REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 493 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

THANI MZEE KHAMISI.....CLAIMANT

VERSUS

PARKLANDS MOTORS LIMITED.....RESPONDENT

RULING

The application before me for determination is dated 23rd November 2017. It is filed by the claimant under Article 159(2)(d) of the Constitution, Section 80, 1A, 1B and 3A of the Civil procedure Act and Order 12 Rule 7 of the Civil Procedure Rues. The applicant seeks the following orders –

1. That the law firm of Mwaniki Njuguna and Company Advocates be granted leave to come on record on behalf of the claimant

2. That this court be pleased to set aside the orders made on 25th May 2017 dismissing this suit.

3. That this court be pleased to reinstate the suit filed herein on 12th February 2009.

4. That the costs of this application be in the cause.

The application is supported by the grounds on the face thereof and the affidavit of MWANIKI NJUGUNA, counsel for the applicant in which he deposes that this suit was dismissed for want of prosecution on 25th May 2017 in the absence of the claimant's advocates Gakoi Maina and Company Advocates, that mistake of counsel should not be visited on the innocent client who stands to suffer irreparable loss that cannot be compensated by way of damages should the prayers herein not be granted and that no prejudice would be caused to the respondent if the application is allowed.

It is further deposed that the suit was originally filed in the Chief Magistrate's Court on 12th February 2009, that it was dismissed on two occasions on 3rd June 2010 and 15th August 2012 for non attendance by claimant's counsel but on both occasions the applicant moved the court and was able to have the suit reinstated after counsel for the claimant satisfactorily explained to the court the reasons for non attendance.

It is deposed that on 2nd November 2016, counsel for the claimant invited the respondent to fix a hearing date and the matter was fixed for hearing on 25th May 2017. That on that date counsel for the applicant was unwell and did not attend court, hence the dismissal for non attendance.

It is deposed that it is due to the laxity of the applicant's previous counsel that the suit was dismissed hence the appointment of the present counsel Mwaniki Njuguna and Company Advocates.

It is deposed that the application has been brought without inordinate delay, that the suit has high chances of success, that the applicant's fundamental freedom of access to justice as espoused in Article 48 of the Constitution would be denied if the orders sought are not granted and that the court is by virtue of Article 159(2)(d) required to administer justice without undue regard to technicalities.

The respondent filed a replying affidavit of BOSIRE KENNEDY MARK opposing the application. He confirms that the suit was filed on 12th February 2009 seeking redress for alleged unlawful termination of the applicant's employment on 28th February 2008 and that the suit

has been dismissed twice before. He deposes that on 25th May 2

017 he was in court ready to proceed but neither the applicant or his advocate were in court. He deposes that no cogent reasons have been adduced to demonstrate the whereabouts of the claimant when the matter was dismissed on three previous occasions nor any documentary evidence or affidavit to confirm counsel for the application was unwell on 25th May 2017.

Mr. Bosire deposes that the application is misconceived, brought in bad faith, is an afterthought and is calculated to subject the respondent to unnecessary expenses, inconveniences and endless litigation, that natural justice demands that litigation must come to an end and that Article 159(2)(d) demands that justice should not be delayed. That the claimant has demonstrated that he has lost interest in prosecuting his case.

The application was disposed off by way of written submissions.

Applicant's Submissions

It is submitted for the applicant that this court has powers to grant the orders sought under Section 3A of the Civil Procedure Act. That in the case of **PROFESSOR MWANGI S. KIAMENYI -V- THE ATTORNEY GENERAL & ANOTHER** the court reinstated a suit that had been dismissed holding that –

> *"But before I close, I will re-state; the acceptable test is that;*
>
> *When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should he placed too far away from the parties.*
>
> *Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues: -*
>
> *1) whether the delay has been intentional and contumelious;*
>
> *2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court;*
>
> *3) whether the delay is inordinate and inexcusable;*
>
> *4) whether (he delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and*
>
> *5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."*

