



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 47 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**FREDRICK OTIENO GUDO.....CLAIMANT**

**VERSUS**

**AFRICA APPAREL EPZ LIMITED.....RESPONDENT**

**RULING**

This Court made an order on 16<sup>th</sup> April 2018 dismissing the suit herein for want of prosecution on account of the non-attendance of the Claimant's advocate. The Claimant, Fredrick Otieno Gudo, then filed a Notice of Motion Application dated 20<sup>th</sup> April 2018 brought under Article 159(2) (d) and (e) of the Constitution, Section 80, 1A, IB and 3A of the Civil Procedure Act Cap 21 and Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules seeking a review of orders for dismissal and reinstatement of the suit for hearing as well as costs of the suit.

The Application is premised on the grounds that:-

1. The order of dismissal made on 16<sup>th</sup> April 2018 was made *suo moto* by this Court for non-attendance of the Claimant's counsel.
2. The Claimant's counsel sent another advocate one Mr. Mwaniki to hold her brief as she was attending to another matter ELRC Cause No. 58 of 2010 before Onesmus Makau J. at the Employment Court..
3. The Claimant was personally in court on the said day as we had communicated to him about the hearing date.
4. Mr. Mwaniki stepped out of court to attend to an emergency and when our matter was called out there was no representation on our part hence the suit was dismissed.
5. The mistakes of an advocate who was holding brief in this matter ought not to be visited on the Claimant.
6. The Claimant has been ready and willing to prosecute this matter and in the interest of justice, he is seeking the exercise of this court's discretion which is unfettered and aimed at curing the errors by a party to avoid injustice or hardship.
7. It will not be in tandem with the overriding objective of this case to sustain the orders issued *suo moto* dismissing this matter for want of prosecution.
8. The Application has been brought without any inordinate delay.
9. It is in the interest of justice, the said Order be reviewed, set aside and this matter be reinstated for hearing and final determination.
10. No prejudice will be occasioned on the Respondent that cannot be compensated by way of costs if the application is allowed.

The Application is supported by the affidavit of the claimant's Advocate, Lourine Ochogo who attaches a copy of the cause list for Onesmus Makau J. on 16<sup>th</sup> April 2018 highlighting the matter she was attending to and avers that Article 159(2)(d) of the Constitution of Kenya **2010** provides that justice shall be administered without undue regard to technicalities. A Further Affidavit dated 10<sup>th</sup> July 2018 and filed on 11<sup>th</sup> July 2018 was sworn by the Claimant who avers that he was in court on the material day but did not hear his name being called out and that

he has always attended court when called upon by his advocates or the Court. In another further affidavit dated 10<sup>th</sup> July 2018 and filed on 11<sup>th</sup> July 2018, Mr. Mwaniki avers that he stepped out a few minutes to 9.00 am to receive a phone call from his wife who informed him that his son was unwell and needed to be rushed to hospital and so he left to attend to that but when he returned to court, the matter had already been called out. That he unfortunately failed to call the Claimant's advocate and inform her of the said predicament as he was confused.

### **Respondent's Case**

The Respondent filed a Replying Affidavit dated 21<sup>st</sup> June 2018 wherein the Respondent's Advocate avers that the Claimant and his advocates had initially failed to attend court when this matter was mentioned for hearing directions on 30<sup>th</sup> January 2018 and that it then served the claimant's advocates with a hearing notice on 31<sup>st</sup> January 2018 informing them that the Court had scheduled the matter for hearing on 16<sup>th</sup> April 2018 and even filed an Affidavit of Service on the said 16<sup>th</sup> April 2018. That the Claimant has failed to provide evidence supporting her advocate's assertions that she had instructed Mr. Mwaniki to hold her brief because she had another matter and that producing a cause list which is found online is not proof that his advocate was appearing before the learned Judge on the same day. Further, that even if Mr. Mwaniki's assertions were true, he ought to have indicated to the Court his predicament and requested it to recall the file but which he did not do.

She avers that she has perused the proceedings of Cause No. 581 of 2010 of 16<sup>th</sup> April 2018 and established that counsel for both parties therein were not in Court on the material date and that the suit was dismissed, which means the Claimant's advocate is misleading this Court. She annexes documents including the certified proceedings for Cause No. 581 of 2010 as proof and states that she strongly believes the Claimant and his Advocate intentionally abandoned prosecuting this matter which was filed in 2012 and that their conduct reeks of slackness because they have on numerous occasions failed to attend court like on 28<sup>th</sup> May 2017, 20<sup>th</sup> September 2017, 30<sup>th</sup> January 2018 and the said 16<sup>th</sup> April 2018. That this application is frivolous and an abuse of the Court process hence merits no consideration and that besides the Claimant's Advocate being dishonest, she has disobeyed a Court Order issued on 28<sup>th</sup> March 2017 to pay the Respondent costs of Kshs.7,000/=. She prays that the Claimant's application be dismissed with costs to the Respondent.

