



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 586 OF 2012**

**CONSOLIDATED WITH CAUSE NO. 312/13, 313/13, 314/13, 315/13, 316/13, 317/13, 318/13, 319/13, 320/13 AND 321/13.**

*(Before Hon. Lady Justice Maureen Onyango)*

**CHARLES OGOLA.....1<sup>ST</sup> CLAIMANT**

**DANIEL KIOKO.....2<sup>ND</sup> CLAIMANT**

**KIMEU NYAMAI.....3<sup>RD</sup> CLAIMANT**

**VERSUS**

**MANSON HART KENYA LIMITED.....RESPONDENT**

**RULING**

The application before me for determination is dated 22<sup>nd</sup> November 2018. It is filed by the claimants under Sec 63(e) 3A of the Civil Procedure Act, Order 12 Rule 1 and 3 of the Civil Procedure Rules and all other enabling provisions of the law. The claimants seek the following orders-

1. That this Court be pleased to set aside its order of dismissal of suit for non-attendance and have the same re-instated.
2. That the costs of this application be in the cause.

The application is grounded on the affidavit of WILLIAM OCHANDA ONGURU. The reasons for the application of the Notice of Motion by the claimant is that the advocate, Mr. David Mogoi requested to hold claimants advocate's brief failed to do so in good time as he was attending to another matter being CMCC Case No. 4533 of 2016. The claimants aver that counsel did not deliberately fail to attend court as he was not around. The claimants believe that it is in the interest of justice to re-instate the suit to enable the matter be finalised and that the mistake of counsel should not be visited upon a litigant.

The respondent opposed the application and filed grounds of opposition on 15<sup>th</sup> January 2019 as follows-

1. That there was delay in filing the application as the suit was dismissed for want of prosecution on the 17<sup>th</sup> April 2018 and the application was filed over seven months later.
2. That the claimants have been indolent in prosecuting this suit and only attended court when they were served with a hearing notice for the 2<sup>nd</sup> July 2018 by the Deputy Registrar of the Employment Court.
3. That the David Mogoi advocate referred to in the supporting affidavit had no sworn any affidavit deposing that his failure to attend to this suit on 17<sup>th</sup> April 2018 was because he attended to another matter first in the CMCC.
4. That the claimants seek an equitable remedy yet equity aids the vigilant and not the indolent.
5. That the respondent is no longer a going concern having sold its business to Kenya Clay Products Limited and that if this suit is re-instated and judgement delivered in favour of the claimants, execution would be futile.

6. That the application lacks merit and it is an abuse of the court process and the same should be dismissed with costs to the respondent.

### **Applicants Submissions.**

The applicants submit that the suit was dismissed on 17<sup>th</sup> April 2018 for non-attendance of both parties. For that reason, they are seeking reinstatement of the case and are relying on the affidavit dated 30<sup>th</sup> October 2018. Further, they submit that the court has discretion and that both parties were absent. The applicants request the court to use its discretion and to give a second and final chance. It is further submitted that the respondent has two options which is to file grounds of opposition or by affidavit. The applicants state that the reason for the delay was that the diary was full. They submit that the case has merit and should be given a chance and court should not shut the door while agreeing that the fault was on the part of the advocate.

### **Respondent Submissions.**

The respondent opposes the application. The respondent submits that there has been delay in filing the application more than 7 months and the applicants are not keen in prosecuting the matter. It is further submitted that the respondent was served with a hearing notice in which the applicants were under the impression that the suit was on-going. The respondent submits that it is the notice of the Deputy Registrar that prompted the applicants to act. It is submitted that the reason given for non-attendance by the advocate holding brief is not supported by an affidavit and it has just been deponed and at the very minimum, the advocate should have been asked to swear an affidavit. They also state that the applicants are seeking an equitable remedy and equity aids the vigilant not the indolent and prays that the application be dismissed with costs.

### **Determination.**

I have considered the application, grounds of objection and submissions by the parties. The issue for determination in the present application is whether there is a basis for the court to exercise its discretionary power to set aside the order of 17<sup>th</sup> April 2018 and re-instate this suit. The guiding principle for the court in exercise of its discretion to re-instate a matter must be exercised fairly and judicially. It must be on a good reason and not on mere allegations. Harris J stated in *Shah v Mbogo [1967] EA 116 at 123B* stated:

*“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”*

In *Shabir Din v Ram Parkash Anand (1955) 22 EACA 48 Briggs JA* stated:

*“I consider that under order IX rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.”*

Justice should be done to all parties. Article 50 of the constitution provides that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court and applies to both parties. The respondent has submitted in one of their grounds of opposition that execution if judgement is delivered in favour of the applicants would be futile as the respondent is no longer a going concern. The right of an applicant to seek audience from a court of competent jurisdiction is absolute and applies to all people. The assumption by the respondents about futility of executing judgement should not be entertained as this would be violation of the applicants right. Trials should be allowed to run their course to their logical conclusion and therefore the submission by the respondent is misguided.

