



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1348 OF 2010

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th September, 2016)

WOKABI WANG'OMBECLAIMANT

VERSUS

PYRETHRUM BOARD OF KENYA.....RESPONDENT

RULING

1. The Application before Court is dated 14.6.2016 brought under Order 12, Rule 7 of the Civil Procedure Act, Section 3A of the Civil Procedure Act seeking the setting aside of the dismissal order dated 18.4.2016. The Application is based on the grounds that:

- 1. The Applicant has always been eager and interested in prosecuting the case to its logical conclusion.***
- 2. The Claimant/Applicant was prevented from prosecuting the claim for reasons beyond his control.***
- 3. The suit was dismissed on 18.4.2016 for non-attendance. Neither the Applicant nor his Counsel was aware that the matter was listed for dismissal for want of prosecution.***
- 4. Neither the Applicant/Claimant nor his Counsel was served with a Notice to Show Cause why the suit should not be dismissed for want of prosecution.***
- 5. The Claimant/Applicant stands to be grossly prejudiced unless the claim is re-instated as it would be tantamount to condemning unheard.***
- 6. The Claimant has a good case with high chances of success, it would be fair if it can be heard and determined on merit rather than on technicalities.***
- 7. Under Article 159 of the Constitution and Section 1A and 2A of the Civil Procedure Act, it is imperative, just, fair and expedient and in the best interest of justice to reinstate the suit and have it determined on its merits rather than on technicalities.***
- 8. The Court has unfettered discretion to grant the relieves sought herein.***

2. The application is supported by the Affidavit of Wokabi Wang'ombe the Claimant, wherein he states that after filing the pleadings herein his Advocates on record made several invitations for fixing a hearing date to the Respondent's Advocates and on each occasion the matter was to come up for hearing, it failed to do so on account of not being listed in the Court's hearing list and the Court file went missing thereafter.

3. The Claimant avers that his Advocates wrote to the Court raising the concerns of the missing file and non-listing which correspondences they did not receive any response.

4. It is the Claimant's contention that he was informed by his Advocates on record that the Court file had been transferred to Nakuru and shortly thereafter his Advocates office in Nakuru closed for the period 2014 to 2016. As a result of the closure the Claimant lost contact with his Advocates and did not know the position of the file until he was able to trace them in 2016.

5. When the Claimant inquired about his file from his Advocates, they travelled to Nakuru from Eldoret where they had relocated to and it transpired that the Court file had never been received in Nakuru registry from Nairobi.

6. They travelled to Nairobi where they found the file and upon perusal they discovered that the claim had been dismissed on 18.4.2016.

7. He states that if the orders sought are not granted, he stands to suffer immense injury, prejudice, loss and damages.

8. The Respondents opposed the application. They filed their replying affidavit on 23.6.2016. The affidavit was sworn by one Solomon Odera an employee of the Respondent who deponed that the application is misconceived, frivolous, an afterthought, oppressive and made in bad faith. They aver that they received the hearing notice on 11th March 2016 and attended Court on 18th April, 2016. That the hearing notice was equally addressed to the Applicants.

9. They deny that the file was even missing or was transferred to Nakuru as alleged. They contest that the application has no merit and should therefore be dismissed.

10. Having considered submissions of both parties, I take note of annexures on the Claimant's application which are various letters requesting for a hearing date or a mention to fix a hearing date which range from the period 2011 March to 2013 July.

11. This shows an interest in the hearing of the matter by the Claimant upto that point. There is no further activity on the file from November 2013 to April, 2016 when this claim was dismissed for want of prosecution.

12. The Applicant indicated that he didn't receive any notice to show cause why the claim should not be dismissed. The Notice to Show Cause had been served by the Court but unfortunately no return of service was ever filed to show service of the same.

13. In the circumstances, the issue of condemning the Applicants without a hearing emerges as the decision to dismiss the claim was made without the Applicants being served.

14. I find that on that ground alone, the application has merit and I allow it and set aside the orders dismissing the Claimant's case on 18.4.2016.

15. The Claimant is now directed to hereby set this case for hearing within 30 days. In default the case will stand dismissed for want of prosecution.

16. Costs to the Respondent.

Read in open Court this 14th day of September, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mathenge holding brief for Orege Respondent – Present

No appearance for Claimant