



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 677B OF 2014

SYLVESTER ODUOR OYILE.....CLAIMANT/APPLICANT

- VERSUS -

PRIMEFUELS (KENYA) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 15th March, 2019)

RULING

The suit was listed for hearing on 17.04.2018 before Nduma J. Counsel for the claimant was absent but had served counsel for the respondent to attend Court and the respondent's Counsel was present as served. Counsel for the respondent informed the Court that the matter had been settled in a judgment dated 13.06.2013 and prayed that the suit be dismissed. Counsel further submitted that the judgment had been satisfied. The Court then made orders that the matter having been determined by a judgment delivered on 13.06.2013 by Lady Justice Monica Mbaru, it was erroneously set down for hearing by the claimant; and the suit having been determined, the file is closed.

The claimant was dissatisfied and filed a notice of motion on 20.06.2018 through Miyare & Company Advocates and brought under Article 48, 50(1) and 159 (2) of the Constitution of Kenya, 2010; section 3, 12 (3) (viii), 16 and 29 (1) of the Employment and Labour Relations Court Act, Chapter 234B of the Laws of Kenya; and rules 17(1), (2) and (3) and 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. The claimant prayed for orders:

- a) The application be certified as urgent.
- b) The Honourable Court be pleased to review and set aside its proceedings and consequential order given herein on 17.04.2018.
- c) The Honourable Court be pleased to reinstate or revive the suit herein; and give directions on expeditious hearing and disposal thereof.
- d) Costs in the cause.

The application was based on the supporting affidavit of George Miyare Advocate as attached on the application and upon the following grounds:

- a) The claimant filed on 06.03.2012 Civil Cause No. 340 of 2012 against the respondent for compensation for unfair termination and for payment of terminal dues. On 13.06.2013 Mbaru J entered judgment for the claimant as was prayed for. The respondent applied for review and which was granted on 07.04.2014 by Mbaru J with orders that the memorandum of claim was struck out together with all processes filed therein by Lumumba Mumma & Kaluma Advocates on behalf of the claimant; the judgment entered for the claimant therein and all consequential processes was set aside; the claimant was directed to file a fresh suit to be heard by any other Judge of the Court other than Mbaru J. Thus the claimant filed the present suit on 28.04.2014 and served the respondent on 06.05.2014.
- b) The claimant's counsel had served a hearing notice of the matter for hearing on 17.04.2018 but failed to diarise the same with the consequence that the claimant and counsel for the claimant failed to attend the hearing as listed before Nduma J on 17.04.2018. On 12.06.2018 the claimant discovered about the orders by Nduma J of 17.04.2018 and moved to file the application on 20.06.2018.
- c) The advocate for the respondent misrepresented to the Court on 17.04.2018 that Mbaru J had given a judgment determining the suit whereas the judgment referred to in the previous suit between the parties had been set aside and the advocate was aware accordingly.

d) The orders of 17.04.2018 should therefore be set aside because otherwise, the claimant will be seriously prejudiced by the injustice flowing therefrom.

The respondent opposed the application by filing on 18.12.2018 the replying affidavit of Kevin Kwasa Advocate as filed through O & M LLP Advocates. Counsel stated that the hearing notice for 17.04.2018 had been duly served and he attended court but the claimant's advocates who served the notice were absent. The failure to diarise the matter by Counsel was not sufficient justification and serves only to prolong the matter before the Court. Thus, the litigation must be allowed to come to an end especially that the terminal dues had been settled.

The Court has considered the parties' respective positions and submissions. It is clear that there is an error apparent on record that the dispute between the parties had been determined by a judgment by Mbaru J in a previous case between the parties but which was not the case. The respondent does not deny the applicant's account that the judgment in the previous suit had been set aside. The Court returns that the application for review will therefore succeed.

The Court has considered the justice in the case and the respondent's case that the reason for failure by the respondent to attend Court on 17.04.2018 was not a sufficient reason to set aside orders as given on that date. The Court returns that the orders as given were not for dismissal of the suit for want of the claimant's presence at the time and place appointed for the hearing. Accordingly the Court will not delve into the sufficiency of the reasons as urged for the respondent.

In conclusion the application filed for the claimant herein on 20.06.2018 is hereby allowed with orders as follows:

- 1) The orders given by Nduma J in this suit on 17.04.2018 are hereby reviewed and set aside.
- 2) The suit is therefore reinstated and parties are invited to take directions towards expeditious hearing and determination of the suit.
- 3) Costs of the application in the cause.

Signed, dated and delivered in court at **Nairobi** this **Friday 15th March, 2019.**

BYRAM ONGAYA

JUDGE