



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 650 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

GILBERT KOECH KIPYEGON.....CLAIMANT

VERSUS

EAST AFRICAN LOGISTICS LIMITED.....RESPONDENT

RULING

The Claimant/Applicant in his Notice of Motion Application dated 6th July 2018 seeks the following prayers:

1. That this application be certified urgent and service be dispensed with and heard *ex parte* in the 1st instance.
2. That this court do make an order setting aside and/or varying this court's orders dismissing the claimant's cause made on 20th April 2016.
3. That upon grant of prayer 2, this court do make an order reinstating the claimant's suit.
4. That cost be in the cause.

The Application is supported by the Affidavit of Kinyanjui Theuri, the counsel for the Claimant, and the grounds that: -

1. The Claimant's cause was dismissed by this Honourable Court on 20th April 2016 for want of prosecution.
2. The Claimant testified and concluded his case on 14th May 2013 and the court directed that the Respondent's case be heard on 28th June 2013.
3. The matter came up for hearing on the 28th June 2013 but did not proceed because the Respondent's witnesses were not available and the court directed that the matter be heard on 4th October 2013.
4. On 4th October 2013 the Respondent made an application to file further list of documents, the Application was allowed and parties were directed to take a date at the Registry.
5. Since then the court file disappeared and the Applicant made several attempts to trace the same without success.
6. On 2nd February 2015, the Applicant invited the Respondent's Advocate to fix the matter for hearing, however the file could not be traced and parties were advised to follow up with the registry staff. Despite various follow ups, the file was not traced. On 12th December 2017 upon further follow up at the Registry, it was discovered that the matter had been dismissed. However, the physical file could not be traced.
7. On 24th January 2018 the Applicant, through its Advocate on record, wrote to the Deputy Registrar requesting her intervention in tracing the court file, however there was no response and further follow up bore no fruits.
8. It was only until 28th June 2018 that the physical court file was retrieved from the Registry archives with the help of the registry

staff. Upon perusal, it became apparent the matter was dismissed on 20th April, 2016 for want of prosecution.

9. The Court's basis on dismissing the suit was that parties were served with a hearing notice dated 7th March 2016, but failed to appear. It is however, the Applicant's position that such notice has never been served upon him or his Advocates on record. The Applicant was never made aware of the said hearing date, since the Hearing Notice was never served upon his Advocates on record and thus the dismissal of the matter was not occasioned by the conduct of the Applicant, but rather the fact that the Court file could not be traced.

10. The Applicant made a swift move upon tracing the Court's file and upon learning that his claim was dismissed for want of prosecution and filed the present Application to have the suit reinstated.

11. That the Claimant is apprehensive, which apprehension is real and eminent that if the orders sought herein are not granted, he stands to suffer substantial loss and damage.

The Respondent opposed the Application through its Grounds of Opposition dated 8th October 2018 filed on even date being that:

1. The Application is frivolous, vexatious, an abuse of process and a waste of precious judicial time and is meant to scuttle the substantive hearing of the various applications already on record;
2. There has been inordinate delay on the part of the Claimants in prosecuting the case and no reasonable explanation for the delay has been offered;
3. This delay is intentional and therefore inexcusable as there is no evidence of any action taken by the Claimant to prosecute his case since the year 2013;
4. It has been over 2 years since this matter was dismissed and there is no evidence of any action on the part of the Claimant;
5. This delay is an abuse of the court process and gives rise to substantial risk to fair trial and will cause serious prejudice to the Respondent;
6. This is therefore not a matter for the exercise of the discretion of the Court, as the interest of justice would not be served in reinstating this matter.
7. The Claimant's application dated 25th June 2018 should therefore be dismissed with costs.

On 8th October 2018, the court directed (by consent) that parties proceed by way of written submissions.

