



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1382 OF 2014

MAURICE OTIENO NGICHO.....CLAIMANT

VERSUS

BRINKS SECURITY SERVICES LIMITED.....RESPONDENT

CONSOLIDATED WITH CAUSE NO. 1381 OF 2014

JOSEPH SAKWA OKUTOTO.....CLAIMANT

VERSUS

BRINKS SECURITY SERVICES LIMITED.....RESPONDENT

CONSOLIDATED WITH CAUSE NO. 1383 OF 2014

HYRINE MIKAE BONARERI.....CLAIMANT

VERSUS

BRINKS SECURITY SERVICES LIMITED.....RESPONDENT

(Before Hon. Justice Hellen S. Wasilwa 26th February, 2020)

RULING

1. Pending before me for determination is the Claimant's Notice of Motion Application dated 9th May, 2019. The Application is filed under Section 12 of the Employment and Labour Relations Court Act, Sections 1A, B and 3A of the Civil Procedure Act, Rule 22 (2) of the Employment and Labour Relations Court Rules, Order 12, Rule 7 of the Civil Procedure Rules and all enabling provisions of the law. The Application seeks for Orders that:-

- 1. The dismissal Orders issued in this case by Hon. Lady Justice Hellen Wasilwa on 17th October, 2018 be set aside.***
- 2. The Suit be reinstated for hearing and disposal on merit.***
- 3. Costs of this Application be in the cause.***

2. The Application is premised on the grounds that:-

- a) This case was dismissed on 17th October, 2018 by the Hon. Lady Justice Hellen Wasilwa for non-attendance.***
- b) The Claimant's Advocate received a hearing notice from the deputy registrar on 9th October, 2018 indicating that the matter had been fixed for hearing on 16th October, 2018 during service week before Court 2.***
- c) On 16th October, 2018 when the case was scheduled for hearing, the same was not listed on the day's cause list which***

prompted a follow up at the cause listing department of the Court registry. The Claimant's advocate made several follow ups only to be informed that the file could not be traced in the file movement register and was advised to check at a later date.

d) The Claimant's advocate made a further follow up only to realize that the case was before Ho. Lady Justice Hellen Wasilwa on 17th October, 2018 when the case was called out but there was no appearance from either party. The case was then dismissed for non-attendance.

e) Failure by the Claimants and their advocate to attend Court on the date set for hearing was not in any way by design as the registry had misguided the parties on the correct hearing date and as such the Claimants were misadvised on the proper hearing date.

f) The Claimants are interested in prosecuting this case and are eager to have their day in Court.

g) No prejudice will be suffered by the Respondent as they will have a chance to defend the suit in Court during the hearing.

h) It is in the interest of justice and fairness that the Application be allowed since the Claimants should not be punished for the unfortunate turn of events.

3. The Application is further supported by the Affidavit of **DANIEL MUKELI**, the Claimants Advocate on record herein sworn on 9th May, 2019, in which he reiterates the grounds on the face of the Motion.

4. In opposition to the instant Application the Respondent filed a Replying Affidavit deposed to by **RAYMOND NZIOKA**, the Human Resource Manager of the Respondent Company on 17th September, 2019 and filed in Court of 3rd October, 2019, in which he avers that the instant Application is an afterthought as it has been filed more than seven (7) months after the matter was dismissed by this Honourable Court. He further averred that no explanation for the delay in filing the same was availed by the Claimants herein.

5. He further contended that their lawyers were present in Court on 17th October, 2018 when the matter was called out for hearing in the absence of the Claimants nor their lawyer and therefore the matter was rightfully dismissed for want of prosecution.

6. The Respondent confirmed having been served with hearing notice from the Court indicating that the matter would proceed on 16th October, 2018. He however stated that on confirming with the online list it was noted that the matter was scheduled for hearing on 17th October, 2018 prompting them to adjust to attend Court on 17th October, 2018.

7. The Respondent further states that the Claimant in his Application has failed to demonstrate any diligence on his part choosing to blame the Court registry for the mix-up.

8. He further maintained that if the Claimant's Advocates truly visited the cause listing department they would have been notified that the matter was scheduled to proceed on 17th October, 2018 as the list for the entire week had already been updated online.

9. He further averred that the Claimants have never shown any interest in these matters and therefore the delay to prosecute the matters. He therefore contended that the Claimant's Application lacked merit, is frivolous and an abuse to the Court process.

