REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT KISUMU

INDUSTRIAL CAUSE NO. 286 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

ALFRED OGINGA IGONYI & 62 OTHERS..... CLAIMANT

VERSUS

OGEMBO TEA FACTORY..... RESPONDENT

RULING

This is an old case filed in Kisii High Court vide **KISII HCCC NO. 17 OF 2007.** It involves 67 Plaintiffs who are former employees of the Respondent Ogembo Tea Factory. The case was transferred to this Court by a ruling of the Okwany J. in which she states that the High Court has no jurisdiction to determine the case.

The matter that was pending for determination when the file was transferred to this Court is an application by the Plaintiffs seeking reinstatement of the suit which was dismissed for want of prosecution on 22nd July 2015. The application is dated 7th October 2015 but was filed on 25th November 2015.

The grounds in support of the application are that -

i) That the suit was dismissed on 27th July, 2015 for failure to Show Cause why the same should not be dismissed for want of prosecution.

ii) That neither the Plaintiffs nor their Counsel were aware that the matter was listed for dismissal for want of prosecution on 27th July, 2015.

iii) That this matter is part-heard, there is part-payment of the claim and parties are still attempting to reach a settlement.

iv) That it was only upon writing to the Deputy Registrar on 6th October, 2015 to fix the matter for mention to take a date for further hearing that the applicants learned that the matter had already been dismissed for want of prosecution.

v) That it is in the interest of justice that the matter be reinstated for further hearing and be determined on merit.

vi) That no prejudice will be occasioned to the Defendant as negotiations have been ongoing and in any event will have its day in court.

The application is supported by the affidavit of JASON ONDABU Counsel for the Plaintiffs sworn on 7th October 2015. In the affidavit he depones that the case is part-heard and there is a partial consent judgment which has been settled by the Defendant. He states that parties were in the process of negotiating final judgment and has annexed correspondence between the parties the last two being a letter dated 20th March 2015 from Kerandi Manduku & Company Advocates for the Claimant indicating that their Mr. Jason Ondabu will be available for a meeting to attempt a further settlement on 24th March 2015 at 2.00pm. The second is a letter dated 27th May 2015 from Ondabu & Company Advocates in which he refers to previous correspondence and telephone conversation with Mr. Nyachiro and seeks to know the Defendant's position with regard to the matter.

He further depones that the Plaintiffs were not aware of the dismissal of the case for want of prosecution until 6th October 2015 when he wrote to Court requesting for a date for mention. He states that no notice to show cause was served upon the Claimants. He depones that for a long time the Court diary had been full making efforts to have the case fixed for hearing fruitless. He depones that no prejudice will be occasioned to the Defendant by the application being allowed.

The Respondent filed a replying affidavit of FLORENCE MITEY, Head of Legal and Regulatory Affairs of Kenya Tea Development Agency, an agent of the Defendant authorized to swear the affidavit on behalf of the Defendant. She depones that the suit was filed in 2007 but the Claimants had not taken any steps to fix it for hearing till the Court dismissed it on its own motion for want of prosecution. She states that the dismissal was not on technicalities but on procedure, and that the Claimants were aware that the suit was likely to be dismissed if it was not prosecuted. She states the applicant has not given sufficient grounds for delay in prosecuting the matter, that there were no negotiations as alleged as all letters from Claimants' advocates were not replied to by the Respondent's advocates, an indication that the defendant was not interested in the negotiations. She further states that the application was made more than 6 months after the dismissal of the suit. She prays that the application be dismissed.

SUBMISSIONS

There is no copy of the submissions filed on behalf of the applicants in the Court file. What is in the file is the Defendant's submissions and Reply to Defendant's submissions. However from what is on record, there is sufficient information upon which to base Court's decision. I have decided to use the documents on record for expediency as this is an old matter which was dismissed for want of prosecution at the initiation of the Court.

For the defendants it has been submitted that the principles developed over time by Courts to guide exercise of discretion by Court in dismissal of suits for want of prosecution are the following-

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. Whether the plaintiff has offered a reasonable explanation for the delay.

6. Even if there has been delay, what does the interest of justice dictate lenient exercise of discretion by the court?

The Defendant relied on the decision of Chesoni J (as he then was) in **IVITA V KYUMBU [1984] KLR 441** where he stated

"The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite

such delay. 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 not easy take 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. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time".

The Defendant submits that the application by the Plaintiff lacks merit and has been brought to Court in bad faith, that the judiciary's "Justice at Last" initiative aimed at dismissal of cases which had been delayed in Court and that the dismissal was in line with Order 17 Rule 2(1) which states that in any suit in which no application has been made or step taken by either party for one year, the Court may 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.

