



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 121 OF 2015

GRACE WANJIRU MURIU.....CLAIMANT

- VERSUS -

KENYA BAPTIST THEOLOGICAL COLLEGE.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th June, 2019)

RULING

The Court delivered judgment in the suit on 16.11.2018 in favour of the claimant and against the respondent for:

- a) The declaration that the termination of the claimant's employment by the respondent on account of redundancy was unfair.
- b) The respondent to pay the claimant a sum of Kshs. 3, 623, 121.00 by 31.01.2019 failing interest to be payable at Court rates from the date of the judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

The respondent filed on 22.11.2018 a notice of motion through Kirwa Koskei & Company Advocates. The application was amended by the notice of motion filed on 17.01.2019 brought under Article 50(1) and Article 159 of the Constitution of Kenya, Section 1A, 1B, 3 and 3A of the Civil Procedure Act Cap. 21. Laws of Kenya; and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The respondent seeks the following substantive prayers subject of the present ruling:

- 1) That the judgment and decree of the Honourable Court delivered on 16.11.2018 together with all consequential orders arising therefrom be set aside.
- 2) That the defendant be granted unconditional leave to canvass and defend the claim herein.
- 3) Costs be in the cause.

The application was based upon the attached supporting affidavit of Reverend Joseph Kamau and upon the following grounds:

- a) The respondent discovered that the hearing had proceeded and judgment delivered on 16.11.2018 in circumstances whereby the previous advocate on record for the respondent Lucy Wanja Advocate had failed to inform the respondent about steps in the suit and instead the respondent was kept in the dark.
- b) The mistake of the advocate should not be visited upon the respondent.
- c) The respondent was not notified to attend the pre-trial conference.
- d) The claimant failed to serve the mention notices and the hearing notice.
- e) The respondent's previous advocate had been appointed as a commissioner of the Commission of University Education and then a legal advisor to former Cabinet Secretary, Lands Hon. Jacob Kaimenyi and had not operated as a legal practitioner for 3 years.
- f) Justice will be served by allowing the application and is just that the application is granted.

The claimant opposed the application by filing on 20.03.2019 the replying affidavit of Carol Wanjiru Kimachia Advocate. The application was opposed upon the following grounds:

- a) The notice of summons was served upon the applicant on 09.02.2015.
- b) The applicant appointed (on 17.09.2015) the firm of Wanja Julius & Associates to act in the matter.
- c) The applicant never bothered to file a defence in the suit.
- d) Judgment was delivered on 16.11.2018.
- e) That every time the applicant's advocates were served they alleged they were no longer on record for the applicant.
- f) The applicant was duly served with mention notices and hearing notice through its advocates on record per the exhibited affidavits of service.

The parties filed submissions on the application. The Court finds as follows:

- 1) On the issue of service, the evidence is that the applicant was served the summons and the statement of claim and the applicant has given no good cause why a defence was not filed to oppose the claimant's case. The applicant has not raised even a single triable issue to justify the reopening of the suit. The Court in the judgment found, "**Despite service the respondent failed to enter appearance, to file defence and to attend the hearing of the suit. The claimant testified to support her case.**" That finding on service and failure to file a defence stands as not shaken at all.
- 2) In absence of a draft defence or any triable issue raised for the applicant, the Court returns that as submitted for the claimant, the present application is merely calculated to prevent the claimant from enjoying the fruits of her successful judgment long after lapsing of 4 years since the suit was filed.
- 3) As submitted for the claimant, once the suit was filed, it was the applicant's obligation to take due step and follow up its case. The Court follows the holding in **Alice Mumbi Nyaga –Versus- Danson Chege Nyaga & Another [2006]eKLR**, that a civil case once filed is owned by a litigant and not the litigant's advocate; it behoves the litigant to always follow up his case and check its progress; and the litigant cannot come to Court and say that he was let down by his advocate when a decision adverse to him is made by the Court. In this case the applicant has failed to give a reason, even a weak one, why the defence was not filed and why at the hearing of the application not even a single triable issue was urged to justify reopening of the case with leave to belatedly defend the suit.
- 4) Further and as submitted for the claimant, if there was established negligence on the part of the applicant's advocates, then as held in **Omwoyo –Versus- African Highlands & Produce Co. Ltd [2002]1KLR**, by Ringera J, it would be a proper case where the applicant's remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment.

In conclusion, the application filed for the respondent herein on 17.01.2019 as amended accordingly is hereby determined with orders:

- a) The application is dismissed.
- b) The applicant to pay the claimant's costs of the application.

Signed, dated and delivered in court at Nairobi this Friday 14th June, 2019.

BYRAM ONGAYA

JUDGE