



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1509 OF 2015**

(Originally Milimani CMCC No. 1418 of 2007)

**BONIFACE MUTUA KITUNGU**

**CLAIMANT**

v

**PETER MWAURA KAMAU t/a MWAURA**

**KAMAU & CO. ADVOCATES**

**RESPONDENT**

**RULING**

1. For determination is an application by Boniface Mutua Kitungu (applicant) filed in Court on 4 March 2019 seeking orders

1. THAT the Honourable Court be pleased to set aside the orders given on 21/11/2014 on CMCC No. 1418 of 2007 by Hon Ole Keiwa for want of prosecution and allow for hearing and determination.

2. THAT the Honourable Court be pleased to set aside the orders given on 28/01/2019 by Honourable Justice S. Radido for E&LRC Cause No. 1509 of 2015 dismissing for want of prosecution but not served with Notice to Show Cause.

3. THAT the Claimant herein is seeking protection from the Honourable Court since the Defendant is bringing into the case lawyers without appointment as required by practice.

4. THAT the costs of this application be in the Cause.

2. Upon service of the application, the Respondent filed a preliminary objection contending

1. THAT the applicant lacks the necessary locus to bring the said application as a pauper the order allowing him to do so having been set aside on 16 October 2007.

2. This Court lacks jurisdiction to entertain the application dated 4<sup>th</sup> March 2019 the initial suit having been dismissed by the lower court on 21<sup>st</sup> November 2014.

3. NBI CMCC No. 1418 of 2007 does not exist since no filing fee was paid on the same and consequently the current suit does not exist.

3. The applicant filed a supplementary affidavit on 13 June 2019 and the Court took submissions on 17 June 2019.

**Background**

4. It would be in order to set out the history/background to the litigation up to the time the application under consideration was filed.

5. On 21 February 2007, the subordinate Court allowed the applicant to sue as a pauper. As a consequence, the applicant instituted Milimani CMCC No. 1418 of 2007.

6. The Respondent filed a *Defence* which the applicant felt consisted of mere denials, and on 7 May 2007, the applicant applied for summary

judgment.

7. On 25 June 2007, the subordinate Court allowed the application for summary judgment.

8. On 30 June 2007, the Respondent applied to have stay of execution and setting aside of the summary judgment. The application was allowed by the subordinate Court on 2 November 2007.

9. On 21 November 2014, the Subordinate Court dismissed the suit pending before it under Order XVII of the Civil Procedure Rules.

10. When the applicant appeared before the subordinate Court on 28 May 2015, the Court explained to the applicant and the Respondent the status of the suit. The Court therefore noted that there was no suit capable of prosecution.

11. On 5 June 2015, upon the application of the applicant, Mbaru J ordered that the CMCC No. 1418 of 2007 be transferred to this Court for hearing and determination (it appears that the applicant did not inform the Court that the subordinate Court had dismissed the suit).

12. When the parties next appeared before Court on 29 September 2015, the Court (Nduma J) noted that the suit had been dismissed, and therefore referred the parties back to Mbaru J.

13. The parties appeared before Mbaru J on 29 October 2015 and the Judge explained to the applicant that it was improper to have sought the transfer of the suit when it had been dismissed by the subordinate Court.

14. Things went quiet until 10 January 2019 when the Deputy Registrar issued a *Notice to Show Cause* why the suit should not be dismissed for want of prosecution with a return date of 28 January 2019.

15. When the file was called out on the latter date, there was evidence that the applicant had been served, and because none of the parties were in Court, the Court ordered that the Cause be dismissed with no order as to costs.

16. The dismissal of 28 January 2019 prompted the applicant to file the motion now under consideration and with the background, the Court can now address the application on the merits.

#### **Dismissal by subordinate Court**

17. The first order sought by the applicant was in respect of setting aside of the dismissal order by the subordinate Court.

18. It is clear from the record that all along the applicant was aware that the subordinate Court had dismissed his suit.

19. The proper approach therefore would have been for the applicant to move the subordinate Court for review of the dismissal order, or to appeal to this Court against the dismissal.

20. The applicant did not. In fact he hid information from the Court when applying for transfer.

#### **Dismissal of 28 January 2019**

21. The suit before the subordinate Court having been dismissed before the transfer order was made, it was not proper for the applicant to move this Court for transfer.

22. The dismissal of 28 January 2019 was therefore of no legal validity.

23. It is also not true as asserted by the applicant that he was not served with the *Notice to Show Cause*. An affidavit of service on record demonstrates that he was served through his given postal address.

24. In respect to the preliminary objection(s) raised by the Respondent, the Court finds that the objection on the *pauper ground* irrelevant to the application under determination, and if not irrelevant, would not be decisive.

25. The Court would however uphold the objection on lack of jurisdiction to entertain the instant application as presented because the substantive suit before the subordinate Court had been dismissed before the transfer order.

26. Before concluding, it appears to the Court record in this file may have been interfered with (some records seem to have been removed from the file).

27. The Court will not speculate as to which of the parties stand or stood to benefit from such interference.

28. The application filed in Court on 4 March 2019 is dismissed with costs to the Respondent.

**Delivered, dated and signed in Nairobi on this 15<sup>th</sup> day of July 2019.**

**Radido Stephen**

**Judge**

**Appearances**

Applicant in person

For Respondent Mr. Momanyi instructed by Gachoka & Co. Advocates

Court Assistant Lindsey