



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 500 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 17th June, 2019)

PATRICK LUMUMBA WAKHUSAMA.....CLAIMANT

-VERSUS-

EDWARD NDUNGU.....1ST RESPONDENT

ZETORT COMMUNICATIONS LIMITED.....2ND RESPONDENT

RULING

1. The Claimant/Applicant, Patrick Wakhusama, filed a Notice of Motion application dated 04/03/2018 brought under *Sections 1A, 1B & 3A and 63(e) of the Civil Procedure Act and the Industrial Court Act* against the Respondents, Edward Ndungu and Zetort Communication Ltd, seeking to review and set aside the dismissal of this claim on 23/10/2018, to be set down for hearing forthwith and for costs to be in the cause. The Application is based on the following grounds:-

- a) The Claimant is keen and anxious to have his day in court and has made several efforts to set down the case for hearing without success.***
- b) The case was dismissed on 23/10/2018 when it had been diarized for 23/11/2018.***
- c) The Advocate and the client were not aware that the case was on the cause list.***
- d) The Claimant has made several efforts to prosecute the case.***
- e) It is only fair and just that the case be relisted and set down for hearing forthwith.***

2. The Application is supported by the Affidavit sworn by the Respondent's Advocate, Wilberforce Khalwale who avers that they received instructions from the Claimant to file this claim in Court on or about March 2014 and which they did on 27/03/2014. That the Respondents then filed a reply on 01/12/2015 and served them on the same date and that when the matter came up for hearing on 02/12/2015, it could not be reached as the trial judge had several other matters to be heard.

3. That his firm invited the Respondents' advocates to fix a hearing date which was fixed for 26/05/2016 but on this date, the case was not heard as the Respondents' advocates were not ready to proceed having not filed and served their witness statements.

4. That on 10/10/2017, his firm again invited the Respondents' advocates to fix a hearing date and that the Deputy Registrar set down the case for hearing on the 14/03/2018 but on the material date of hearing, the matter was adjourned to a date to be fixed at the registry.

5. That on 30/07/2018, his firm invited and fixed the case to be heard on 23/10/2018 but his Clerk mistakenly diarized the matter for 23/11/2018 which date was communicated to his client and the Respondent. That when the matter came up for hearing on 23/10/2018 without any party attending, it was dismissed and that he has annexed various correspondences relevant to this Application.

6. That he learnt that the case had been dismissed by the Court when he sought to fix the same for directions on 28/02/2019. The above mentioned Court Clerk, Christopher Mulinya also filed his affidavit in support and confirmed the averments made by Wilberforce Khalwale and supporting this Application.

7. The 1st Respondent who is the Director of the 2nd Respondent filed a Replying Affidavit dated 18/04/2019 averring that he has attended every fixed date concerning this matter.

8. That when he attended Court on 14/03/2018, the matter failed to proceed and instead 23/10/2018 was fixed by consent and that the Claimant's advocates served his advocates with a hearing notice dated 02/08/2018 for the hearing fixed on 23/10/2018.

9. He annexes a copy of the said hearing notice which is marked as annexure **ENWI**. That he attended Court for hearing on the said 23rd October, 2018 and when the matter was called out, there was no appearance from the Applicant or his advocate which led to the dismissal of the suit for non-attendance.

10. That he is advised by his advocates that if indeed there was an error or mistake in misdiarizing the matter in the advocate's master diary, then the Applicant slept on his rights and waited for 6 months before making this application that is dated 04/03/2019.

11. That reopening this matter after 6 months prejudices him as he is forced to start defending afresh after a long time and that the Applicant's delay is inordinate and cannot be explained by the circumstances in the Application herein. That the Applicant is determined to mislead this court and it is prudent that the application be dismissed with costs so as to bring litigation to rest.

Oral Submissions

12. When the Application came up for hearing on 29/04/2019, Counsel for the Claimant/Applicant Mr. Khalwale submitted that the application was for reinstating the suit and that he relied on the grounds on the face of the application and the affidavits of 04/03/2019.

13. That it is the Claimant who set down the case for hearing 3 times and that they misdiarized the last hearing day thus failing to attend Court on 23/10/2019, which was not intentional. That the Claimant is in Court and is anxious to proceed with the case.

14. Counsel for the Respondents, Mr. Obura submitted that they rely on the Replying Affidavit dated 18/04/2019 which is straight forward. That there is no evidence the master diary was undiarized and that the Claimant took 4 months to make the application. He prayed for the application to be dismissed.

15. I have examined the averments of the Parties herein. The Applicant has vide his affidavit shown that he has heard an interest in pursuing this matter and fixed it for hearing previously when the matter could not be reached for hearing.

16. Indeed, on this day of 23/10/2018, the Applicant failed to attend Court. This is when this case was dismissed for want of prosecution. However going by the previous interest that the Applicant had in this matter, the failure to attend on 23/10/2018 can be attributed to an innocent mistake for which the Claimant should not suffer.

17. I therefore allow the application before me and reinstate this case for hearing.

18. I also order the Claimant to set down this case for hearing within 30 days. In default the case to stand dismissed.

19. Costs in the cause.

Dated and delivered in open Court this 17th day of June, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Obura holding brief Muchemi for Respondent

Applicant – Absent