Applicant's Submissions

The Applicant submits that though there has been delay on the part of the Applicant in prosecuting his case, the same is not inordinate and can be explained. He relied on the case of *Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 Others [2014] eKLR* where the court opined that inordinate delay cannot be quantified with precision as it is a conclusion arrived at after analysis and consideration of factors that define each individual case. According to the Judge, in determining inordinate delay, Court should consider the nature of the case, the entire conduct of the party in delay and the explanation given for the delay, among other factors.

The Applicant submits that the delay occasioned in prosecuting the case is not entirely the Claimant's fault. The Claimant was a diligent litigant as he was quick to conclude his case. However, the Respondent thrived by delaying the prosecution of its case. The Applicant further submits that the Claimant's conduct calls for vindication by the Honourable Court.

The Applicant submits that he was not served with the hearing notice dated 7th March 2016 which scheduled the hearing of the matter for 20th April 2016. Consequently, the Applicant was unaware of the court proceedings which eventually culminated in the dismissal of this case.

The Applicant submits that before a court dismisses a suit for want of prosecution, it should satisfy itself that the Claimant has been properly informed of the impending decision and provided with ample opportunity to militate against the taken decision. He relies on **rule 16 (1) of the Employment and Labour Relations Court (Procedural Rules) 2016** which provided that:

"In any case in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of the filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit."

The Applicant further submitted that:

"...while the Employment and Labour Relations Court (Procedural Rules) 2016 have left it to the discretion of the Court to decide whether or not to give the notice in writing to the Claimant, dismissing an entire suit is too extreme a consequence to mete out to a Claimant. It is a drastic decision whose consequence is to banish a party from the seat of justice forever. Courts should not take such drastic action without informing the party concerned."

He further relied on *article 47 of the Constitution of Kenya, 2010*, which provides the right to fair administrative action. Further, *section 4 of the Fair Administration Action Act, 2015*, elucidates this right thus,

- (1) every person has the right to administrative action which is expeditious, efficient, reasonable and procedurally fair...
- (2)
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision;
 - (a) Prior and adequate notice of the nature and reasons for the proposed administrative action."

The Applicant also submitted that the Respondent has not demonstrated any prejudice it has suffered from the delay in prosecuting the case or any prejudice it stands to suffer if the suit is reinstated. The Applicant relies on the case of *Azhar Mohammed Sheikh & 8 others v Velji Narshi Shah & Another [2017] eKLR* where the High Court quoted and relied on the decision of the Court of Appeal in *Ivita vs. Kyumbu [1975]* where it was held that a defendant must satisfy the Court on the prejudice it stands to suffer if a suit is dismissed. The Court held that;

"Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution."

The Applicant submits that it is in the interests of justice that the Court sets aside the orders made on 20th April 2016 and orders for reinstatement of the suit on condition that the Claimant prosecutes the case within a given period of time. The Applicant submits that this is a part-heard suit and that the Claimant already prosecuted and closed its case. The Respondent exuded so much lethargy at prosecuting its case. It would not be in the interests of justice to cast away the Claimant while he has had the taste of the course of justice.

Respondent's Submissions

The respondent submits that ample case law has been determined on the issues that courts ought to consider before dismissing a case for want of prosecution and conversely when to reinstate a matter. The Respondent relied on the case of *Utalii Transport Company Limited & 3 Others V. NIC Bank Limited & Another [2014] eKLR* where the Courts stated as follows;

"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 of law from such impulsive inclination, and requires it to make further enquiries 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 judgment-seat."

The Respondent further relied on the opinion of Datckwerts LJ in *NAGLE v FIELDEN [1966] 2 QBD 633* at page 648, and Lord Diplock in *BIRKET v JAMES [1978] A.C. 297* where it was stated:

"... I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:

1. Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
2. Whether the delay is intentional, contumelious and, therefore, inexcusable;
3. Whether the delay is an abuse of the court process;
4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
5. What prejudice will the dismissal occasion to the plaintiff?
6. Whether the plaintiff has offered a reasonable explanation for the delay;
7. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?"