It is further submitted for the defendant that the claim by the Plaintiffs that negotiations were ongoing or that they had tried to fix a hearing date to no avail are misleading as the last attempt to fix a date was in 2015 and that the Defendant did not respond to correspondence on negotiations. The Respondent submits that there is no valid reason for failure to fix the case for hearing, that the reasons preferred by the Plaintiff for the failure to fix hearing date is inexcusable and there is no communication availed from Court to prove that the Court's diary had no dates. The Defendant submitted that the Plaintiffs' contention that they were not personally served is not a ground for reinstating the suit.

The Defendant relied on the following further authorities:-

1. Ceres Estate Limited V. Kieran Day & 4 Others [2013]eKLR where a similar application was dismissed.

2. ***Fran Investments Limited V. G4S Security Services Limited [2015]eKLR.*** In this case too, an application to reinstate a suit that had been dismissed for want of prosecution was dismissed by the Court.

3. ***Netplan East Africa Limited V. Investments & Morgages Bank Limited [2013]eKLR.*** In this case likewise, an application for reinstatement of a suit that had been dismissed for want of Prosecution was rejected by the Court.

In the reply to the Defendant's submissions Counsel for Plaintiffs has submitted that the Defendants have not denied that parties were negotiating, that pursuant to the negotiations two part consents have been recorded in Court and payment made to the Plaintiffs and further that it is the defendant who occasioned all adjournments on account of attempting out of court settlement. It is submitted that in all the authorities relied upon by the Defendant the Court declined to reinstate the suit on grounds that are not applicable to the present suit. Counsel for Plaintiffs submitted that in all the authorities notice was duly served upon the Plaintiff but the Plaintiff failed to attend Court. Counsel submitted that in this case the Plaintiffs were not served with the notice to show cause. It is further submitted for the Plaintiffs that the Court record shows that the Plaintiffs have always attended Court.

The Plaintiff's Counsel urges the Court to exercise its jurisdiction in favour of the Plaintiffs and to reinstate the suit. It is further submitted that the Defendant will suffer no prejudice as it was also not aware of the Notice to Show Cause since there was no service upon all the parties.

DETERMINATION

I have considered the application and the affidavit and documents in support thereof. I have also considered the Replying Affidavit and the written submissions with the authorities cited. I have further

perused the Court record.

It is evident from the Court record that the parties were last in Court on 13th May 2014 when the case was adjourned to enable the parties conclude out of Court settlement and was fixed for further mention on 9th July 2014 when both parties failed to attend Court. The Court directed that parties should take a date in the registry. The next court record is contained in a typed form which shows that on 22nd July 2015 the case was dismissed for want of prosecution under Order 17 Rule 2(1) of the Civil Procedure Rules. The Court record does not contain any Notice to Show Cause, nor any inquiry by the Court as to whether the notice was issued and served upon the parties. The Court record therefore confirms the Plaintiff's position that the parties were never served with Notice to Show Cause why the case should not be dismissed for want of prosecution. The record further confirms that there were out of Court negotiations in an attempt to settle the case and further that there was consent recorded by the parties on 22nd October 2011 in which the Defendant paid Shs.4,181,720 with interest from date of filing suit.

The Defendant has not denied that it received letters attached to the affidavit of JASON ONDABU in support of the application. The latest of those letters is dated 27th May 2015 and refers to conversations between MR. ONDABU for the Claimant and MR. NYACHIRO for the Defendant. The denial by the Respondent that the parties were discussing out of Court settlement, or that the failure by the Defendant's Counsel to respond to letters from the Plaintiff's Counsel meant they were not willing to negotiate is to say the least, absurd and a reflection of the Respondent's bad faith.

Order 17 Rule 2(1) of the Civil Procedure Act under which the suit was dismissed for want of prosecution provides as follows:-

> ***2. Notice to show cause why suit should not be dismissed***
>
> > *(1) In any suit in which no application has been made or step taken by either party for one year, the court may 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.*

A suit can therefore only be dismissed after parties have been notified in writing and they have failed to show cause to the satisfaction of the court.

There is no record that the parties herein were given notice in writing or any notice at all, to show cause why the suit should not be dismissed for want of prosecution and therefore the dismissal was in error. I am persuaded that had the Court's attention been drawn to the fact that the parties had not been served with a notice to show cause the Court would not have dismissed the suit. I am further persuaded that had the parties been served with the notice to show cause the applicant would have shown good cause to the satisfaction of the Court that there were ongoing attempts, at least from the Plaintiffs, to have the suit settled out of Court.

For the foregoing reasons I find that the orders sought in the application are merited and reinstate the suit with no orders for costs.

Parties are directed to immediately set the case down for mention with a view to taking an early hearing date.

Dated and signed and delivered this 2nd day of February, 2017

MAUREEN ONYANGO

JUDGE