



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 452 OF 2016

BETWEEN

THOMAS OMONDI OTIENO.....CLAIMANT

VERSUS

WELLS FARGO.....RESPONDENT

Rika J.

Court Assistant: Benjamin Kombe

Obara & Obara Advocates for the Claimant

Walker Kontos Advocates for the Respondent

RULING

1. The Claimant filed his Statement of Claim on 13th June 2016. He states that he was employed by the Respondent Company as a Security Guard, on 15th August 2008. He was summarily dismissed on 28th January 2016. He prays for Judgment against the Respondent for terminal benefits and compensation for unfair termination.
2. The Respondent filed its Statement of Response on 4th October 2016.
3. On 22nd June 2017, the Claimant's Advocates fixed the Claim for mention on 11th July 2017, with the intention of taking a hearing date.
4. None of the Parties attended Court on 11th July 2017, and the Court dismissed the Claim for non-attendance.
5. The Parties consented on 1st March 2018, to have the Claim reinstated.
6. On 10th December 2018, the Claimant's Advocates again fixed the Claim for mention on 18th February 2019, seeking a date for hearing.
7. Come 18th February 2019, there was no attendance by either Party. The Court noted that the Claim was dismissed on 11th July 2017 for non-attendance, and subsequently reinstated by consent of the Parties. For the second time the Claim was dismissed for non-attendance.
8. The Claimant has filed an Application dated 1st March 2019 seeking to have his Claim reinstated once again. The Application is supported by an Affidavit filed by Claimant's Advocate Mr. Obara, who explains that on the 18th February 2019, he was held up in his chambers preparing for hearing of a Civil Case that was coming up at the Senior Resident Magistrate's Court Mombasa. He sent his Clerk to the E&LRC, but by the time his Clerk arrived, the Claim had already been called out and dismissed.
9. The Respondent relies on Grounds of Opposition filed on 3rd July 2019. Its position is that no valid reason is shown, why the Claimant's Advocates failed to attend Court. There is no Affidavit sworn by Claimant's Advocates' Clerk, to confirm the contents of Mr. Obara's affidavit. The Application was filed 14 days after dismissal of the Claim, which constitutes unreasonable delay. The Application is an abuse

of the Court process. The Respondent prays for its dismissal.

10. The Application was heard on 4th July 2019.

11. The Claimant reiterates the contents of Mr. Obara's Affidavit in his Submissions. He argues that he had not received a notice, to show cause why his Claim should not be dismissed, under Rule 16 of the E&LRC (Procedure) Rules 2016. Rule 33 of the same Rules requires an application for Review, is brought within a reasonable time. There is no specific number of days stipulated. The Court has discretion in revisiting and setting aside its orders or decrees.

12. The Respondent relies on 2 decisions – *ELC Case No. 120 of 2017 (OS) at Kerugoya, Josephine Wanjiku Mithamo v. John Kangangi, Mithamo & Another [2019] e-KLR*, and *Court of Appeal Civil Application Nai 118/2007 (UR 78/2007), Reliance Bank Limited (In Liquidation) v. Guardways Ventures Limited & 2 Others & Another [2007] e-KLR*. In the former, the ELC found that an Advocate's Clerk who was said to have received a Hearing Notice, and failed to bring it to the attention of the Advocate, should have sworn an Affidavit, supporting an Application such as the one made by the Claimant herein. In the latter decision, it was held that whenever there is a delay, the Party guilty of the same should offer some explanation before the Court can exercise its discretion in his favour.

The Court Finds:-

13. The Claim was filed in 2016 over 3 years ago, and first dismissed for non-attendance on 11th July 2017.

14. Parties agreed on reinstatement of the Claim on 1st March 2018.

15. The Claimant fixed the Claim for mention on 18th February 2019, when again, none of the Parties attended Court.

16. The Court dismissed the Claim for non-attendance for the second time.

17. Contrary to the Submission made by the Claimant, dismissal was not under Rule 16 of the E&LRC (Procedure) Rules 2016. It was not for want of prosecution, but for non-attendance. This is clearly indicated on both dates when the Claim was dismissed.

18. There was no obligation on the part of the Court to issue the Claimant a notice to show cause, before dismissal for non-attendance.

19. Dismissal for non-attendance was based on Sections 3 and 12(3) (viii) of the E&LRC Act. Section 3 states:-

i. The principal objectives of this Act is to enable the Court to facilitate the just, expeditious and proportionate resolution of disputes governed by the Act.

ii. The Court shall in exercise of its powers seek to give effect to the principle objective in Subsection (1).

iii. The Parties and their Representatives, as the case may be, shall assist the Court to further the principal objectives and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.

20. The Claimant and his Representatives, on more than one occasion, failed to assist the Court; to participate in the proceedings of the Court; and to comply with directions and orders of the Court.

21. Section 12(3)(viii) of the E&LRC Act empowers the Court to make any appropriate order, in exercising its jurisdiction.

22. Orders for dismissal of Claims for non-attendance issued under this jurisdiction, not under Rule 16 which the Claimant invokes.

23. Parties must not take dates, stay away from the Court on dates taken, and expect Claims to be stood over generally. When Parties fix dates, they must attend Court, and assist the Court in moving the proceedings forward.

24. The Court agrees also, that the Claimant has not given adequate reasons to persuade the Court to exercise its discretion in his favour.

25. The Clerk said to have been instructed by the Claimant's Advocate to attend Court, and who arrived late to find the Claim dismissed, has not sworn any Affidavit.

26. The Claimant's Advocate has not explained why he opted to prioritize a matter before the SRM's Court, over a matter before the E&LRC, particularly as he well knew of the history of this Claim.

27. The submission by the Respondent on what constitutes reasonable time in filing of Application such as is brought by the Claimant, resonates. 14 days is inordinate delay, the Claimant's Advocate having learnt of dismissal on the same date of dismissal. The Affidavit in Support is sworn by the Claimant's Advocate, and it cannot be argued that there was time taken, in calling the Claimant himself to his Advocates' Chambers, to prepare and file an Affidavit. 14 days taken to present the Application, is not a reasonable time under Rule 33 of the E&LRC Rules.

28. The Claimant's Application has no merit.

IT IS ORDERED:-

(a) The Application filed by the Claimant, dated 1st March 2019 is declined.

(b) No order on the costs.

Dated and delivered at Mombasa this 26th day of July 2019.

James Rika

Judge