



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO.452 OF 2013

STEPHEN CHAMBARI.....CLAIMANT

VERSUS

PAN AFRICA LIFE ASSURANCE LIMITED.....RESPONDENT

RULING

1. The Claimant filed a Notice of Motion on 10th May 2013 seeking the following Orders:

- a) **THAT** the Honourable Court do set aside its orders issued on 16th April 2018 and reinstate the Claimants claim and have the same heard and determined on merits.
- b) **THAT** costs be in the cause.

2. The Application is supported by the claimant's Affidavit sworn on 10.5.2018 and the following grounds set out on the body the motion:

- a) The Honourable Court dismissed the suit for want of prosecution by the Applicant on 16th April 2018
- b) Neither the Claimant nor his Advocate on record were served with the Mention Notice for 16th April 2018.
- c) The Claimant'S Advocates have been diligent in prosecuting this matter save for adjournments which were unavoidable and the reasons thereafter given to the Honourable Court.
- d) The Respondents will not suffer prejudice if the suit is reinstated but the Applicant stands to suffer damages and great loss.
- e) It is in the interest of justice that the suit be reinstated and heard on merits.

3. The Respondent filed its Grounds of Opposition on 13th September 2018 to the Claimant's Notice of Motion contending that:

- a) The application is drawn and filed by a stranger to this suit. The Claimant's advocates on record is P.K. Njiiri & Company Advocates while the instant application is drawn by Njiiri Kariu & Njau Advocates.
- b) Njiiri Kariu & Njau Advocates could not possibly expect to have been served by the court with a Hearing/Mention notice for 16th April 2018, as they have never been formally on record for the Claimant, having not filed a Notice of Change of Advocates in the suit on behalf of the Claimant.
- c) Njiiri Kariu & Njau advocates could not possibly expect to have been served by the Court with a Hearing/ Mention Notice for 16th from that of P.K. Njiiri & Company Advocates.
- d) This Court became *functus officio* upon dismissing the suit for want of prosecution and lacks jurisdiction to entertain the Claimant's Application.

4. The parties canvassed the Application by way of written submissions.

Claimant's submissions

5. The Claimant submitted that the Honourable Court on 10th March 2017 sent a hearing notice bearing the address P.K. Njiiri & Company Advocates National House, 2nd Floor, Koinange Street which would have sufficed in giving the Claimant's advocates notice.

6. The Claimant submitted that the firm of Njiiri Kariu & Njau Advocates was located in National House, 2nd Floor Koinange Street and the only change was in the name but the Advocates remained the same.

7. The Claimant further submitted that he had made several attempts between 2014 and 2016 to secure hearing dates but dates were not available at the Court registry but the dates were not available. The dates were given during the activation week but the Advocates weren't served. Consequently, they did not attend Court and the matter was dismissed.

8. The Claimant submitted that he is willing to comply with all directions the Court gives and get the earliest hearing date.

Respondent's Submissions

9. The Respondent in its written submissions argued that the only two ways for a firm of advocates to legitimately come on record to act on behalf of a party in an ongoing suit was by filing a notice of Appointment or a Notice of Change of Advocates. The Respondent relied on Order 9 Rule 5 and Rule of the Civil Procedure Act and the holding of Justice Kimei in **Stephen Mwangi Kimote v Murata Sacco Society [2018]eKLR** that:

“Order 9 does not impeded the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the court and the other parties...”

10. The Respondent submitted that the Application is drawn and filed by a stranger to this court and is therefore defective. She relied on the cases of **The Ethics and Anti-Corruption Commission v Kapsoen Estates Limited & Another [2017]eKLR** and **Jackline Wakesho v Aroma Café [2014]eKLR**.

11. The Respondent further submitted that all the parties were served with the Hearing Notice and the all notices of the judiciary service week, and indeed that of the week running from 16th to 21st April 2018 are posted on the judiciary website. She relied on the case of **Benson P.N. Murugami v Comprite Kenya Limited [2016]eKLR** where the Court held:

“...Advocates ordinarily peruse cause lists to ascertain what cases they are to attend to and which courts would be handling it. The Respondent therefore cannot be believed that in the plethora of information on the service week it could not discern from cause lists that this case was listed for hearing on 18th April 2016 before Ongaya, J...”

orders but orders to set aside yet the court became **functus officio** upon rendering its decision dismissing the Claimant's suit. The Respondent submitted that there are very few instances in which a court would by law be allowed to revisit a decision whose effect was the determination of the suit. She relied on the decisions in **Wanjala Mutonga v William Barasa Wanjala [2016]eKLR** and **Menginya Salim Murgani v Kenya Revenue Authority [2014] eKLR**.

Analysis and determination

13. After careful consideration of the motion, affidavits and the written submissions, the following issues arose for determination:

- a) Whether the court is **functus officio** and without jurisdiction to determine the application.
- b) Whether the claimant was served with hearing notice.
- c) Whether the orders sought should be granted.

Functus officio and lack of jurisdiction

14. On 16th April 2018 the Court dismissed the suit for want of prosecution when the Claimant and his counsel failed to attend court. The date was when courts hear or dismiss the old suits after giving notice to the parties. The application is anchored on the ground that neither him nor his Advocate's firm was served with the Hearing/Mention Notice for 16th April 2018. The question that arises is whether the court can revisit the impugned decision.

15. The respondent's contends that the decision to dismiss the suit was final and the only remedy to the claimant lies on appeal or review. That the application before the court is not for review and as such, the court is **functus officio** and lacks jurisdiction to determine the present application.

16. I agree with the respondent that dismissal of a suit for want of prosecution is final decision of the suit on merits because what the court does in such circumstances is to make a finding of fact that the claimant has tendered no evidence to prove his/her case in the required standards. After such a decision the court becomes **functus officio** save for the power to review if properly invoked.

17. In **Menginya Salim Murgani v Kenya Revenue Authority [2014] eKLR** where it was held that

“it is a general principle of the law that a court after passing judgment, becomes functus officio and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by the law”

18. The application before me is not for review but for setting aside the judgment. The provisions of the law upon which it premised do not donate any power to revisit its final decisions otherwise than through review. That request should be directed to the appellate court. Consequently, I find that the jurisdiction of the court has not been properly invoked and proceed to uphold the objection by the respondent that the court is *functus officio* and without jurisdiction to determine the application.

Disposition

19. For the reasons that the court is *functus officio* and without jurisdiction, I strike out the Notice of Motion dated 10.5.2018 with order as to costs. The matter shall be mentioned before the deputy registrar on 25.1.2019 to confirm filing of submissions for the disposal the counterclaim as directed by Justice DK Njagi Marete on 15.1.2019.

Dated, Signed and Delivered at Nairobi this 20th day of December, 2018

ONESMUS N. MAKAU JUDGE