



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

CAUSE NO 1230 OF 2011

TOM WAMUNGA.....CLAIMANT

VERSUS

IMPRESA COSTRUZIONI GIUSEPPEMALTAURO SPA...RESPONDENT

RULING

1. Pursuant to an application by the Respondent, my brother **Nzioki wa Makau J** made an order on 19th February 2014 dismissing the Claimant's claim for want of prosecution. Subsequent to this order the Claimant moved the Court by way of Notice of Motion dated 12th May 2016 seeking reinstatement of the claim.
2. For various reasons, the Claimant's application took long to be heard and when Counsels for the parties appeared before me on 24th November 2016 they agreed to proceed by way of written submissions.
3. The application which is supported by the Claimant's own affidavit is based on the following grounds:
 - a) The Claimant instructed the law firm of Anyango Ogutu & Co Advocates who filed suit on 26th July 2011;
 - b) The Claimant did not know the progress of his matter until his current Advocates perused the court file after filing Notice of Change of Advocates;
 - c) The Claimant's former Advocates did not set down the matter for hearing prompting the Respondent's Advocates to move the Court for dismissal of the claim for want of prosecution;
 - d) The Claimant has a good claim and ought to be allowed to ventilate his case fully for determination by the Court on merit;
 - e) The fault of the former Advocates should not be visited upon the innocent Claimant;
 - f) The Respondent will not suffer any prejudice if the claim is reinstated.
4. The Respondent's response is contained in a replying affidavit sworn by its Financial Controller, Sandro Spencer on 26th May 2016. He states that the Claimant has not given any reason for the delay in prosecuting his case. He adds that the application for dismissal of the claim was duly served.
5. Spencer depones that the employees who were dealing with the matter had since left employment and the passage of time means that the Respondent may not be able to trace documentation relevant to the

case. The Respondent maintains that it will be highly prejudice if the case is revived.

6. The issue for determination in this application is whether the Claimant has made out a case for setting aside the orders of the Court made on 19th February 2014, dismissing the claim for want of prosecution. The orders sought in the current application are discretionary and discretion must always be exercised judiciously and not whimsically.

7. The Claimant filed his claim on 26th July 2011 and the Respondent responded on 17th August 2011. From the court record, the case was adjourned on 20th November 2012 and again on 19th February 2014 because the Claimant was absent. The Claimant states that he was not aware of the status of his case since his Advocate did not advise him. This begs the question as to whose claim it was in the first place. In the written submissions filed on behalf of the Respondent on 8th February 2017, reference was made to the decision in *Alice Mumbi Nganga v Danson Chege & another [2006] eKLR* where **Kimaru J** held that civil cases are owned by the litigants and not their Advocates. It was therefore incumbent upon the Claimant to diligently follow up his case.

8. In considering an application such as the one now before me, the Court must consider the time lapse between the order targeted for setting aside and the application for setting aside. In *Fatuma Hamed Mohammed & another v Ismael Ole Pasha [2010] eKLR* **Lenaola J** (as he then was) considered a time lapse of forty five (45) days unreasonable.

9. In the instant case, the time lapse runs to over two (2) years. This delay is not only unreasonable but is inexcusable in the circumstances as it would appear that the Claimant literally dumped his case at the Advocate's office and then went to sleep. Such a litigant does not merit the discretion of this Court. Moreover, it would be highly prejudicial to drag the Respondent back to Court after such a long lapse of time.

10. For the foregoing reasons the Claimant's application is dismissed with no order for costs.

11. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF APRIL 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Ongicho for the Claimant

Mr. Gathu for the Respondent