



**REPUBLIC OF KENYA**

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

**CAUSE NO 92 OF 2017**

**BAKARI ABDALLA TUNYA.....CLAIMANT**

**VS**

**MODERN COAST (K) LTD.....RESPONDENT**

**RULING**

1. On 25<sup>th</sup> September 2019, I dismissed the Claimant's claim for non- attendance. The Claimant subsequently filed a Notice of Motion dated 27<sup>th</sup> September 2019, seeking the following orders:

- a) That the order of the Court issued on 25<sup>th</sup>September 2019, dismissing the Claimant's suit for non-attendance be varied and/or set aside;
- b) That the Court be pleased to reinstate the Claimant's suit for hearing;
- c) That the costs of the application be provided for.

2. The application is supported by an affidavit sworn by the Claimant's Counsel, Gloria Nduku, Advocate and is based on the following grounds:

- a) That the Claimant desires and is willing to prosecute the case and have it determined on its merit;
- b) That the Claimant has been making efforts towards causing the matter to be listed for hearing;
- c) That on the date on which the matter was given a hearing date, the Claimant's Counsel heard and diarised the date as 26<sup>th</sup> September 2019 instead of 25<sup>th</sup> September 2019, hence the failure to attend court on the date the matter was listed;
- d) That it is in the interest of justice that mistakes of the Advocate should not be visited upon the litigant;
- e) That the Respondent will not be prejudiced in any way should the orders sought be granted as the application has been brought promptly;
- f) That it is in the interest of justice that the order dismissing the suit be varied and/or set aside and the suit be reinstated and listed down for hearing and determination on merit.

3. The Respondent's response is contained in a replying affidavit sworn by its Counsel, Peter Omwenga, Advocate.

4. Mr. Omwenga depones that the averment by Counsel for the Claimant that on 29<sup>th</sup> January 2019, when the matter was listed for mention to take a hearing date, she heard and diarised the wrong date is false and misleading.

5. Counsel for the Respondent further depones that on 29<sup>th</sup> January 2019, when the hearing date was granted by the Court, the Advocate for the Claimant was not in court, hence her allegations that the case was dismissed as a result of her mistake are not true.

6. Mr. Omwenga goes on to depone that his firm served the Claimant's Advocates with a hearing notice on 29<sup>th</sup> January 2019 hence the alleged mistake by the Claimant's Advocate of wrongly diarising the matter cannot suffice.

7. The Respondent's Advocate accuses the Claimant's Advocate of misleading the Court by swearing a false affidavit.

8. Counsel for the Respondent maintains that no sufficient reason has been advanced to persuade the Court to exercise its discretion in favour of the Claimant, by setting aside the order dismissing the suit for non-attendance.

9. The Claimant's application asks the Court to exercise its discretion in his favour.

10. The discretion of the Court is not whimsical; there must be evident reasons for the choices the Court makes in this regard. In ***Peter Kiplagat Rono v Family Bank Limited [2018] eKLR*** the High Court (**Mumbi Ngugi J**) reiterated the long-standing principle that the discretion of the Court is intended to avoid injustice or hardship arising from an accident, inadvertence or excusable mistake or error, but not to aid a party who deliberately seeks to obstruct or delay the course of justice.

11. In ***Bains Construction Co. Ltd v John Mzare Ogowe [2011] eKLR*** the Court of Appeal stated the following:

***“It is to some extent true to say mistakes of Counsel.....should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duty as principal and does not perform it, surely such principal should bear the consequences.”***

12. Years later, the same Court of Appeal in ***The Council, Jomo Kenyatta University of Agriculture and Technology v Joseph Mutuura Mbeera and 3 others [2015]eKLR*** held that not every inaction by an Advocate is an excusable mistake worthy of the sympathy of the Court.

13. I have looked at the court record and found that the averments by Counsel for the Claimant in the supporting affidavit do not reflect what transpired on the ground. While Counsel deposes that she was in court on 29<sup>th</sup> January 2019, when the hearing date of 25<sup>th</sup> September 2019 was taken, a perusal of the court record reveals that there was no representation for the Claimant on that day.

14. To put it bluntly, Counsel for the Claimant lied on oath and even after she was called out in the replying affidavit filed on behalf of the Respondent, she chose not to respond to the severely damaging allegations made against her.

15. What then does the Court do in such a situation? This being a civil application, I will not delve into the issue of perjury, which is a criminal offence.

16. The only finding I will make therefore is that because the Claimant's application is supported by an affidavit infested with falsehoods, there is nothing placed before the Court to move it to exercise its discretion in favour of the Claimant.

17. The Claimant's application dated 27<sup>th</sup> September 2019 is therefore dismissed.

18. The costs of the application will be met by Counsel for the Claimant.

19. These are the orders of the Court.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF JULY 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mburu Kariuki for the Claimant

Mr. Omwenga for the Respondent