



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.560 OF 2014

ANNE KANAICLAIMANT

VERSUS

THE PARLIAMENTARY SERVICE COMMISSION..... 1ST RESPONDENT

THE SAMBURU COUNTY WOMEN REPRESENTATIVE,

HON. MAISON LESHOMO 2ND RESPONDENT

RULING

The claimant filed application and Notice of Motion dated 12th February, 2020 seeking for orders that the court be pleased to set aside the order delivered on 20th November, 2019 dismissing the claimant's case and to reinstate the suit and costs be paid.

The application is supported by the annexed affidavit of Kahiga Waitindi the advocate for the claimant and on the grounds that;

1. *Mr Alemba holding brief for Mr Karanja attended court on 10th of July 2015 for a mention to take hearing date.*
2. *The said Mr Alemba inadvertently recorded the wrong hearing date on court attendance form. (20/12/2019 instead of 20/11/2019)*
3. *As a result, the file was diarised for 20/12/2019.*
4. *Even the Hearing Notice was served for 20/12/2019.*
5. *The inadvertence was an honest mistake.*
6. *The plaintiff is still interested in prosecuting the case.*

Mr Kahiga thus avers in his affidavit that due to the inadvertence of counsel there was no notice that the matter was coming up for hearing on 20th November, 2019 and hence did not attend court when the matter was dismissed for non-attendance.

The mistake was unintended and an honest human error and the client should not be penalised.

The 1st respondent filed Grounds of Opposition and avers that the claimant failed to attend court on 20th December, 2019 to find out why the matter was not listed despite serving the respondent with a Hearing Notice. the claimant has been indolent and application filed with delay and should be dismissed. There is no affidavit by Mr Alemba to confirm the averments made in support of the application.

Both parties made oral submissions in court.

The claimant filed the Notice of Motion on 18th February, 2020 and In response, the respondent filed Grounds of Opposition.

Rule 16(9) of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires a party to respond to a Notice of Motion by filing grounds of opposition together with a replying affidavit.

(9) A party may respond to an application by filing grounds of opposition verified by an affidavit.

This is to ensure that matters of fact are addressed through the affidavit and not by grounds of opposition unlike the position subsisting under Order 50 Rule 16(2) of the

Civil Procedure Rules. See **Leisure Lodges Limited versus Dr. Lalit D Kotak [2003] eKLR.**

To file Grounds of Opposition without the Replying Affidavit thus denies the applicant a fair chance to interrogate the facts addressed in such grounds.

From the record and history of the matter, the claimant has made effort to attend and have the matter heard and determined save on 10th July, 2019 Mr Amalemba attended for the claimant and in the absence of the respondent a hearing date was allocated for 20th number, 2019 but there was no attendance when the matter was dismissed for non-attendance.

The claimant has explained that the matter was diarised for the 20th December, 2019 but there is no evidence that on such date the claimant attended court and the outcome. The respondent too, there is no evidence there was attendance and the outcome or any action taken for the misleading Hearing Notice Served.

The court objective is to address all matters on the merit and where there is failure to attend without good basis, the matter should stand dismissed. Where there is good and reasonable cause shown, then the court on such basis should hear parties on the merits.

Taking into account the totality of the history, the claimant grounds in support of the application and the acknowledged error in diarising the hearing date and which was also communicated to the respondent in error, the court shall hear the matter on the merits save the claimant shall meet costs due to the respondent for attendance in the prosecution of the Notice of Motion all assessed at ten thousand Kenya Shillings (Ksh.10, 000) before allocation of a hearing date.

Accordingly, application dated 12th February, 2020 is hereby allowed; the order issued on 20th November, 2019 is hereby set aside and the suit reinstated save the claimant shall pay the respondent Ksh.10, 000 in costs.

Dated and delivered electronically this 21st May, 2020 at 0900 hours

M. MBARU JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship the Chief Justice on 15th March, 2020 the Order herein shall be delivered to the parties via emails.

this 21st May, 2020 at 0900 hours

M. MBARU JUDGE