



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1033 OF 2012

JOHN E. KIHUMBA MUYA.....CLAIMANT

VS

NAIROBI INSTITUTE OF BUSINESS STUDIES LTD.....RESPONDENT

RULING

1. The Claimant's application dated 20th July 2016 and filed in Court on 25th July 2016 seeks the setting aside of the order made on 20th April 2016 dismissing the Claimant's claim and consequently reinstatement of the claim.
2. The application which is supported by the Claimant's affidavit sworn on 20th July 2016 is based on the following grounds:
 - a) That the case was dismissed without considering the orders issued by the Court on 31st July 2012 when the parties agreed by consent that the matter be stood over generally until conclusion of criminal proceeding facing the Claimant in Criminal Case No 495 of 2012 which has a direct relationship with the present suit;
 - b) That the Claimant did not receive the hearing notice dated 4th April 2016 until 12th July 2016 as his Post Office box number had been closed for non-payment of rental fees;
 - c) That the Claimant has an arguable case with a high chance of success and it is in the best interest of justice that his claim be reinstated for hearing and determination.
3. In his affidavit sworn on 20th July 2016, the Claimant depones that the criminal case against him is still pending.
4. The Respondent's response is contained in replying affidavit sworn by its director, Anthony Mburu Wanyoike on 16th September 2016. He depones that prior to instituting this claim on 18th June 2012, the Claimant had been charged with the offences of stealing by servant, forgery and uttering a false document.
5. Wanyoike further depones that there was no direct relationship between the criminal proceedings against the Claimant and the claim which was dismissed by this Court. He goes on to state that the pendency of criminal proceedings does not necessitate stay of proceedings in a civil matter.

6. The single issue for determination in this application is whether the Claimant has laid before the Court sufficient grounds for setting aside of the order issued on 20th April 2016, dismissing his claim.
7. The application is brought under Order 12 Rule 7 of the Civil Procedure Rules which empowers the Court to set aside an order dismissing a suit. In dealing with such an application the Court must have the ends of justice in view. From the court record, this matter came up for mention on 3rd July 2012 when none of the parties was present prompting the Court to stand it over generally.
8. At the next court appearance on 31st July 2012, the Claimant asked the Court to stand over the matter generally as there was a criminal case pending at Makadara Law Courts which has a bearing on this case. It appears that the Respondent did not object to the Claimant's request which was granted by Court.
9. The Claimant did not take any further action until the Court, on its own motion, set down the matter for hearing during the service week in April 2016. The matter went before **Marete J** and upon application by Counsel for the Respondent, the court dismissed the claim.
10. The Claimant who did not attend Court on 20th April 2016 states that he did not receive the hearing notice issued by the Court because his post office box had been closed for non-payment of rental fees. He adds that the notice came to his attention on 12th July 2016 when the post office box was reopened.
11. In support of his application, the Claimant produced a receipt for rental fees for his post office box dated 12th July 2016 and the Court therefore found no reason to disbelieve his averment that he had not received the hearing notice issued by the Court before this date.
12. Further, the Court notes that the order granted on 31st July 2012 to which the Respondent seems to have acquiesced appears to have confirmed a connection between this case and the criminal case pending at Makadara Law Courts.
13. It would therefore be unjust to penalize the Claimant for not taking steps towards prosecuting his claim while the Court itself had allowed his request to await the outcome of the criminal case.
14. For this reason I allow the Claimant's application and reinstate his claim for hearing and determination. The parties are directed to take a hearing date on priority basis.
15. The costs of this application will be in the cause.
16. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF
JANUARY 2017**

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JUDGE

Appearance:

John E. Kihumba Muya (the Claimant in person)

Miss Maumo for the Respondent