### **Claimant/Applicant's Submissions**

The Claimant submits that they are aware of the costs of Kshs.7,000 owed to the Respondent and he is ready and willing to make the said payments and with regards to their application herein, he submits that the court is not powerless to grant relief when the ends of justice and equity so demand because the powers vested in the Court are of a wide scope and ambit. That **Section 3A of the Civil Procedure Act** provides that, **"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

Further, the Claimant relies on the case of **Professor Mwangi S. Kimenyi vs The Attorney General & Another HCCC No. 720 of 2009** where the court reinstated a suit that had been dismissed while holding 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 be 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 the 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."*

In the decision in **Transami (K) Limited Vs Sokhi International (K) Ltd** (Unreported) the learned Judge 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."*

The claimant also relied on the case of **Richard Ncharpi Leiyagu -V- Independent Electoral Boundaries Commission & 2 Others [2013] eKLR** where the Court observed at par 22 that thus:-

***"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law.***

***This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the Court process from abuse that would amount to injustice and at the end of the day there should be proportionality.***

It is submitted by the Claimant that he has been very keen to prosecute this matter and that the reasons given by his Counsel on her failure to attend court are truthful and reasonable and that they delayed in filing this application for reinstatement because the file could not be traced at the registry but managed to file it as soon as it was found. He finally submits that the Respondent's Replying Affidavit only speaks of the mistake of his counsel on 16/04/2018 but does not raise any valuable legal points that would prevent this Court from reinstating the above suit and urges this Honourable Court to grant the orders as prayed for.

### **Respondent's Submissions**

The Respondent submits that on whether this suit should be reinstated, it relies on **Order 17 Rule 2 (1) of the Civil Procedure Rules** which provides that where in any suit no step has been taken by either party for one year, the court has to give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. That the Applicant was given notice as contemplated under Order 17 Rule 2 (1) of the Civil Procedure Rules and served with a Notice to show cause and/or a Notice of Dismissal of Suit. Further, that in ***Fran Investments Limited v G4S Security Services Limited [2015] eKLR*** the Court held at paragraph 8 as follows:

*“Order 17 Rule 2 (1) of the Civil Procedure Rules grants the court power to dismiss a suit in which no step has been taken for one year. The Order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit. This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think, it is so especially when one fathoms the requirements of article 159 of the Constitution and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “sword of the Damocles”. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff...”*

It is submitted by the Respondent that the Claimant has not furnished a valid reason to persuade this Court that the delay in prosecution of his claim was reasonable. That the firm of Gakoi Maina and Company Advocates which is on record for the Claimant in this matter is not a firm on record in Cause 581 of 2010 as averred by the Claimant's Advocate and that Mr. Mwaniki also failed to provide at least a hospital record to prove that his son was taken to hospital on the said date and that his not requesting for the file to be recalled is not an ordinary mistake but evidence of serious negligent conduct. That the Claimant was also not diligent and keen in prosecuting this matter and it is not enough for him to blame his advocates, relying in the case of ***Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002*** where the Court expressed itself as follows:-

*“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case.”*

The Respondent finally submits that the Court should take into account the Claimant's past conduct in the prosecution of this matter and that it would be travesty of justice for the court to exercise its discretion in favour of the Claimant and that the Court rightfully exercised its discretion in dismissing the suit for non-attendance when the matter came up for hearing.

### **Determination**

The main issue for determination is whether the Court should review the orders for dismissal and reinstate this suit for hearing. The Claimant has mainly submitted by providing case law where it was shown that delay is excusable and that failure to attend court by a party should not form the basis for a dismissal of suit. The Respondent on the other hand has submitted that the Claimant has not given any valid reason why the suit should be reinstated and that he had a duty as the litigant to diligently prosecute his matter and not blame the dismissal of the suit to his advocate's absence in court.

Section 3A of the Civil Procedure Act and Order 17 Rule 2(1) of the Civil Procedure Rules grants this court the inherent power to reinstate a suit that has been dismissed for want of prosecution. In the case of ***Fran Investments Limited v G4S Security Services Limited [2015] eKLR*** the court held that the court should balance the interests of each party in determining such an application.

In the case of ***Gold Lida Limited v Nic Bank Limited & 2 others [2018] eKLR*** the Court ordered for a reinstatement of suit by observing that:

*“Section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte. The court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties.*

*The guiding principle in the court's exercise of this judicial discretion was laid down in ***Mbogo & Another Vs Shah EALR 1908***. The court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship*

*resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.”*

Also in **Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103** Apaloo JA outlined the following approach to a similar question:

*“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.*

In the present application it is the respondent’s averment that Counsel for the applicant misled the court and has not furnished court with a valid reason for the delay. Counsel for the applicant did not bother to controvert the averments in the replying affidavit to the effect that claimant’s Counsel was misleading the court as she was not before Makau J. in Cause No. 581 of 2010 on 16<sup>th</sup> April 2018 when this case was dismissed.

The court does not treat favourably parties who, being in default, compound the situation by deliberately misleading the court. A party who comes to equity must come with clean hands.

For the foregoing reasons I find no merit in the application and dismiss it with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF DECEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**