The application is supported by the affidavit of counsel and it indicates that the advocate was not able to attend court for the reasons deponed. The submission of the respondent claiming the advocate should have sworn his own affidavit is unfounded. Counsel for the applicants submitted orally in court that the advocate had attended another matter and this delayed him holding the brief and the same was indicated in the affidavit by the counsel.

This is a court of equity and therefore the parties ought to come with clean hands. The respondent seeks to have the application dismissed on claims that the applicants are indolent seeing that they seem not keen to prosecute the matter and state that the seven months gap from the dismissal of the suit to this hearing is too long. I find that there was no inordinate delay in filing the matter as the same was done within 6 months during which time the parties have been attending court at various times. It is worth noting that the respondent was not present in court on the day the matter was dismissed and this is not contested by either party. The court finds that the applicants did not sleep on their rights as the delay has been explained to be occasioned by there being no available dates in the diary. In the case of **Cecilia Wanja Waweru V Jackson Wainaina Muiruri & another [2014] eKLR** the Court of Appeal in holding the view that reinstating the appeal in the High Court would amount to an abuse of the court process and injustice, stated:-

*“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant’s conduct from the time the appeal was filed up to the date the application for reinstatement was filed.....”*

This is a court of justice and in exercise of its discretion it ought to take into account the interests of both parties. The applicants would be locked out of the justice system if the matter stands dismissed. The applicants advocate admits that it was the advocate who was at fault and the applicants should not be punished for the fault of the advocate. In **Belinda Murai & Others Vs Amoi Wainaina (1978)**, Madan J set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake;

*“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”*

In **Gold Lida Ltd v NIC Bank & Joseph Gikonyo T/A Garam Investment Auctioneers ELC Civil Suit No. 177 of 2017**, the learned Judge stated,

*”In my view, the overriding objective of our constitutional and statutory framework on civil procedure is to achieve substantive justice to the litigants. It is contended that the issue of costs of the suit is outstanding. If that be case indeed, there would be a basis for a hearing to determine that single issue. This view is informed by Article 50 of the Constitution of Kenya which secures the right to a hearing before the court. This court is obligated to safeguard that right. In light of this, I am of the view that the inconvenience to be suffered by the defendants as a result of reinstatement of this suit can be adequately remedied through an award of costs.”*

In **Branco Arabe Espanol v Bank of Uganda (1999) 2 EA 22**, the court held that,

*“Under Order 23 Rule 2 (2) of the Civil Procedure Rules, an order for*

*dismissal of a case can be set aside for sufficient cause. The circumstances of the case showed that the appellant was prevented by sufficient cause from depositing the money for security of costs within the time allowed because it was under the mistaken belief that a guarantee would suffice as security for costs as per the advice of their counsel. The Supreme Court found that the present case was one where the error by counsel for the appellant should not be visited on the appellant, and that the circumstances amounted to sufficient cause for the purposes of setting aside dismissal of the suit. While the Court's power to dismiss a suit, under Order 23 Rule 2 (1) is automatic upon the plaintiffs failure to comply with an order for security for costs, the Court's power to reinstate such dismissed suit under Rule 2 (2) is discretionary. The Supreme Court found that the trial judge properly exercised her discretion by setting aside the dismissal of the appellant's suit.”*

In **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173** it was held that:

*“That discretion must be exercised upon reasons and must be exercised judiciously..... In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle..... The answer to that weight, matter was not to advise the Appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what if might have well amounted to an excusable mistake visited upon the Appellant by its Advocate.”*

The respondents have not cited any legal provisions or judicial authorities that prohibit the applicants from getting the suit reinstated. They have also not shown that they will be prejudiced by the re-instatement of the suit as sought by the application. Re-instatement should be granted by the courts provided that there are justifiable reasons for doing so. In the present case I find that the re-instatement sought by the applicants is merited. I therefore allow the application, set aside the order of dismissal of suit made on 17<sup>th</sup> April 2018 and reinstate the claimant's suit. The claimants must however set down the suit for hearing within 60 days failing which these orders will lapse. There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**