



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.267 OF 2016

AMY WANJA RURIGICLAIMANT

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....RESPONDENT

RULING

The claimant filed application dated 1st February, 2021 seeking the court to review and or set aside the orders issued on 16th December, 2020 marking the suit dismissed and the same be reinstated for hearing on the merits.

The application is supported by the affidavit of the claimant and on the grounds that on 16th December, 2020 the matter was listed for hearing before court No.4 but the court file was placed before court No.2 and the advocate logged in on the court link for court no.4 and waited patiently but the matter was not called. Manda Advocate for the respondent wrote a message making enquiries over the matter and Masese Advocate also consulted with the Court Assistant who informed him that the matter was before Court No.2.

In her Affidavit, the claimant avers that her advocate logged into court No.2 but the matter had already been marked as dismissed for want of prosecution and the respondent's advocate had logged out and could not be addressed.

Parties appeared before court No.2 guided by the cause list for the 16th December 2020. The Deputy Registrar acknowledged the mistake through email dated 17th December, 2020.

There was no deliberate failure to attend before court No.2 where the court file was placed and application should be allowed to allow the claimant a hearing on the matter on the merits.

In reply, the respondent filed the Replying Affidavit of Albert Anjichi the legal manager and who avers that the prayers sought are at variance with the court record. The court did not dismiss the suit on 16th December, 2020 but rather dismissed the claimant's application dated 24th November, 2020 and there is abuse of court process.

On 16th December, 2020 the matter before court was for hearing of application dated 24th November, 2020 and not as alleged. The claimant or her advocate were not present at the call over before court no. 4 and did not join for virtual court in court No.2 and Counsel, Mr Manda was logged in and a printing of the cause list show the claimant's advocate was present in court and his letter to court on 16th December, 2020 does not mention that there was any attendance in court.

Mr Anjichi also avers that the claimant had been reluctant to prosecute this matter after being listed severally in court on 24th November, 2020, 16th November, 2020 and all dates the claimant was absent. This is done with intention to frustrate the respondent who shall be prejudiced if the application is allowed and should therefore be dismissed with costs.

Both parties filed written submissions which have been addressed and the single issue for determination is whether the court should *review and/or set aside the orders issued on 16th December, 2020 marking the suit was dismissed and the dismissed suit be reinstated.*

On the record show that on 21st October 2020 the claimant's representative attended at the registry and was allocated a hearing date for 24th November, 2020.

On the due date, 24th November, 2020 the claimant was absent and the respondent was represented by Manda advocate and the suit was dismissed for non-attendance and non-prosecution on the part of the claimant.

On 3rd December, 2020 the claimant filed application under Certificate of Urgency and the court addressed t ad directed service and mention on 16th December 2020 and where both parties were absent. The court issued the following orders;

In the absence of the claimant to address application dated 24/11/2020 there being no evidence of service as directed by the court on 7th/12/2020 *the application is hereby dismissed.*

On 16th December, 2020 the cause list for the day posted on Kenya Law website is the main List and an Addendum List attached thereto and under Court No.2 matter No. 2 is AMY WANJA RURIGI VS CONSOLIDATED BANK OF KENYA LTD.

This is the official record upon which the court is guided.

Even where the claimant erroneously attended before Court No.4, which is not the case as Notice published directed parties to Court No.2, the subject application coming for hearing on 16th December, 2020 was with regard to application dated 24th November, 2020 seeking the setting aside of the Orders issued under Court No.2 dismissing the suit for want of attendance and non-prosecution. The court of interest ought to have been the court which issued such orders, that is Court No.2 and not Court No.4.

Due diligence hence necessitated vigilance on the part of the claimant to go through the entire cause list(s) for the day an including the Addendum Cause list for 16th December, 2020.

A review of court orders should only arise where there is discovery of new matter, there is a mistake, there is need for clarification or there is a good cause to justify the court going back on its orders once issued.

On 24th november, 2020 the court dismissed suit for good cause.

The orders sought in the application dated 1st February, 2021 seeking to *review and/or set aside the orders issued on 16th December, 2020 marking the suit as dismissed and the dismissed suit be reinstated* is at great variance with the position subsisting as of that date. the suit was already dismissed and the matter due for hearing was the application dated 24th November, 2020 and which was dismissed.

No suits exists for reinstatement.

The court finds no new discovery; there is no mistake on the record or any need for clarification. Equally there is no good justification to warrant the orders sought as couched as to allow the application would be to circumvent due process and cause the respondent great prejudice.

In the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR** the Court of Appeal held that Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel;

A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

Was this a case of a mistake or deliberate error?

As set out above, what the claimant is seeking is a review and setting aside of orders issued on 16th December, 2020 and the reinstatement of the suit since dismissed for want of attendance and non-prosecution and the same is found without merit. There is no matter addressed that there was a mistake and the court finds none. The record put into account, the various dates issued and the non-attendance on several occasions does not place the claimant on good standing for the court to be swayed and invoke discretion for her benefit.

Accordingly, application dated 1st February, 2021 is found without merit and is hereby dismissed with costs to the respondent.

DELIVERED AT NAIROBI IN OPEN COURT THIS 18TH DAY OF NOVEMBER, 2021

M. MBARU

JUDGE