

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2037 OF 2014

DR. SHEM EVANS OHITO.....CLAIMANT

VERSUS

KENYA HOSPITAL ASSOCIATION T/A THE NAIROBI HOSPITAL.....RESPONDENT

RULING

1. Before is the Claimant's notice of motion application dated 18th October 2019. Through it, the Claimant seeks to reinstate the motion dated 23rd November 2018. A brief history of the matter is necessary in order to demonstrate why this application is being heard in 2021. The suit was mentioned in the presence of the Claimant and in the absence of the Respondent before the Hon. Ngumi, Deputy Registrar of the Court on 30th May 2018 and fixed for hearing on 25th July 2018. A hearing notice was to issue and presumably one was served on the Respondent. On 25th July 2018 when the matter appeared before Radido J., the Claimant was absent but the Respondent was present. The Court then dismissed the suit for non-attendance of the Claimant and his Advocate. The Claimant then filed the notice of motion application dated 23rd November 2018 seeking reinstatement of the suit. The motion was fixed for 10th December 2018 and after the Claimant's advocate was heard, the motion was dismissed by Radido J. Subsequently, the Claimant filed this motion dated 18th October 2019 seeking to reinstate the earlier application dated 23rd November 2018. The parties were either absent or not ready to proceed on 14th November 2019 – Respondent absent, 30th June 2020 – both Claimant and Respondent absent, 3rd December 2020 – Claimant absent, 23rd April 2021 – both Claimant and Respondent absent and 11th May 2021 – Claimant absent. The notice of motion application dated 18th October 2019 in the main asserts that the Claimant was neither in Court nor was his advocate present when the case was fixed for hearing. The same ground was advanced before Radido J. in the application sought to be reinstated through the motion dated 23rd November 2018.

2. The Claimant's motion is opposed by the Respondent who filed an affidavit deponed by Mr. Caxstone P. Kigata advocate for the Respondent. The deponent asserts that the suit was dismissed with costs to the Respondent by Radido J. on 25th July 2018 and dissatisfied by the Ruling the Claimant made an application dated 23rd November 2018 wherein on 10th December 2018 the Judge dismissed the application with no order as to costs. He deponed that the Court having struck out the claim and later dismissed the application for reinstatement, the Court is *functus officio*. The Respondent argues that the application before Court is therefore an abuse of the Court process and has been found to be without merit twice. It was argued that the present application is thus an appeal against the Ruling by Justice Radido clothed and/or disguised as an application to set aside orders.

3. The Claimant submits that Order 45, Rule 1 of the Civil Procedure Rules, 2010 provides that:-

"Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay".

4. The Claimant submitted that from the above provision of law, the Claimant's application is premised on the ground "on account of some mistake apparent on the face of the record". The Claimant asserts that the Ruling of Hon. Justice Radido was 'error apparent on the face of the record' and that the Honourable Court should exercise its discretion in his favour as he was not present when the hearing date was taken and neither was he served with a hearing date. He submitted that had he been aware of the hearing date, he would have attended the court and prosecuted his case and his suit would not have been dismissed. He cites the case of **Mumby's Food Products Limited & 2 Others v Co-Operative Merchant Bank Limited Civil Appeal [2002] eKLR** where the Court observed that the error or omission must be self-evident and should not require an elaborate argument to be established and that it will not be a sufficient ground for review that another Judge could have taken a different view of the matter. The Claimant further submitted that the discretion to set aside an order is never exercised in favour of someone who deliberately by evasion or otherwise seeks to block the course of justice. The Claimant submitted that the factors to consider are enumerated in the case of **Franklin J. B. Chabari v Tharaka Nithi County Government & Another [2019] eKLR** as:

i. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

ii. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

iii. A discretionary power should be exercised judicially and not arbitrarily or idiosyncratically.

5. The Claimant submitted that in the case of **Fatuma Hamisi Mwarasi v Orini Limited, Reef View Investments Ltd & 3 Others [2020] eKLR**, the Court analysed the affidavits in support of the application and was satisfied that the failure to attend court was not intentional or deliberate on the part of the Plaintiff and that the same should be excused. The said Court held that it was persuaded the circumstances of the case justified giving the Plaintiff another chance which is not only feasible but also the just thing to do and that the overriding objective of the court would also come to the aid of the applicant in order for the case to be decided on merit. The Claimant submitted that the real issues in the suit are yet to be determined on merit and therefore the Claimant should be given his day in court and the suit be heard and determined on merits. He submitted that he has demonstrated sufficient grounds for the grant of orders sought in his application dated 18th October 2019 and prays the same be allowed with costs.

6. The Respondent did not file any submissions. Court has considered the motion, the pleadings, the Court record and the law as well as decisions cited in coming to this decision. The Claimant's suit was dismissed on 25th July 2018, his attempt at reinstatement was dismissed on 10th December 2018 and the application seeking to reinstate the dismissed application is therefore not only misplaced but a waste of precious judicial time and resources. It ought never have been filed as the Claimant was attempting to have a third bite at the cherry. His suit having suffered the fate it was destined to face after repeated failure to attend Court, there is nothing left for this Court other than dismiss the Claimant's application with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2021.

NZIOKI WA MAKAU

JUDGE