



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1400 OF 2011**

**FRANCIS NDULI .....CLAIMANT**

*VERSUS*

**NAS AIRPORT SERVICES LIMITED.....RESPONDENT**

Mr. Mutuku for applicant

M/s Bonyo for respondent

**RULING**

1. The applicant, by a notice of motion application seeks reinstatement of the main suit which was dismissed on 20<sup>th</sup> April 2016 and the suit proceed to hearing on merit on priority basis. The application was heard by me because Wasilwa J. was not available at the time.
2. The suit was initially filed as HCC Commercial Division No. 519 of 2006 and was subsequently registered as Civil Case 47 of 2009.
3. On 12<sup>th</sup> July 2011, the suit was referred to the Employment and Labour Relations Court, by Hon. Waweru J. and the sum of Kshs.610,023 deposited in court on 5<sup>th</sup> July 2007 pursuant to the order of 23<sup>rd</sup> April 2007 be forwarded to this court on same terms.
4. A close perusal of the record shows the following;

*Once the matter was transferred to the ELRC, it was mentioned before Mukunya J. on 5<sup>th</sup> October 2011 for directions in the presence of counsel Nyabena for Muthoka for claimants and M/S Bonyo for respondent.*
5. Matter was given a further mention date on 10<sup>th</sup> November 2011.
6. On 10<sup>th</sup> November 2011, matter was before Steward Madzayo J. when there was no appearance for the claimant and M/S Bonyo represented the respondent. It was given a further mention date for 30<sup>th</sup> November 2011.
7. On 30<sup>th</sup> November 2011, the matter was given a hearing date on 24<sup>th</sup> July 2012 in the presence of both counsel for the parties.

8. On 24<sup>th</sup> July 2017, the claimant was present and ready to proceed with the hearing with two witnesses before Onesmus Makau J. M/S Bonyo was also present however matter was taken out by the Judge and fixed for hearing on 3<sup>th</sup> October 2012.
9. On 3<sup>rd</sup> October 2012, both parties were ready to proceed before D. K. Marete J. however, the matter could not proceed for unexplained reasons and was postponed to 10<sup>th</sup> October 2012. On the date none of the parties appeared. The respondent took a hearing date at the registry on 30<sup>th</sup> October 2012, for 15<sup>th</sup> November 2012.
10. On 15<sup>th</sup> November 2012, there is no record what transpired and there is no indication whether the claimant was served with a hearing notice by counsel for the respondent to attend court on 15<sup>th</sup> November 2012.
11. The matter was then listed during the service week on 20<sup>th</sup> April 2016 more than three years down the line without any step being taken by either party and the suit was dismissed by Wasilwa J. for want of prosecution in the absence of both parties.
12. The Judge did not provide details of the history of the matter in the short order for dismissal.
13. The claimant now submits that the notice to show cause during the service week was not served on them. The claimant discovered the dismissal on 26<sup>th</sup> April 2016 and filed this application. The claimant relies on order 17 rule 2 sub-rule (1) of the Civil Procedure Rules, which provides 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.”*
14. At the time, the Rules of this court had no provision for notice to show cause, however, there is now a provision in The Employment and Labour Relations Court (Procedure) Rules 2016 which provides at Rule 16 (1) as follows;
- “In any suit 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 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.”*
15. This rule appear to have adopted the principal from the Civil Procedure Rules for dismissal for want of prosecution.
16. In the present case, the Judge did not indicate whether notice to show cause was served on the parties and the explanation by the claimant/applicant that they had made persistent efforts to ensure the matter is fixed for hearing appear to hold water in view of the record the court has alluded to until there was a huge gap of inaction between the 15<sup>th</sup> November 2012 and 20<sup>th</sup> April 2016 when the matter was dismissed.
17. The court gives the applicant, the benefit of doubt and accords him the last chance to prosecute this matter.
18. Accordingly, the order by Wasilwa J. dismissing the suit is set aside and the matter reinstated for hearing on the merits.
19. The hearing date to be fixed on the date of the ruling by the Judge.

**Dated and delivered at Nairobi this 1<sup>st</sup> Day of September 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**