



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.983 OF 2017**

**KENYA SHIPPING CLEANING AND WAREHOUSES**

**WORKERS UNION..... CLAIMANT**

**VERSUS**

**VEGPRO (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENYA UNION OF COMMERCIAL FOOD AND**

**ALLIED WOKERS .....2<sup>ND</sup> RESPONDENT**

**RULING**

The claimant, Kenya Shipping and Warehouses Workers Union filed application dated 22<sup>nd</sup> October, 2021 and seeking for orders that the court is pleased to set aside orders issued on 18<sup>th</sup> October, 2021 dismissing the suit and the same be reinstated and listed for hearing.

The application is supported by the annexed affidavit of Samson Ongera the National Organising Secretary and on the grounds that the claimant filed suit dated 29<sup>th</sup> May, 2017 on equal dated and which was dismissed on 18<sup>th</sup> October, 2021 for want of prosecution. The matter was never listed for show cause as to why it should be dismissed and the allegations by the 1<sup>st</sup> respondent that the claimant had refused to appear in court and file an affidavit as to why the suit should not be dismissed for want of prosecution was misleading as the claimant was never served with any notice to show cause.

The claimant union has a good case and should be heard on the merits.

Mr Ongera in his affidavit avers that on 18<sup>th</sup> October, 2021 this matter came up for mention and then dismissed for want of prosecution amid protests from the claimant that they had not been served with any notice to show cause. The claimant has made numerous efforts to fix the matter for haring but due to COVID pandemic effects and court operations being downscaled it was not humanly possible to attend court and take hearing dates.

Upon perusal of the file the claimant learnt that the Deputy Registrar mentioned the matter on 23<sup>rd</sup> July, 2021 for directions on the hearing and mention allocated for 28<sup>th</sup> September, 2021 and another for 18<sup>th</sup> October, 2021 when the matter was dismissed.

The claimant was never served with notices and the Affidavit of Service filed indicating service upon the claimant was not to

the email address of the claimant. Notice was sent to [kscwwunbi@gmail.com](mailto:kscwwunbi@gmail.com) and to [kufaw16@gmail.com](mailto:kufaw16@gmail.com) whereas the claimant's email address is [kscfwwu@gmail.com](mailto:kscfwwu@gmail.com) and no notice was received on such address.

No notice to show cause has ever been served upon the claimant pursuant to section 16 of the Employment and Labour Relations Court (Procedure) Rules.

In reply, the 1<sup>st</sup> respondent filed the Replying Affidavit of John Matanyi the Human Resource manager and who avers that a suit is dismissed for want of prosecution where a party fails to move the court diligently and no reasonable explanation is given for failure to move the court and have the matter prosecuted.

The claimant filed suit on 29<sup>th</sup> May, 2017 and has since not taken any steps to prosecute the matter and leading to the court issuing notices to the parties to attend and taken hearing date when the claimant failed to attend on 28<sup>th</sup> September, 2021. The claimant we served with notice through [kswwunbi@gmail.com](mailto:kswwunbi@gmail.com) and through [kufaw16@gmail.com](mailto:kufaw16@gmail.com) and on 18<sup>th</sup> October, 2021 the claimant's representative was in court and was allowed a hearing by the court.

The court properly dismissed the suit as the claimant had no good cause as to why they had failed to attend and prosecute it. the application is in abuse of court process and should be dismissed with costs.

The claimant and 1<sup>st</sup> respondent filed written submissions which have been put into account and the single issue for determination I whether the orders of 18<sup>th</sup> October, 2021 dismissing the suit herein should be set aside and the suit reinstated.

On 18<sup>th</sup> December, 2019 the court delivered ruling herein following an application filed by the claimant dated 29<sup>th</sup> May, 2017 which was filed together with the Memorandum of Claim. The respondent had also filed a Notice of Preliminary Objections dated 1<sup>st</sup> October, 2017 which the court addressed in the ruling.

Since such ruling the claimant has not taken any step to prosecute the matter until the instant application.

On 21<sup>st</sup> July, 2021 the court issued notice to the parties to attend for directions and only the 1<sup>st</sup> respondent was in attendance. Another mention date was allocated for 28<sup>th</sup> September, 2021 and only the 1<sup>st</sup> respondent attended and the court directed parties to attend on 18<sup>th</sup> October, 2021 for the claimant to show because why the suit should not be dismissed for want of prosecution. Such order is within the provisions of Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2016;

***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.***

The court on its own motion is allowed to issue notice to the parties to show because why suit should not be dismissed for want of prosecution.

On 18<sup>th</sup> October, 2021 the claimant's representative was in attendance and submitted that he was not aware of the purpose of the mention as he had not been served with notice.

It is not in dispute that the 1<sup>st</sup> respondent notice to the claimant was through [kswwunbi@gmail.com](mailto:kswwunbi@gmail.com) and through [kufaw16@gmail.com](mailto:kufaw16@gmail.com) as confirmed in the Replying Affidavit of John Matanyi.

I have perused the record and retried the claimant's letter dated 3<sup>rd</sup> March, 2018 and therein note their address is [kscwwu@yahoo.com](mailto:kscwwu@yahoo.com);

In a letter dated 3<sup>rd</sup> October, 2017 the email address is the same [kscwwu@yahoo.com](mailto:kscwwu@yahoo.com):

In a letter dated 20 August, 2018 the same address is noted;

On 12<sup>th</sup> July, 2021 the court issued notice to the parties to attend at the registry for allocation of a hearing date through the claimant's address [kscwwu@yahoo.com](mailto:kscwwu@yahoo.com) and the 1<sup>st</sup> respondent through the address [okweh\\_achiando@yahoo.com](mailto:okweh_achiando@yahoo.com).

Only the 1<sup>st</sup> respondent attended.

A similar notice issued to the claimant through the 1<sup>st</sup> respondent as directed by the court on 28<sup>th</sup> September, 2021 through the address on record at [kscwwu@yahoo.com](mailto:kscwwu@yahoo.com)

Save for the claimant to urge the court that the address of [kswunbi@gmail.com](mailto:kswunbi@gmail.com) and through [kufaw16@gmail.com](mailto:kufaw16@gmail.com) do not belong to them, nothing is noted and said as concerns the address [kscwwu@yahoo.com](mailto:kscwwu@yahoo.com)

This is the noted address used by the court registry and through which the claimant has severally been served.

Even where the above was contested, which confirms there was service upon the claimant, the court on good cause is allowed to dismiss a suit for want of prosecution where for a year the party fails to take action.

From 18<sup>th</sup> December, 2019 the claimant has not done anything to prosecute the matter. The submissions that there was COVID-19 pandemic which led to downscaling to court operations is not entirely true since there were normal operations until 16<sup>th</sup> March, 2020 and from May, 2020 hybrid physical and online operations were in use.

Even where the claimant was constrained for whatever reason, upon notice through the court dated 12<sup>th</sup> July, 2021 there was no attendance.

This does not demonstrate a diligent litigant keen to be heard. No good cause is shown as to why the claimant failed to take action to prosecute the suit.

**Accordingly, application dated 22<sup>nd</sup> October, 2021 is found without merit and is hereby dismissed. costs to the 1<sup>st</sup> respondent.**

**DELIVERED IN COURT AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021.**

**M. MBAR''**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....



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