



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 722 OF 2013**

**DAVID NJOROGE NJENGA.....CLAIMANT**

**VS**

**GETRIO INSURANCE BROKERS LTD.....RESPONDENT**

**RULING**

1. The Claimant's application brought by Notice of Motion dated 6<sup>th</sup> July 2016 seeks to set aside the order made on 22<sup>nd</sup> April 2016 dismissing the Claimant's suit.
2. The application which is supported by the affidavit of David Maina Nyamu, Advocate sworn on 6<sup>th</sup> July 2016 is based on the following grounds:
  - a) The suit was dismissed on 22<sup>nd</sup> April 2016, during the service week, for non-attendance of the parties and/or their Counsel;
  - b) Counsel for the Claimant was not served with any hearing notice and was therefore not aware of the matter being listed on that day;
  - c) The Claimant has an arguable case with a high chance of success;
  - d) That it would be fair and in the interest of justice to reinstate the suit for hearing and determination on merit.
3. In the supporting affidavit sworn by David Maina Nyamu, Advocate he depones that on 20<sup>th</sup> June 2016, he was notified by the Respondent's Advocates that they had received a hearing notice from the Court on 17<sup>th</sup> May 2016.
4. Counsel further depones that prior to this, his firm had on 4<sup>th</sup> December 2015 invited the Respondent's Advocates to attend the Registry on 11<sup>th</sup> December 2015, for the purpose of fixing a mutually convenient date.
5. On 11<sup>th</sup> December 2015, the Claimant's Advocates detailed a process server by the name David Mulelesi Miluu to attend the Registry and fix the matter for hearing. Miluu later notified Counsel for the Claimant that the matter had been fixed for hearing on 19<sup>th</sup> July 2016. It was while preparing for the hearing that the Claimant's Advocates received a letter from the Respondent's Advocates notifying them of a hearing that might have taken place on 22<sup>nd</sup> April 2016.

6. The question for determination in this application is whether the Claimant has made out a case for setting aside of the order made on 22<sup>nd</sup> April 2016, dismissing the Claimant's claim for want of prosecution.

7. From the court file, the following record of activity emerges:

a) On 9<sup>th</sup> September 2013, the Claimant's Advocates served a hearing notice for 29<sup>th</sup> November 2013 on the Advocates for the Respondent;

b) On 10<sup>th</sup> September 2013, the Respondent's Advocates wrote to the Claimant's Advocates indicating that the date taken was not convenient.

By copy of this letter, the Registrar was asked to take out the matter;

c) On 23<sup>rd</sup> April 2015, the Claimant's Advocates forwarded a draft statement of agreed issues to the Respondent's Advocates.

8. From this record, it seems to me that the Claimant had the intention to prosecute his claim. Further, the Court could not tell the mode and date of service of the hearing notice issued by the Deputy Registrar on 22<sup>nd</sup> March 2016, lending credence to the averment by Counsel for the Claimant that the hearing notice was not served on him.

9. For the foregoing reasons I find that this a proper case for setting aside of the order of the Court issued on 22<sup>nd</sup> April 2016 dismissing the Claimant's claim for want of prosecution.

10. The said order is therefore set aside and the Claimant's claim reinstated for hearing on priority basis.

11. The costs of this application will be in the cause.

12. It is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Nyamu for the Claimant

No appearance for the Respondent