10. In conclusion, the Respondent urged this Honourable Court to dismiss the instant Application with costs.

11. The parties hereto agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

12. It is submitted by the Claimant herein that the delay in filing the instant Application was occasioned by the change in advocates at the Claimants' Advocate firm. It was further submitted that this mistake should not be visited upon the Claimants directly.

13. The Claimant urged this Honourable Court to exercise its discretion and allow the instant Application. To buttress this argument, the Claimant cited and relied on the case of *Philip & Another Vs Augustine Kibede* 1982 – 88 KLR 103 where it was held:-

“Blunders 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 board equity approaches 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 Court as is often said else for the people of deciding the rights of the parties and not the people imposing discipline.”

14. The Claimant further urged this Honourable Court to exercise its discretion and allow the instant Application and reinstate the dismissed suits for hearing and determination on merit. To fortify this argument the Claimant cited the cases of **Wanjiku Kamau Vs Tabitha Kamau & 3 Others (2014) eKLR**, **Lochab Bros Limited Vs Peter Karuma T/A Lumumba, Lumumba Advocates (2013) eKLR** and **Esther Wamaitha Njihia & 2 Others Vs Safaricom Limited (2014) eKLR**.

15. The Claimants maintained that they have shown sufficient reasons and/or cause as to why the instant suit ought to be reinstatement for purposes of hearing and determination on merit.

16. They further submitted that the Respondent shall not suffer any prejudice if the orders sought in the instant Application is allowed as they will have an opportunity to defend the suit. For emphasis, the Claimant cited the case of **James Mwangi Gathara & Another Vs Officer Commanding Station Loitokot & 2 Others (2018) eKLR.**

17. In conclusion, the Claimant urged this Honourable Court to exercise its unfettered discretion and allow the instant Application as prayed in favour of the Claimants herein.

Respondent's Submissions

18. The Respondent on the other hand submitted that this matter was rightfully dismissed by this Honourable Court for non- attendance on the part of the Claimant on 17th October, 2018 when the matter was scheduled for hearing.

19. The Respondent maintained that there was inordinate delay in filing the instant Application and no explanation given for such delay by the herein. It is on this basis that the Respondent maintained that the instant Application was an after-thought and urged this Court not to allow the same. To buttress this argument, the Respondent cited the decision in the case of **Timothy Mworira M'twaruchiu Vs Stephen Mundia Gichuki & Another (2018) eKLR** where the Court held:-

“...In absence of any reason by the advocate who was duly served with the hearing notice it will be difficult for this Court to exercise its discretion in favour of the applicant ...”

20. To further fortify this argument the Respondent relied on judicial decisions in the cases of **Mradula Suresh Kantaria and Surech Nanillal Kaptaria Civil Appeal No. 277 of 2005, James Yanga Yeswa Vs Bob Morgan Security Services Limited (2019) eKLR** and **Sammy Nzioka Bitu & 3 Others Vs Casablanca Restaurant Club & 2 Others (2016) eKLR.**

21. The Respondent further submitted that the Claimant has shown any interest in prosecuting this cause to conclusion. They urged this Court to be guided by the decision in the case of **Bilha Ngonyo Isaac Vs Kembu Farm Limited & Another (2018) eKLR** and find that the Claimant is not a serious litigant and consequently proceed to dismiss the instant Application with costs to the Respondent.

22. In conclusion, the Respondent maintained that the instant Application lacks merit and is an abuse to the Court process. They urged this Honourable Court to dismiss the same with costs.

23. I have considered the averments of both Parties. From the record, the Claimants were served with a hearing notice indicating that this case had been fixed for hearing on 16.10.2018. This fact is also conceded by the Respondent.

24. The matter was however fixed for hearing on 17/10/2018 and the file brought before me when I dismissed the claim for want of prosecution.

25. Indeed, I note that it was the mistake of our registry to serve the Parties with a hearing notice for 16.10.2018 and fix the case for hearing on 17.10.2018.

26. The failure by the Claimant to attend Court on 17.10.2018 cannot be visited against them in the circumstances. I find the application to reinstate the claim merited and so I allow it and reinstate the dismissed suits Nos. 1382/2014, 1381/2014 and 1383/2014.

27. Costs in the cause.

Dated and delivered in open Court this 26th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mutua for Respondent – Present

Opendo holding brief Namada for Claimant