



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO.1737 OF 2015**

**JAMES MUTHAURA MWITO.....CLAIMANT**

**VERSUS**

**CHINA JIANGXI INTERNATIONAL KENYA LIMITED.....RESPONDENT**

**RULING**

The claimant filed application dated 21<sup>st</sup> April, 2021 seeking for orders that the order dismissing application dated 4<sup>th</sup> February, 2020 on 11<sup>th</sup> March, 2020 for non-attendance is set aside and the application be reinstated for hearing on the merits.

The application is supported by the affidavit of Patrick Waiganjo Wachira and on the grounds that the dismissal of the application dated 4<sup>th</sup> February, 2020 was not through the claimant's fault but due to unforceable circumstances and the applicant has adequate reasons why the application dated 4<sup>th</sup> February, 2020 should not be dismissed in the first place. On 11<sup>th</sup> March, 2020 the applicant's counsel had two matters, one before this court and another before the High Court and when he arrived to proceed with this matter, the clerk he had assigned to get an advocate to hold his brief, he learnt the matter had already been mentioned and application dismissed.

Mr Waiganjo also avers that the claimant is keen to prosecute this matter on the merits.

In reply, the respondent filed the Replying Affidavit of Adano Damocha Advocate who avers that the claimant filed suit on 23<sup>rd</sup> September, 2015 and on 16<sup>th</sup> August, 2016 sought for an adjournment on the grounds that he had wrongly diarised the matter and a new hearing date was allocated for 26<sup>th</sup> September, 2017 when the suit was dismissed for non-attendance by the claimant.

The claimant filed application dated 4<sup>th</sup> February, 2020 seeking to reinstate the suit but again on the hearing date the claimant was absent and the application was dismissed. The respondent has been in attendance in all these instances.

The claimant then ignored the orders dismissing the application and served a hearing notice dated 3<sup>rd</sup> August, 2021 a period of more than a year late. The delay is not explained and the respondent is yet to be served with application dated 21<sup>st</sup> April, 2021.

Adano also avers that this suit has been on-going since the year 2015 and every time a hearing date is allocated the claimant has remained absent. There is no evidence as to what matters Counsel was attending to on 4<sup>th</sup> February, 2020 so as to be late in this case and these applications are just but a waste of court time and should be dismissed with costs.

**Determination**

In his written submissions, the claimant has relied on the case of **Edney Adaka Ismail v Equity Bank [2014] eKLR** where the court in addressing an application seeking the reinstatement of a suit dismissed for non-attendance held that;

*It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter. From the Plaintiff's Supporting Affidavit of 6th May, 2013, it is clear that the Plaintiff was keen on his case as he followed up on the dates of the hearing of the application, a fact that has not been disputed by the Defendant.*

And in the case of **Bilha Ngunyo Isaac v Kembu Farm Ltd & another & another [2018] eKLR** the court held that;

*The party seeking to reinstate the suit must also demonstratable good faith the case, what unavoidable circumstances meant. Had the matter been brought up then, may be, the result would have been different, once again, in the court's discretion.*

This case was dismissed for non-attendance on 26<sup>th</sup> September, 2017 after the claimant had attended at the registry on 13<sup>th</sup> October, 2016 and secured the hearing date. This was followed by application dated 4<sup>th</sup> February, 2020, a period of over 2 years seeking to reinstate the suit. There was no attendance and the application was dismissed.

Effectively, there is no suit and no matter for reinstatement.

Application now seeking to reinstate application dated 4<sup>th</sup> February, 2020 is sheer abuse of court process. Even where such was not the case, which is here, the missing denominator is the claimant. Since filing suit in the year 2015 he has never attended court and as the right-holder of the suit herein, he has not attached any affidavit as to his whereabouts for the last 5+ years.

The Supporting Affidavit in support of the application is sworn by Mr Waiganjo and who avers that he was unable to attend court on 4<sup>th</sup> February, 2020 since he had two other matters before this court and the High Court is the deal breaker here. The attached Notice relates to a Hearing Notice for this matter *for hearing on 19<sup>th</sup> February, 2020*. there is no evidence with regard to the matter allegedly before the High Court in Misc.Appl. No.67 of 2018.

This is the claimant's suit since the year 2015. he instructed counsel to attend and secure hearing dates but has continued to absent himself so as to secure his rights once allocated a hearing date.

**The suit having been dismissed on 26<sup>th</sup> September, 2017 the court finds no good cause in the instant application which is hereby dismissed with costs to the respondent. Such costs are hereby assessed at Ksh.20, 000 and to be paid within 30 days after which date, interests shall accrue until paid in full.**

**DELIVERED IN COURT AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2021.**

**M. MBAR?**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....