents however never filed any Defence to date.
11. There is an attempt to fix this case for hearing by the Claimant. However, there is no indication as to why this never really happened. The Claimants contend that this was occasioned by the absence of the Court file. This cannot be far from the truth because there is no letter addressed to the Deputy Registrar complaining about the file's non-availability.

12. The Court took its own initiative following the delay in setting this case down for hearing and invited parties for a Notice to Show Cause why this case should not be dismissed for want of prosecution. It is indeed the duty of the Claimant to ensure he prosecutes his case. Whereas the defence never filed their defence, the Claimant should have taken the initiative to proceed and set the case down for ex-parte hearing. He did not do so. The plausible step by this Court would be to dismiss this application.

13. However, I note that the primary duty of this Court is to do justice for all. There are indeed moments when an Advocate would act irresponsibly and it would be costly on the client. It would thus be imperative upon this Court in deciding whether to allow or not allow this Application to note that it is within this Court's discretion to act. It is true, that there has been an inordinate delay in prosecuting this case. The delay however lies squarely upon the Applicant/Claimant. This delay should not be condoned.

14. However, I believe it is not in the interest of justice for a litigant to be condemned due to the omission of his advocate. It is also not in the interest of justice for a party to be condemned unheard. It makes good sense to determine a case on merit rather than on technicalities as provided for under Article 159(1)(d) of the constitution.

15. In the circumstances, I will allow this application and reinstate the dismissed claim. I will direct that the same should proceed for hearing on merit and the Claimants should take action and set down this claim for hearing within 90 days. In default, the claim will stand dismissed.

16. Costs of the Application to be in the cause.

**Dated and delivered in open Court this 26<sup>th</sup> day of September, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Namesake holding brief for Nyamu for Claimant – Present

Respondent – Absent