



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 247 OF 2013
MOI UNIVERSITY CO-OPERATIVE
SAVINGS & CREDIT SOCIETY LTD.....CLAIMANT

v

WESLEY KIPKOECH TANUI.....RESPONDENT

RULING

1. The Claimant sued the Respondent on 16 August 2013 seeking Kshs 945,000/- alleged to have been stolen due to the Respondent's dereliction of duty.
2. On 26 September 2013, the Claimant orally applied for leave to serve the Notice of Summons and Statement of Claim through substituted service and the Court granted the leave the same day for service through the Daily Nation newspaper. Service was to be effected within 14 days.
3. The Court fixed mention for 11 October 2013 to confirm service.
4. The Claimant did not effect service within the 14 days and the Court scheduled the Cause for mention on 15 November 2013 to confirm service.
5. When the Cause was next mentioned on 16 January 2014, the Claimant was not represented and the Court directed the Deputy Registrar to serve upon it a mention notice returnable on 31 March 2014.
6. By 31 March 2014, the Claimant had not effected service through the Daily Nation and the Court rescheduled the Cause for mention on 16 May 2014 to confirm service.
7. On 16 May 2014, none of the parties appeared in Court when the file was called out and the Court set a mention for 4 July 2014, with an order to the Deputy Registrar to notify the Claimant.
8. By 4 July 2014, the Claimant had again not effected service and the Court set mention for 24 July 2014 to confirm service but on this day, the Claimant sought for more time.
9. The Court directed the Claimant to amend the Statement of Claim to include the Respondent's address and fixed the Cause for mention on 1 October 2014.
10. On 1 October 2014, the Claimant sought a further 30 days to effect service through substituted service and the Court granted 10 more days.
11. On 13 October 2014, the Claimant informed the Court that service had been effected (an affidavit of

service was filed on 14 October 2014).

12. On 28 October 2014, the Claimant sought a hearing date. The Court fixed the Cause for hearing on 3 June 2015.

13. However, on the scheduled hearing date, the Claimant sought an adjournment which was granted.

14. The Cause was next mentioned on 10 November 2015, but the Claimant being absent, the Court directed that a show cause for dismissal be issued.

15. The show cause was issued on 16 November 2015, with a return date of 14 December 2015, and because the Claimant did not appear or send a representative, the Court dismissed the Cause.

16. On 7 June 2016, the Claimant moved Court under certificate of urgency seeking review/setting aside of the dismissal order and reinstatement of the Cause.

17. The motion was taken on 27 July 2016.

18. Among the reasons given by the Claimant for failure to attend Court on 14 December 2015 were that the show cause notice was not served upon it, the file was not traceable in the registry, that the Claimant stood to suffer irreparably unless the orders sought were not granted and that the wider interest of justice required grant of the orders.

19. The Claimant is seeking an exercise of discretion by the Court. Such an exercise must be judicious and not arbitrary or capricious. The Court must examine all the relevant facts before it.

20. The Claimant has not satisfactorily explained why it took it about 6 months to seek reinstatement of the Cause.

21. It did not even mention when it learnt that the Cause had been dismissed.

22. The Claimant did not present any evidence from the registry of any attempts to trace the file.

23. The Claimant's conduct after the initial leave for substituted service was given leaves a lot to be desired. It is not clear whether it had any interest in pursuing the claim.

24. There is absolutely nothing on record to suggest that the Claimant sought for extension of time to serve through substituted service. Any irregularity in this respect may have been cured during the repeated mention dates the Court gave for confirmation of service.

25. But of more concern to the Court is that Summons have a validity of 1 year and assuming the Summons here were issued on 16 August 2013, the same were valid until 15 August 2014.

26. The Summons having expired around 15 August 2014 could not validly survive beyond that date, without a formal application by the Claimant to extend the validity as opposed to time for service.

27. In my considered view, this is not a suitable case to exercise the Court's discretion in favour of the Claimant and the Court orders that the motion dated 6 June 2016 be dismissed with costs.

Delivered, dated and signed in Nakuru on this 7th day of October 2016.

Radido Stephen

Judge

Appearances

For Claimant Ms. Ngere instructed by Mburu Maina & Co. Advocates

Court Assistant Nixon