

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 1940 OF 2014

MARGARET WAIRIMU GACHERU.....CLAIMANT

- VERSUS -

BETA HEALTHCARE INTERNATIONAL LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 10th April, 2019)

RULING

The claimant filed an application on 30.01.2019 through T.M. Kuria & Company Advocates. The application was under Order 51 Rule 1 of the Civil Procedure Rules, section 3A and 63(e) of the Civil Procedure Act and all other enabling sections of the law. The substantive prayer is for setting aside of the order dismissing the suit given on 15.10.2018. The application is based on the supporting affidavit of Thomas Mbaria Kuria Advocate for the claimant as attached on the application. The reason urged for setting aside is that on the date fixed for hearing the suit, the case was listed before the Court for hearing and at the same time before the Honourable Deputy Registrar of the Court. The claimant and her advocated went before the Deputy Registrar and by the time they arrived before the Judge, the suit had been dismissed. It is urged that the dismissal be set aside on account of the mix-up occasioned by the listing error in the cause lists of 15.10.2018.

The respondent has opposed the application by filing on 05.03.2019 the replying affidavit of Margaret W. John-Mathenge and through Makhanu, Odhiambo & Company Advocates. It is urged that despite seeing the case listed before the Judge for hearing on the material date, the claimant and her advocated opted to prioritise appearance before the Deputy Registrar. That prioritisation was not excusable because the claimant had fixed the suit for hearing and had failed to serve the respondent a hearing notice and the respondent had attended before the Judge upon seeing the case listed for hearing. Thus the dismissal order should not be set aside. It is further urged for the respondent in the preliminary objection filed on 05.03.2019 that the claimant invoked the Civil Procedure Act and Rules instead of invoking rules of the Court. Further, despite learning about the dismissal on 15.10.2018, the application to set aside had been filed belatedly on 30.01.2019.

The Court has considered the parties' respective positions and submissions. The Court finds that on the material hearing date it is not in dispute that the suit was listed both before the Judge and the Deputy Registrar. The Court returns that in that regard, there is established a reasonable cause for failure by the claimant and her advocate not to appear before the Judge at the time and place fixed for the hearing. It is true that they ought to have prioritised appearance before the Judge but it is equally true that it was possible, and possibly reasonable, to appear initially before the Deputy Registrar as they did.

The Court has considered the valid concerns that the Civil Procedure Act and Rules were invoked whereas the rules of the Court ought to have been properly invoked. The Court returns that in view of Article 159 of the Constitution, that procedural defect would not occasion denial of substantive justice in the matter. The Court has also considered that the application was filed belatedly as urged for the respondent. To balance ends of justice, the claimant shall pay the respondent's costs of the application in any event.

In conclusion the application filed for the claimant on 30.01.2019 is hereby determined with orders that the orders given on 15.10.2018 dismissing the claimant's suit herein are set aside and parties to fix a hearing date forthwith; and the claimant to pay the respondent's costs of the application in any event.

Signed, dated and delivered in court at Nairobi this Wednesday 10th April, 2019.

BYRAM ONGAYA

JUDGE