



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 880 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 11th October, 2016)

PETER MWANGI MAINA CLAIMANT/APPLICANT

VERSUS

THE STANDARD GROUP LIMITED RESPONDENT

RULING

Pleadings

1. The Application before Court is dated 24.6.2016, brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 10 Rule 4 and Order 51 Rule 1 and 15 of the Civil Procedure Rules, 2010, seeking orders that:

1. The Order of the Honourable Court made on the 20th day of April, 2016, dismissing the Claimant's/Applicant's suit dated 24.5.2012 for lack of attendance and all consequential Orders and or Decree be reviewed, varied and/or set aside.

2. The suit dated 24th may, 2012, be reinstated and allowed for hearing.

3. This Honourable Court be pleased to order stay of proceedings against the Applicant pending hearing and determination of this Application.

4. The costs of this application be provided for.

2. Which Application is based on the following grounds:-

1. That the Claimant's Advocates received the Hearing Notice dated 4th April, 2016, on 22nd April, 2016.

2. That the said hearing notice stated that the hearing of the suit was to proceed on 20th April, 2016.

3. That they did not have prior notice of the hearing.

4. That the Applicant is keen on prosecuting his Claim and he feels aggrieved by the decision of

the Honourable Court.

5. That the Respondent has already filed a Bill of Costs and The Plaintiff stands to suffer irreparable loss if the suit is not reinstated and the further proceedings stayed until the Claimant is heard.

6. That in the interest of justice the said Order ought to be reviewed and the Claim dated 24.5.2012 ought to be reinstated for hearing and determination.

7. That the Applicant stands to suffer irreparable damage.

3. The Application is supported by the affidavit of Kimamo Muchiri, the Claimant's Advocate and states that the firm received a hearing notice for dismissal of the suit on 22nd April, 2016, whereas the matter was listed for dismissal on 20.4.2016, two days after receipt of the hearing notice and thus did not attend on the day of hearing.

4. They contend that the Respondent has already filed a bill of costs and the Claimant stands to suffer irreparable loss if the suit is not reinstated and further proceedings stayed until the Claimant is heard.

5. That the Applicant is keen on prosecuting his Claim and feels aggrieved by the decision of the Court and seeks for the Orders of 20.4.2016 to be reviewed in the interest of justice.

6. The Respondent filed a Replying Affidavit sworn by one Caroline Cheruiyot, the Senior Legal Officer of the Respondent wherein she states that the Claimant failed to prosecute the suit since 4.12.2012 or give instructions to his Advocate on prosecuting the case.

7. The Respondent state that the Claimant admits the delay in prosecuting his matter but does not give any reasonable excuse for the same. The fact that the Claimant's Advocate could not trace him is evidence of disinterest in prosecuting the matter. They pray for the suit to be dismissed with costs.

Submissions

8. In Submissions the Claimant states that he had not been in the Country to prosecute his claim and produced travel documents to this effect. They state that the power to dismiss a suit should be used very sparingly and in the clearest of cases and after weighing the interests of parties and seeing quite clearly that the suit is so hopeless and incapable of sustenance. The delay in prosecuting the claim is not so inordinate as to warrant the Claim being dismissed.

9. The Claimant further submits that nonattendance to Court on 20.4.2016, was not occasioned by themselves but due to late receipt of the hearing notice dated 4th April, 2016, that was received on 22.4.2016, two days after the hearing date. They rely on the case of **Mwangi S. Kimenyi vs. Attorney General & Another 92014)eKLR** where it was held:

“The decision whether a suit should be re-instated for trial is a matter of justice and it depends on the facts of the case. See the case of Ivita vs. Kyumbu (1984) KLR 441, Chesoni J. (as he then was) that 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 no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from the 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.”

10. They also rely on the case of **Githere vs. Kimungu** (1976-1985 Hancox J. stated:

“the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the Court should not be too far bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case.”

11. The Claimant also relies on Article 159(2)(d) of the constitution which provides that justice shall be administered without undue regard to technicalities. They state that one of the cardinal principles of fair hearing is that no person should be condemned unheard and that the delay herein is not so inordinate to be considered inexcusable.

12. The Respondent in their submission state that the Claimant failed to prosecute the matter for almost two years at which point the Respondent filed an Application to dismiss the suit for want of prosecution. That despite being served with the Application the Claimant only replied to the same 8 months later then went back to sleep.

13. That the Court then issued a hearing notice on 4.4.2016, and the Respondent attended Court on 20.4.2016, but the Claimant and his Advocate were not present.

14. The Respondent’s Application to dismiss the suit was dismissed the Court having been satisfied that the Claimant had gone to sleep for 4 years since filing the Claim.

15. They Claim that the Claimant’s delay in prosecuting the suit is inordinate and inexcusable and as such the Application should be disallowed. They rely on the case of **Mwangi S. Kemenyi vs. Attorney General & Another (2014)eKLR** where it was held:

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it would be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore inexcusable.”

16. They also rely on the case of **Barnabas Maritim vs. Manywele Korgoren & Another (2016)eKLR** where it was held:

“It should always be remembered that the duty to prosecute a case rests with the person who has presented it. The Court registry is not a place to pile up cases. A litigant must be vigilant and must pursue his case. He must at all time, if he has engaged counsel, liaise with his advocate to ensure that his case is given due attention. Nothing would have been easier for the Applicant/Claimant even in the period he was away, than to call his advocate to ensure that his case is given due attention.”

17. MThe Respondent also state that Article 159 of the Constitution of Kenya 2010 provides for exercising judicial authority without delay and as such pray for the Application to be disallowed with costs.

18. Having considered the submissions by both parties, I notice that indeed the Applicant delayed in the prosecution of this case since 2012 but which the Claimant attributes to his absence having been out of the Country. That is an acceptable explanation but delay for 4 years is inordinate and it would have been cautious for the Claimant to inform the Respondent the reasons for this delay.

19. On the issue of the application that now dismissed this case for want of prosecution, the Claimant was served with the application on 22.4.2016 but the application was heard on 20.4.2016. This is a clear case of a man being condemned unheard despite the delay that had been previously occasioned.

20. It is my finding that hearing the application to dismiss the claim in the absence of the Applicant and where service had not been effected upon him was unfair in the circumstance.

21. I therefore allow the application to set aside orders dismissing the Applicant Claimant's case. I order the suit reinstated and I also direct that the Claimant set down the case for hearing within 30 days.

Read in open Court this 11th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Njuguna holding brief for Kimamo for Claimant – Present

No appearance for Respondent