



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT MERU**

**CAUSE NO.44 OF 2019**

***(Before D.K.N.Marete)***

**JOHNSON MWANIKI NYAGAH.....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF EMBU.....1<sup>ST</sup> RESPONDENT**

**MARTIN NYAGA WAMBORA.....2<sup>ND</sup> RESPONDENT**

**RULING**

This is an application dated 22nd April, 2021 and comes out as follows;

1. *For the reasons stated in the certificate of urgency and the suit, this application be certified urgent and heard ex-parte on first instance.*
2. *This Honourable Court be pleased to review, vary and or set aside the Order of Dismissal for non-attendance by Justice Nzioki wa Makau issued on 5<sup>th</sup> March 2020.*
3. *This Honourable Court be pleased to reinstate this suit.*
4. *Costs of this application be provided for.*

It is grounded thus;

1. *The Claimant herein filed this suit on 19<sup>th</sup> December 2019, through the firm of Ms.Onyoni Opini & Gachuba Advocates.*
2. *Thereafter, the said advocates failed to communicate and failed to pick calls from the Claimant and thus no progress was reported by the advocates to the Claimant.*
3. *After several attempts to reach the said firm of Ms.Onyoni Opini & Gachuba Advocates the claimant, on 9<sup>th</sup> April 2021, engaged a different firm, to wit, Ms Githumbi Gachaga & Achoki Advocates to take over the matter.*
4. *On following up, the Applicant has just discovered that his suit was dismissed for non-attendance on 5<sup>th</sup> March, 2020, when it was scheduled for hearing.*
5. *Immediately upon discovery of the adverse orders of dismissal, the Claimant now makes this present application for reinstatement as the suit was not dismissed on his account but on account of the advocates formerly on record.*
6. *The Respondents will not suffer any prejudice if this suit is reinstated.*
7. *It will be in the interest of justice if this suit is reinstated and be heard on merit.*

The Respondents in their Grounds of Opposition dated 2nd May, 2021 denounce the application and pray that the same is dismissed with

costs.

The grounds of opposition come out thus;

- The Claimant/Applicant is guilty of laches and there has been inordinate delay in bringing the application to court.
- There is substantive indolence on his part and equity will always aid the vigilant.
- There is no good cause for the absence of the claimant's advocates on 5th March, 2020 at the hearing.
- That the claimant squandered his right to be heard on 5th March, 2020.
- The claimant has not offered satisfactory explanation for failure to reach his advocates who have been on record for one year.
- The suit is a non-starter, the claimant having considered at paragraph 5 of the statement of claim that he was an employee of the County Public Service Board.
- The suit offends section 57 of the County Government Act, 2012 as the County Public Service Board is corporate and can sue or be sued.
- This court has no jurisdiction to handle the dispute as it stands; there is no employee-relationship.
- The orders sought in the claim cannot be effected by an employer, the Embu Public Service Board which is not a party to the suit.

The Claimant/Applicant in his written submission, like in his case explains the sequence of events leading to the dismissal of the claim for non-attendance. He avers that this was a causative of his indolent counsel who failed to propel the matter in accordance and never let him know by such failure.

The Claimant/Applicant submits that upon realising the dismissal of the suit, he instantly instituted this application to counter the adverse order of court.

Further, the Claimant submits that the dismissal was on 5th March, 2020 at the onset of the Novel Covid 19 pandemic which paralysed the operations of the court system making it impossible to effectively follow up matters in court.

The Applicant in furtherance of his case seeks to rely on the authority of **Ibrahim Mohammed Leo & another v Hussein Mohamed Leo & 4 others (2020) eKLR** where the court observed thus;

*“Some of the adjournment can be attributed to the prevailing Covid -19 pandemic and cannot be visited on any of the parties.”*

Again, in **Utalii Transport Company Limited & 3 others v Nic Bank Limited & another (2014) eKLR**, the court held thus;

*“On applying court's mind on the delay, caution is advised for courts not to take the word “inordinate” in its dictionary meaning, but in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.”*

Further, the same court held that;

*“A delay is inexcusable, if it is shown to be intentional and contumelious, for instance, where there has been disobedience of a peremptory order of the court. See the case of ALLEN v ALFRED McALPHINE (supra). Absent of such disobedience, the court should consider whether there has been a reasonable explanation for the delay.”*

These circumstances fall into his case and therefore the prayer for reinstatement.

