



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KERICHO**

**ELRC CAUSE NO. 160 OF 2016**

**PAUL K. LANGAT.....CLAIMANT/APPLICANT**

**-VERSUS-**

**KENYA DEFENCE FORCED 9<sup>TH</sup> BATALLION.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Claimant/applicant's application dated 14<sup>th</sup> August, 2018 filed through the firm of Mogire Nyamwaya and Associates Advocates seeking the following orders;

- a. That Ex-parte in the interim, the firm of Mogire Nyamwaya and associates to come on record on behalf of the claimant in place of Alwanga & Company Advocates.**
- b. That the Honourable Court be pleased to set aside the orders dismissing the suit and reinstate the same.**
- c. That costs of this application be in the cause.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the claimant on 14<sup>th</sup> August, 2019 on the following grounds: -

- a. That, the claimant suit was dismissed on 14<sup>th</sup> November, 2017 for want of prosecution as the counsel previously on record arrive late in court having travelled from Eldoret.
- b. That, his previous advocate on record failed to inform him of the true position of the suit and he learnt of the said dismissal later prompting the filing of this application.
- c. That, the mistake of counsel ought not be visited upon an innocent client.
- d. That he is desirous of prosecuting his case to its logical conclusion as the same has good and triable issues with high chances of success.
- e. He thus prayed that the suit be reinstated for hearing and determination on merit.

3. In opposing the application, the Respondents through its staff officer II Records **Frankline Oyese Omuse**, swore a replying affidavit dated 2<sup>nd</sup> March, 2021 and filed in this Court on 23<sup>rd</sup> October, 2019, on the following grounds;

- i. That the applicant/ claimant instituted this Suit on 22<sup>nd</sup> November, 2016 and took no step to prosecute the same till 14<sup>th</sup> November, 2017 when the Court rightfully dismissed the same for want of prosecution.
- ii. That, the application herein is an afterthought as the claimant had subsequently filed another suit similar to this in Eldoret being **ELRC Cause number 269 of 2018** and that the application herein is an attempt by the claimant to avoid being time barred and avoid the doctrine of Res judicata.

iii. That the application is based on falsehoods as the claimant and or his advocate has never appeared before this Court, further that no reason had been given for the indolence.

iv. He thus urged this Court to dismiss the application as allowing it would prejudice the respondent who has lost witnesses and is strained of finance to continue defending this suit for more than 2 years since its institution.

4. The application was disposed of by way of written submission with the applicant filing on 19<sup>th</sup> October, 2020 and the Respondent filed on 3<sup>rd</sup> February, 2021.

#### **Applicant's submissions**

5. The applicant's counsel submitted that, the claimant/ Applicant is empowered to change his advocate at any time during proceedings as envisaged under Order 9 Rule 9 of the Civil Procedure Rules 2010 and further enshrined under Article 50 of the Constitution of Kenya 2010.

6. He submitted that this court has discretion to set aside default Judgment as was held in **Mbogo-v- Shah[ 1968] EA** when the court has been furnished with cogent reasons to want the exercise of the said discretion.

7. It is the applicant's submissions that when the applicant learnt of the dismissal of this suit, he immediately instructed the current advocates to come on record and seek to reinstate the said suit, further that dismissal was occasioned by his former advocates whose actions ought not be visited upon the claimant as was held in **Wachira Karani –v- Bildad Wachira [2016] ekr.**

8. He therefore urged this Court to allow the application in the interest of justice to enable the claimant prosecute his case to its logical conclusion.

#### **Respondents Submissions**

9. The respondents counsel submitted that once the claimant filed this suit on 22<sup>nd</sup> November, 2016, they had a series of non-attendances being 24/1/2017, 15/2/2017, 6/3/2017, 1/7/2017 and 14<sup>th</sup> November, 2017 which led to dismissal of his case rightfully under Rule 16 of this Court Rules, therefore he argues that the claimant is an indolent party.

10. He submitted further that the applicant herein after filing Eldoret ELRC Case number 269 of 2018 on 26<sup>th</sup> October, 2018, they raised a preliminary objection on grounds of res judicata and the suit being time barred which the applicant withdrew it and subsequently filed this application to reinstate this suit more than a year after its dismissal.

11. It was further submitted that the applicant has blamed his former advocate on record for failing to attend court leading to dismissal and failure to inform him of the said dismissal on time an issue which the respondent submitted that not all actions that an advocate commits against a client can be excused as was held in **Edney Adaka Ismail –v- Equity Bank Limited [ 2014] ekr.**

12. He argued further that from the circumstance of this case it shows that the claimant knew about the dismissal of the case in this Court that led to filing of a similar case in Eldoret in October, 2018 which he contends shows mischief on the part of the claimant/ Applicant.

13. Counsel submitted that the claimant had a duty to follow up his case even when they have an advocate on record as was held in **J.G Builders –v Plan International [2015] ekr.** Also that the case belongs to the claimant and not his advocate as was held in **Tirth Construction Limited –v- Orion Hotels Limited [2020] ekr.**

14. He concluded by urging this court to dismiss the application as equity does not aid the indolent but the vigilant.

15. I have examined the averments of the parties herein. From the record herein, it is apparent that counsel for the claimant did a poor job in representing him as he failed to attend court on many occasions leading to the dismissal of the claimant's case.

16. Since the claimant has a right to be represented by counsel of his own choice, and not to be condemned for the mistakes of his counsel, I allow the application and reinstate the claimant's case and hearing with the firm of Mogure Nyamaya representing him.

17. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 8<sup>TH</sup> DAY OF JULY, 2021**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

No appearance for parties

Court Assistants – Fred and Wanyoike