**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 553 OF 2015**

**(Before Hon. Lady Justice Maureen Onyango)**

**LIA GLORIA MAKYA.....CLAIMANT**

**VERSUS**

**BRIDGE INTERNATIONAL ACADEMIES.....RESPONDENT**

**RULING**

By application by way of notice of motion dated 5th March 2019, the claimant/applicant seeks the following orders –

1. This Court be pleased to set aside the Order issued on 16th January 2019 dismissing the suit herein.

2. The suit herein be reinstated.

3. The costs of this application be in the cause.

The grounds upon which the application is anchored are that –

a) The suit was scheduled to be heard on 16th January 2019.

b) On account of communication from the Respondent's counsel on 15th January 2019, Claimant's counsel did not appear in court but instead had instructed its clerk to attend court to record the proceedings and communicate any orders following

adjournment.

c) The clerk did not make it to court on time.

d) The Claimant sought to fix the matter for hearing last week but found that the matter had been called out on the hearing date and an order dismissing the suit for non- attendance had been made.

e) The record will bear witness that the Applicant has always been present in court and is keen to prosecute this suit and had indeed indulged the Respondent many a time on its requests for adjournments.

f) The Court has in its powers, the discretion to set aside the order dismissing the suit.

g) The Applicant has neither sought to evade nor delay the course of justice and the instant application is timeously made.

h) Costs will be a sufficient panacea for any prejudice the Respondent will suffer in the event that the instant application is allowed.

The application is supported by the affidavit of ANDREW MURA, Counsel for the applicant in which he reiterates the grounds on the face of the application.

The respondent filed a replying affidavit of ANTONY MUGODO, the

respondent's Director of Legal Services. Mr. Mugodo depose that Counsel for the claimant was aware of the date of hearing on 16th January

2019, that even if Counsel was not ready to proceed, the claimant as the principal party was not in court. That counsel's assertion that she was not ready for hearing is untenable, having taken the hearing date ex parte, and Counsel should have attended court and adjourned the case. It is further his deposition that there is no evidence that the Counsel for the claimant informed Counsel for the respondent of intention to adjourn. Further, that Counsel in conduct of the case, Mr. Muigai had not resigned by the date of hearing as alleged in the application. That lateness of counsel is not sufficient reason for reinstatement. Further, that there was inordinate delay in filing the present application.

Counsel for the claimant/applicant filed a further affidavit in which he attaches a copy of a message from Counsel for the respondent seeking to adjourn the suit on 16th January 2019. The message is to the effect that Counsel for the respondent will not be able to proceed with hearing on 16th January 2019 as she was ceasing acting for the respondent. He also offered to pay adornment fees.

**Submissions**

The application was disposed of by way of written submissions.

For the claimant/applicant it is submitted that the claimant who does not reside in the county any more has always been ready to proceed as is evident in the court record. That the claimant has severally accommodated Counsel for the respondent. That there was miscommunication between Counsel for the claimant and Counsel for the respondent on the adjournment and further that the claimant's counsel had sent a clerk to get someone to hold brief and take out the matter but the clerk was late, the applicant's counsel having been unwell.

The applicant relies on the case ***Edney Adaka Ismail –V- Equity Bank Limited (2014) eKLR*** where the court reinstated the suit after dismissal due to misdiarised hearing date. The applicant further relied on the case of ***CMC Holding Limited –V- Nzioki (2014) IKLR*** where the court stated –

> *"That discretion must be exercised upon reasons and must be exercised judiciously … In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle The answer to that weight, matter was not to advise the Appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what if might have well amounted to an excusable mistake visited upon the Appellant by its Advocate."*

The claimant further relied on the case of ***James Mwangi Gathara and Another –V- Officer Commanding Station Loitoktot and 2 Others*** citing ***Philip and Another -V- Augustine Kibede*** in which the court held –

> *"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merit. I mind the broad equity approach to this matter is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs."*

The claimant further relied on the decision in ***Burhani Decorators and Contractors -V- Morning Foods Limited and Another (2014) eKLR*** in which the court stated –

> *"In my view, when a court exercises the inherent jurisdiction to dismiss a party's suit, this must be exercised in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day thee should be proportionality. It was not demonstrated that the appellant herein with its advocate had developed a habit of absconding from court."*

In concluding, the claimant urged the court to consider the fact that the claimant had not previously adjourned the case unlike the respondent who had applied for adjournment severally.

The claimant prayed that the application be allowed.

For the respondent it is submitted that the only remedy available to the claimant is to sue Counsel for negligence. Relying on the decision in ***Josephat Muthui Muli -V Ezeetec Limited (2014) eKLR*** in which the court dismissed an application citing the decision in ***Shah -V- Mbogo***, the respondent submitted that the claimant's counsel has not adduced sufficient reasons to deserve the discretion of the court.

The respondent further submitted that the delay of 48 days from the date of dismissal of the suit to fling of the application was inordinate relying on the case of ***Fatuma Hamed Mohammed and Another -V- Ismael Ole Pasha (2010) eKLR*** where Lenaola J. (as he then

was) held thus –

> *"Applying the principles that the court's discretion to set aside an ex parte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the effuse of Justice."*

The respondent prayed that the application be dismissed for want of merit.

**Determination**

The principles upon which a court may reinstate a suit that has been dismissed for want of attendance are well set out in the case of ***CMC Holdings Limited -V- Nzioki*** (supra).

In the present case, Counsel for the respondent sent a message to counsel for the claimant informing him that he was ceasing from acting for the respondent and would therefore be seeking adjournment. He further offered to pay adjournment fees for the day. Acting on this information Counsel for the claimant did not attend court but sent the court clerk to find Counsel to hold brief. Unfortunately, the court clerk was late and arrived after the case had already been called out and dismissed for non-attendance.

As was stated by Odunge J. in the case of ***Lucy Bosire -V- Kehaucha Div. Land Dispute Tribunal and 2 Others***, mistakes will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer penalty of not having his case determined on its merits.

In the present case it is the respondent who asked for indulgence of the claimant's counsel. Had the respondent been ready to proceed the claimant's counsel would have been in court for the hearing and the suit would not have been dismissed. The same would have been the case if the respondent's counsel who had sought adjournment had attended court and informed the court he had sought indulgence of the claimant's counsel, that being the reason that claimant's counsel was not in court.

I am thus satisfied that the reason for the dismissal of the suit was occasioned by the respondent and the claimant's counsel's clerk only contributed to the same by being late.

On the issue of delay, as explained by counsel for the claimant, he was not aware that the suit had been dismissed until he went to court to take a fresh hearing date in the belief that on 16th January 2019 Counsel for the respondent had adjourned the case.

For the foregoing reasons, I find that the dismissal was caused by an excusable mistake on the part of the claimant's counsel's clerk but was caused majorly by the respondent's counsel. This is justifiable cause to set aside the orders dismissing the suit made on 16th January 2019.

The application thus succeeds and I accordingly make the following orders –

1. The orders issued on 16th January 2019 dismissing the claimant's suit herein are set aside.

2. The suit is reinstated.

3. The costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2020**

**MAUREEN ONYANGO**

**JUDGE**