The Claimant/Applicant further submits that a reinstatement of this suit shall entrench the right to be heard besides that to a fair hearing.

In further buttressing of his case, the Claimant/Applicant again seeks to rely on the authority of **M K v M W M & another (2015) eKLR** it was reiterated that;

*“The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In ONYANGO V.ATTORNEY GENERAL (1986-1989) EA 456, Nyarangi, JA asserted at page 459.*

*“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”*

*“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”*

*“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”*

In the penultimate, the applicant seeks to rely on the authority of **Patriotic Guards Ltd v James Kipchirchir Sambu (2018) eKLR**, where the court held thus;

*“Mistake of counsel ought not to be visited on a litigant.”*

Further, the court observed as follows;

*“Dismissal of a case not only breach of the law, but also of the Constitution in so far as it condemned the litigant without an opportunity to be heard and in breach of the right to a fair hearing guaranteed by Article 50 (1). There is no need to restate the importance of a fair trial as guaranteed by the Constitution. The right to a fair trial remains at the heart of any judicial determination and courts should endeavour to protect and uphold the same.”*

The Respondents in their written submissions dated 17th May, 2021 submit a case of delay in bringing out this application. It is their contention that this application came in one (1) year and one (1) month after the event. In any event, the applicant appointed a new set of advocates Mwaniki Gachuba to act for him in lieu of Onyoni Opini Advocates and these led the change of the matter since 14th February, 2020 when they came on record.

She further submits thus;

*7. This court in the case of County Assembly of Embu v Embu County Public Service Board, Petition No.10 of 2019, where there was a delay of only 5 months, as confirmed at paragraph 4 of the Ruling, the court found the same as inordinate and inexcusable.*

*8. In the case of James Kiplimo Rotich v Taprandich Chumo (2017) eKLR, the court found that a delay of over one year is inordinate and inexcusable.*

*9. We submit that the Claimant/Applicant is guilty of laches as there has been an inordinate delay in bringing the application to court, the delay is not excusable.*

The Respondents further support their case for delay on the ground that no evidence has been tendered to support a case of the claimant communicating to his new counsel on the status of the matter. This is as follows;

*12. The evidence that has been availed is that by the claimant being exhibit JMN-3 is clear that he was aware of the mention date of 30/1/2020 and was aware of the case details, nothing therefore prevented the Claimant from perusing the court file one (1) year one (1) month after dismissal.*

*13. The Claimant has exhibited whatsapp messages to one Nyagah whom we do not know whether he is from Mwaniki Gachuba Advocates or not and the same is not sufficient or excusable explanation for delay in bringing the Application.*

In all, the Respondents reiterate their case in the written submissions.

This matter comes out in favour of the Applicant. He has clearly demonstrated a case of dismissal of the claim on grounds of which he was not party to. Firstly, this was occasioned by the dalliance, indolence and perhaps even incompetence on the part of his counsel on record. All this time, he was not warned of the goings on in the matter. This court would not wish to visit this on the claimant.

The Claimant/Applicant further explains that the delay displayed in this application was occasioned by circumstances beyond his control. There was the onset of the novel Covid-19 pandemic which paralysed operations of courts. It almost grounded their operations.

In this scenario, the case of the applicant takes sway. It is more feasible of the two. It is also trite law and practice that the right to be heard is sacrosanct and should be prevailed at all times.

I am therefore inclined to allow the application with orders that parties bear their costs of the same.

**DATED AND DELIVERED AT NYERI THIS 19<sup>TH</sup> DAY OF JULY, 2021.**

**D.K.NJAGI MARETE**

**JUDGE**

Appearances

1. Mr. Gachaga instructed by Githumbi Gachaga & Achoki advocates for the Claimant/Applicant.

2. Mr. Kigen instructed by Wesonga, Mutembei & Kigen Advocates for the Respondents.