



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.510 OF 2013

EMILY KARIUKICLAIMANT

VERSUS

HENNESSISS HOTEL LIMITED RESPONDENT

RULING

The claimant and applicant herein through application and Notice of Motion dated 2nd December, 2016 is seeking for orders that this court set aside the orders of 13th September, 2016 and reinstate the claimant's suit and the same be heard on its merits.

The application is supported by the claimant's affidavit and on the grounds that the claimant instructed Mr Sane Livingstone Simel of Sane & Company Advocates to file the claim following unfair termination of employment by the respondent. the claimant was served with Notice of Taxation indicating the Bill of Costs dated 29th September, 2016 was coming for hearing on 21st November, 2016.

Upon receipt of the hearing notice the claimant visited her advocates and was informed that Mr Sane is deceased. Unknown to the claimant, Mr Sane died on 17th July, 2016. With this knowledge the claimant perused the court file and realised the claimant had been dismissed on 13th September, 2016. The Affidavit of Service sworn by Samuel Nderitu Kariuki to the effect that the firm of Sane & Company Advocates had been served with application dated 31st August, 2016 and coming for hearing but on this date Mr Sane was not capable of receiving such notice as he was deceased at the time. The claimant was not aware of the death or service upon her advocate of the hearing notice as otherwise she would have attended.

The Law Society of Kenya through its website has notified the public of the death of Mr Sane in 2016.

The claimant is seeking that her application seeking to set aside the orders dismissing her claim on 13th September, 2016 be set aside. Such will serve the interests of justice.

In reply, the respondent through Repaying Affidavit of John Njoroge Mwangi, a director of the respondent company avers that upon the claimant filing her claim dated 12th April, 2013 the respondent was served and defence. The claimant has not taken any action on the claim for purpose of its hearing and disposal forcing the respondent to file application dated 31st August, 2016 seeking dismissal of the suit for want of prosecution.

The respondent's advocates served the claimant through the advocates on record which service was accepted and an Affidavit of Service filed. There was no reply or attendance at the hearing and the court

allowed the application by dismissing the claim with costs to the respondent.

The claimant has only moved the court upon being served with the Bill of Costs. There is no justifiable reason as to why the claimant failed to attend court in person or through her appointed advocates to take action from 13th May, 2013 to 31st August, 2016 when the respondent filed application. The lapse and duration of two (2) years is not explained by the claimant.

Both parties filed written submissions herein.

It is now a common practice for the court and guided by the provisions of Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2016 to bring up all matters with no action for a period of over one (1) year through show cause notices and where there is no good reason for inaction, dismiss such matters. The common ground here is that upon the claimant filing the claim in 2013, various amendments have been made and nothing else. Up and until 31st August, 2016 when the respondent applied to have the claim dismissed for want of prescription and failure by the claimant to take any action, the claimant had not moved the court until now with the current application seeking to set aside the orders dismissing the claim.

Rule 16 provides that;

16. (1) 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 its 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.

(2) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.

(3) Any party to the suit may apply for dismissal as provided in paragraph (1).

(4) The court may dismiss the suit for non-compliance with any direction given under this rule.

Therefore, the court on its own motion or upon being moved by either party can dismiss a claim for want of prosecution. This court therefore, having been moved by the respondent on 13th September, 2016 and satisfied that the claimant's advocate on record had been served and there was no reply or attendance, correctly issued the orders sought by the respondent.

Noting the above, the demise of Mr Sane and advocate for the claimant is not in dispute. Such is a fact and on the court vest to the Law Society of Kenya website while analysing this application indeed confirmed that Mr Sane is deceased as of 2016. The deceased advocate had been in good standing over the years until his demise in 2016.

The good standing of Mr Sane before his demise in 2016 shows that he had the chance to move the court to prosecute the case from 2013 to July, 2016. This was not done hence prompting the respondent to move the court in application of the court Rules of Procedures.

However, noting that Mr Sane now deceased is noted to have passed on around 17th July, 2016 and the application by the respondent dated 31st August, 2016 was then served on the law firm on 1st September, 2016 was then acknowledged by a third party and not Mr Sane himself as noted by Samuel Nderitu Kariuki. The hearing notice and application coming up for hearing is well stamped by the firm of L.S. Sane Advocate. To the naked eye and without the advantage of an expert to analyse the signatures in the hearing notice and the various documents signed by Mr Sane, the resemblance is similar.

However, now with the knowledge that Mr Sane is deceased and this happened on or around the period this matter came up in court and was dismissed for want of prosecution, and had Mr Sane been alive

would have been put to task as to why he failed to attend, we must allow his soul to rest in peace. However, for the inaction by the claimant to ensure the claim was prosecuted in good time, a sanction shall lie.

In ensuring the ends of justice are met, to ensure the claimant is heard on the merits of the claim and noting the demise of Mr Sane then advocate of record for the claimant, the application dated 2nd December, 2016 is hereby allowed save that the claimant shall meet the respondent's costs. Where the claimant fails to take action to prosecute the claim within the next sixty (60) days, the suit shall stand dismissed on the 1st February, 2018.

Delivered in open court at Nairobi this 31st day of October, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants: David Muturi & Nancy Bor

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