

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 77 OF 2015

CHARLES NDERITU GITONGA.....CLAIMANT

VERSUS

KIRINYAGA CONSTRUCTION (K) LIMITED.....RESPONDENT

RULING

1. The motion before me is the Respondent's Notice of Motion application dated 25th September 2019 and filed on 26th September 2019 seeking to reinstate the application dated 17th June 2019 which was dismissed for non-attendance. The motion was supported by the Affidavit of Kiguru Ayub Muhuni sworn in support thereof. In the affidavit the Respondent's Advocate averred that he was not present in Court on 25th September 2019 as he was under the mistaken belief that the application was scheduled for hearing on 26th September 2019. He deponed that he discovered on 25th September 2019 after completing his appearances at Milimani Law Courts in Nairobi he checked the online cause list where he discovered the matter had been listed for 25th September 2019 and he caused an Advocate based in Nyeri to peruse the court file and he indeed established that the matter had been in court on 25th September 2019 and dismissed for non-attendance of the Respondent/Applicant. The application was opposed by the Claimant who filed a Replying Affidavit through his Counsel. The parties also filed submissions to the application which was canvassed and a Ruling reserved for today.

2. The Respondent/Applicant submitted that the issue for determination was whether the Respondent/Applicant had established good grounds to warrant reinstatement of the dismissed application. The Respondent submitted that it was its humble view that it had satisfactorily explained the reasons for the non-attendance on 25th September 2019. The Respondent/Applicant asserted that Counsel mis-diarized the case for 26th September 2019 and it submitted that mistake of counsel should not be visited on the client who is entitled to access justice. The Respondent submitted that it had attached the affidavit of service by the process server who served an erroneous date of the hearing of the motion which was dismissed for non-attendance. The Respondent submitted that the mistake meets the test of reasonability and the motion should be reinstated for hearing. The Respondent relied on the cases of **Kevin Omare Nyayemi v Peter Marongo [2018] eKLR** and **Patrick Lumumba Wakhusama v Edward Ndungu & Another [2019] eKLR** in support of its proposition.

3. The application is dated 25th September 2019 and was filed on 26th September 2019. The application was dated the same day the case was scheduled for hearing and was filed the very next day. The hearing notice the Respondent/Applicant asserts was served upon the Claimant's Advocate indicated that the suit was coming up for hearing of the suit on 26th September 2019. The suit had by this time been heard and determined and the Respondent/Applicants application was what was coming up for hearing on 25th September 2019. Counsel for the Respondent/Applicant did not indicate how it was that he mis-diarized the date as the date was given by court as 25th September 2019 and the file was perused after the application to set aside was scheduled for hearing on 25th September 2019. No grounds were demonstrated to warrant the holding that there was a mistaken belief the application dated 17th July 2019 was coming up for hearing on 26th September 2019. There is absolutely no merit in the motion as the Respondent was not diligent in defending itself and the alleged mistake of Counsel has not been satisfactorily explained to warrant a reversal of the order of dismissal. The application dated 25th September 2019 and filed on 26th September 2019 is unmerited and is dismissed with costs to the Claimant.

It is so ordered.

Dated and delivered at Nyeri this 22nd day of January 2020

Nzioki wa Makau

JUDGE