On the issue of notice, the Respondent relied on the case of *Mwangi S. Kimenyi vs. Attorney General & Another [2014] eKLR* where the Honourable Justice Gikonyo stated as follows: -

"I should think the question whether notice for dismissal of this suit was given under Order 17 rule 2 of the Civil Procedure Rules (hereafter CPR) is a matter of preliminary significance. First, there is no mandatory requirement under Order 17 rule 2 of the Civil Procedure Rules that a notice should be given to the plaintiff before a suit which offends the order is dismissed for want of prosecution. Equally, Order 17 rule 2 of the CPR uses the word "give" and not "serve". To give notice is not the same thing as to

serve notice within the context of the civil procedure. The distinction between the two terms is important because both are legal as well as technical but bear different meanings and entail different mechanisms albeit, however, both are intended to bring the matter at hand to the notice or attention of the party to be affected by the proceeding. "Give" in the context of Order 17 rule 2 of the Civil Procedure Rules denotes "to impart or confer by a formal act" whereas "serve" in the legal sense denotes "to make legal delivery of the court process". See Black's Law Dictionary, Ninth Edition on this. My own view, therefore, is that a notice under Order 17 rule 2 of the Civil Procedure Rules is deemed to have been given by the Court when it is placed in the official website of the Judiciary or in the cause list. Accordingly, notice for dismissal of this suit was given by the court through its website and the cause list for 29th February, 2012. See also the decision by Kilaru J in the case of Jason Mungai Kamau -V- Jane Kamau & 4 Others [2008] eKLR."

The Respondent submitted that there has been no good reason given by the Claimant. It further submitted that the Claimant mentioned in the affidavit that the file had been missing but he has not annexed any letters to prove that he requested assistance from the Court to have the file traced. Had the Claimant shown that he had indeed attempted to trace the Court file, then it would have been apt for the Court to reinstate his claim.

On the issue of whether it is in the interest of justice to reinstate the Claim the Respondent submitted that a balance must be struck between the interests of the Claimant and those of the Respondent in each claim. It cannot be said that dismissal goes against the rights of the Claimant when the Claimant has been indolent. It would be against the rights of the Respondent for a suit by an indolent Claimant to stay in the Courts for a period of over 7 years. There is therefore prejudice which will be suffered by the Respondent in terms of adducing evidence of a matter which is over 7 years, as well as the cost and memory of any potential witnesses. As such, the Respondent prays that the Application be disallowed.

Determination

The issues for determination are the following –

1. Whether the Applicant has offered reasonable explanation for the delay in prosecuting his case.
2. Whether the Applicant is entitled to the orders it is seeking in its Application.

The authorities cited by the parties hereto adequately cover the principles that courts ought to consider in an application for reinstatement of a suit after dismissal for want of prosecution. These are set out elaborately in the case of **Birket –V- James** cited above. They include inordinate delay, reasonable explanation thereof as well as prejudice to the parties.

In addition to the said principles I think the applicant must demonstrate interest in prosecuting the case.

I have noted from the application that it is supported by the affidavit of counsel and not the applicant. In the affidavit it has not been stated where the applicant is or why he did not find it necessary to swear the affidavit himself.

Further, there is no proof that the file had been unavailable to take hearing dates as sworn in the affidavit. The only evident annexed to the affidavit are letters dated 2nd February 2015 inviting respondent to fix hearing date and the letter dated 24th January 2018. There is no evidence that the letter dated 2nd February 2015 was filed in court while the letter dated 24th January 2018 more than a year after dismissal of the case. The letter further relates to Milimani PMCC 650 of 2012 and not this case. As at the date of dismissal of the case, there is no evidence that any action had been taken to fix the suit for hearing from 4th October 2013. Further, after the dismissal of the suit on 20th April 2016, no action was taken until 24th January 2018, a period of more than 20 months. There was thus delay of more than 2 years before the dismissal and a further delay of more than 20 months after the dismissal, both of which have not been satisfactorily explained.

I find no merit in the application with the result that the same is dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE