



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 475 OF 2012

BENSON MUGO MURAGURI.....CLAIMANT

VERSUS

EAST AFRICAN PACKAGING INDUSTRIES LTD.....RESPONDENT

RULING

By a notice of motion dated 13th August 2013 and filed in court on 26th August 2013 the Respondent/Applicant prays for the following orders:

1. That the claim herein be declared to have abated for non-compliance with the court order issued on 31st January 2013;
2. That the costs of this application be borne by the claimant.

The claimant filed grounds of opposition on 11th October 2013 as

follows:-

1. That the application is an abuse of the court process as the same is merely aimed at taking a shortcut to justice and if same is allowed it will drive the claimant from the seat of justice by invoking technicalities contrary to Article 159 of the Constitution
2. That the application offends the clear provisions of the constitution namely, Article 48 and 50(1) which provide for equal access to justice and the right to be heard in any dispute through a fair public hearing,
3. That the failure to amend the memorandum of claim within the time set by court has now been formally explained in the affidavit supporting the Claimant's application for setting aside the order of 9th May 2013 and in any event such failure to amend did not by itself render the claimants claim time barred,
4. That the Respondent/applicant has not demonstrated any prejudice it will suffer if the claimant is allowed to amend its claim and have the same heard on merits,
5. That it will be a miscarriage of justice to deny the claimant an opportunity to be heard on the merits of his claim.

On 30th September 2013 the claimant filed an application for review of the court's order made on 9th May 2013 on the following grounds:

1. That the claimant has failed to comply with the Court Ruling delivered on 31st January 2013 and more specifically the order directing the Claimant to file an amended Claim within 14 days of the said Ruling.

2. That the Claimant's application for extension of time to file an Amended Claim was rejected by the Honourable Court on 9th May 2013.
3. That the live of the suit/claim was dependent on the filing of the said Amended Claim and it is only fair that this Claim be declared to have abated.

The application for review is supported by the affidavit of Julius Opini, counsel for the claimant who depones that the file was misplaced by an unnamed clerk who has not sworn an affidavit to confirm the facts deponed to in the affidavit of Mr. Opini.

I wish to first deal with the Claimant's application for review. Review is provided for in rule 32 of the Industrial Court (Procedure) Rules 2010. Review may be applied for in the following circumstances;

1. A person who is aggrieved by a decree of an order of the Court may apply for a review of the award, judgment or ruling:-
 - a. if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or
 - b. on account of some mistake or error apparent on the face of the record; or
 - c. on account of the award, judgment or ruling being in breach of any written law; or
 - d. if the award, the judgment or ruling requires clarification; or
 - e. for any other sufficient reasons.

The application by the claimant does not fall under any of the circumstances under which review may be granted. It therefore means that the application has no chance of success.

The Respondents application was heard on 11th November 2013. Mr. Wambua appeared for the Respondent/applicant while Ms. Omariba appeared for the Claimant.

Mr. Wambua submitted as follows; The Respondent is seeking an order of the court to declare this suit to have abated due to Claimant's failure to comply with court orders issued on 31st January 2013. He relied on the summons on the face of the application together with the annexed affidavit in support of the application

He submitted that on 31st January 2013 the court delivered a ruling in respect of the Respondents Preliminary Objection. The court directed the claimant to file an amended memorandum of claim within 14 days. The 14 days expired around 14th February, 2013. As at that time, no amended claim had been filed. On 9th May 2013 when parties appeared in court the Claimant's counsel made an oral application for extension of time to file an amended claim which was rejected. The claimant was directed to file a formal application. That particular application was made about 4 months after the ruling. The delay was not explained. In the ruling the claimant was directed to file a formal application for extension of time. To the day of hearing on 11th November 2013 almost 6 months after 9th May 2013 no such application had been made before this court. This is a clear demonstration that the Claimant is no longer interested in the case. It was Mr. Wambua's submission that the life of the claimant's suit was dependent on the Claimant filing the amended claim as directed by court on 9th May 2013. It was Mr. Wambua's further submission that there having been no such amended claim, and the time for amending having expired, there is no valid claim before trial court and indeed the cause of action expired on 2nd May 2013 when the Claimants application for extension of time was rejected by the court. That the Claimant had on a number of occasions demonstrated lack of interest in this matter. He is sleeping on his rights. That it is only fair that the Respondent should not be encumbered with the claim indefinitely. Mr. Wambua urged the court to find that the Claimant's cause of action had been extinguished and there is no valid claim before the court. He urged the court to declare the claim as abated.

On the claimant's reference to Article 159, 48 and 50 of the Constitution with respect to access to justice and administration of justice, Mr. Wambua submitted that the claimant has been given his day in court when the court granted him leave to amend his claim. That the same was not complied with. Again, on

9th May 2013 similar opportunity was granted but there has been no compliance. That fair administration of justice should apply to both sides, that the right also encompasses an expedient resolution of disputes. That the claimant is not keen on disposing of his case. That it is a clear rule of litigation that litigation must come to an end.

With regard to the application for review filed by the Claimant Mr. Wambua submitted that the application was filed after the filing of the Respondent's present application on 3rd September 2013 whereas the Respondent's application was filed on 26th August 2013. That it is clear that the claimant was awakened from the deep slumber by the Respondent's application and it is only then that they filed the application for review. That the fact that the claimant has been in court since 2010 is clear demonstration of the prejudice to the Respondent who has spent time and resources in defending the claim.

Miss Omariba for the Claimant relied on the grounds of opposition filed on 11th October 2013 opposing the Respondent's application. She submitted that the Respondent's application is on abuse of court process aimed at taking a shortcut to justice. That it will deny the Claimant justice by invoking technicalities Contrary to the spirit of Article 159 of the Constitution. That the application also offends the clear provisions of Article 48 and 50 of the Constitution. She prayed that the Claimant be given a day in court and that the claimant be allowed to amend its claim so that the claim can be heard on its merits. That failure to amend the memorandum within the time set had been explained in the Claimants application for setting aside the order of the court of 9th May 2013. That application is dated 20th September 2013. That one of the grounds in the application is that the file could not be traced within 14 days stipulated by the court and therefore the failure to amend the Claimants memorandum within 14 days was not deliberate but due to circumstances beyond the claimant's control.

Miss Omariba further submitted that the Respondent had not demonstrated any prejudice it would suffer if the claimant is allowed to amend its claim and have the same heard on merit. That it would be a miscarriage of justice to deny the claimant an opportunity to be heard on the merits of his claim. She prayed that the Respondents application be dismissed.

I have considered the pleadings and submissions of the parties. In the first place the claimant was negligent in filing her claim which this court gave a lifeline in its ruling of 31st July 2013. The claim had been withdrawn from the Magistrates court instead of being transferred, so that on the face of it the claim filed in this court was statute barred. The 14 days granted to the claimant to amend the claim lapsed on 14th February 2013. The Claimant did nothing about it until 30th September 2013 when they filed an application for review of the court's orders of 9th May 2013. On 9th May 2013 the court rejected a verbal application to amend the Claim and directed that such application should be made formally. If this is the order the claimant wishes to be reviewed then it is not clear what the claimant is looking for. The court did not declare the applicant's claim time barred. It is the Respondent's application now before court which seeks orders declaring the suit time barred. The Claimant's application for review would therefore even if heard, not be of help in resurrecting the claimant's claim as it is not seeking the proper orders.

As pointed out by the Respondent, this case has been in court since 2010. It has not been heard due to the claimant's default. It is against the interests of justice to continue extending olive orders in favour of the claimant whose counsel does not seem to even have a clue of how to proceed with the case. Had the Claimant himself been vigilant the defaults and delays that have been exhibited by the claimants counsel in this case would not have occurred. The claimant appears to be as complacent as his advocates in this claim. The respondent cannot continue to bear the burden of the suit of a complacent litigant indefinitely. Equity does not reward complacency. It is time to relieve the Respondent from the yokes of this claim.

For the foregoing reasons the Respondent's application is allowed.

I declare the claimant's claim to have abated on 14th January 2013 being the time limit within which the amended Memorandum of Claim should have been filed in court.

Each party shall bear its costs.

It is so ordered.

Dated at Nairobi this 21st Day of March 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms. Gathoni Kariuki holding brief for Opini for Claimant

No appearance for Respondent