The applicant further relied on the decision in the case of **JULIET WANGUI NDEGWA -V- FRANCIS JAMES NDEGWA** in which the

court stated –

> *"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 from such impulsive inclination, and requires it to make further inquiries 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 judgement seat. It is, therefore, a matter of discretion by the court…. Accordingly; I will discern the principles which the law has developed to guide the exercise of discretion by the court in an application for dismissal of suit for want of prosecution. These principles are:-*
>
> *a. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;*
>
> *b. Whether the delay is intentional, contumelious and, therefore, inexcusable;*
>
> *c. whether the delay is an abuse of the court process;*
>
> *d. whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;*
>
> *e. what prejudice will the dismissal occasion the plaintiff ?;*
>
> *f. whether the plaintiff has offered a reasonable explanation for the delay;*
>
> *g. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?"*

The claimant further relied on the decision in the **TRANSAMI (K) LIMITED -V- SOKHI INTERNATIONAL (K) LIMITED** in which

H. P

G. Waweru J. stated that –

> *"To let the one lapse of failure to attend court on the 9th May, 2006 shut the plaintiff out from the seat of judgement would, I hold, occasion greater injustice than the convenience to be suffered by the defendant. The Court must always strive to dispose cases upon a proper hearing on the merits where possible."*

It is submitted that the claimant has been keen to prosecute the case and has proved so by expeditiously taking the file through pre-trial process and ensuring it is certified as ready for hearing, that before 25th May 2017 the claimant had always fixed the matter for hearing and always attended court with the intention of prosecuting his claim, that the delay was caused by former counsel of the claimant, that failure of counsel was beyond the control of the applicant and the delay was not deliberate.

Respondent's Submissions

It is the respondent submission that this matter has been pending in court for the last nine (9) years, a clear demonstration that the applicant has completely lost faith in prosecuting this matter. The applicants allegation that it is the mistake of the advocate who was on record that has led to the dismissal of this matter in several occasions is mischievous as no evidence has been provided to prove that the applicant made effort to find out the status of his case and/or be present in court when the matter came up for hearing on the above said occasions in particular on 25th May 2017 when the matter was dismissed for non attendance of both the advocate on record and the claimant.

That the applicant alleges that on the above said date the advocate on record was unwell without giving any proof and/or any affidavit sworn by the said advocate. Further the claimant is silent on his whereabouts on the above said date when the matter was scheduled for the hearing.

The respondent further submits that it would be prejudicial to it given that it has always been ready to prosecute its case and in all the three occasions the matter has been dismissed for non attendance on the part of the claimant and the same reinstated subjecting him to unnecessary expenses and defeating the rules of natural justice which demand that litigation must come to an end.

That the applicant's present application is misconceived, brought in bad faith, is an afterthought which amounts to inconvenience and endless litigation hence a waste of the courts time and resources. That the delay in this matter and failure to attend court by the counsel for the claimant and the claimant has not been well explained and lacks tangible evidence.

The respondent urged the court to dismiss the applicant's application with costs to the respondent.

Determination

I have considered the application, the replying affidavit and submissions of counsel. I have further considered the authorities cited.

The principles for reinstatement of cases dismissed for non attendance are well captured in judicial authorities. The principles are well stated in the case of PROFESSOR MWANGI S. KAIMENYI (supra) and JULIET WANGUI NDEGWA (supra) both cited by the applicant.

In the instant application, the applicant has only concentrated on the issue of delay, which is one of the considerations for grant of the orders sought. The applicant has not stated why he did not attend court; he has not stated that he was not informed of the hearing date by his erstwhile counsel, or that he had any excuse for not attending court.

Indeed, it is the applicant's newly instructed counsel who has sworn the affidavit in support of the application. It is trite law that a person can only attest to what is within his knowledge. Where is the applicant and why has he not filed an affidavit in support of the application?

I find that the applicant has not personally expressed any interest in prosecuting his case. A litigant whose case has been dismissed three (3) times on grounds of defaults and who is seeking reinstatement of the case for the third time must show some initiative by at least attesting to the facts of the case. The affidavit by the advocate contains mere hearsay, as the advocate is not privy to the facts deposed therein.

As provided in Article 159(2)(b) and (d) justice must not be delayed and justice must be done to all, irrespective of status. The applicant does not have a superior right than that of the respondent whom he dragged to court and has kept in court over the past nine years. Litigation must come to an end and reasonable accommodation must be accorded to all parties.

I find this application to be vexatious, an abuse of court process and without merit. I accordingly dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE