



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**

**CAUSE NO. 1600 OF 2013**

**(CONSOLIDATED WITH CASE NO. 1599 OF 2013)**

**JUDY MWENDWA.....1ST CLAIMANT**

**ROBERT NZOMO KIVUNZYO.....2ND CLAIMANT**

**VERSUS**

**OXFAM GB KENYA PROGRAMME.....RESPONDENT**

**RULING**

**Introduction**

1. The two suits herein were dismissed on 17.10.2018 and 18.10.2018 for non attendance and want of prosecution respectively by different judges. As a result, the claimants filed Notice of Appeal against the said dismissal but later withdrew the Appeal Notices and each brought a Notice of Motion dated 9.11.2018 seeking for setting aside of the order dismissing the suits and for suits to be reinstated for hearing on merits. The applications are supported by affidavits sworn by the claimants on the said 9.11.2018.

2. In respect of Cause 1600 of 2013, the claimant contended that the suit came up for mention on 30.7.2018 and it was fixed for hearing by the Court on 19.11.2018 by consent of the parties. That in the meanwhile the suit was rescheduled for hearing on 17.10.2018 by the registry but neither she nor her counsel on record was served with a hearing notice for the new date. Instead, it was served on her former counsel whom she had already replaced. That on 17.10.2018, neither she nor the defence appeared and the court dismissed it for non attendance.

3. In respect of cause 1599 of 2018, the claimant contended that he was neither notified by his counsel of the hearing scheduled on 21.11.2017 nor the adjournment costs that he was condemned to pay the defence witness. That on 18.10.2018 he attended Court ready for hearing after his counsel notified him and that is when he heard about the costs he was condemned to pay to the defence and also that his suit had been consolidated with cause 1600 of 2013. That after the Court session, his counsel told him that his suit had been dismissed. That thereafter he perused the Court file and confirmed the order against him to pay adjournment costs to the defence. He blamed his counsel for mismanaging his case and prayed for a chance to prosecute his case contending that his case for unfair termination has great chances of success.

4. The respondent did not file Replying Affidavit to oppose the Application in Case 1600 of 2013 but did so in Cause 1599 of 2013. The Affidavit was sworn by Mr. Sumananjah Mohanty on 28.11.2018, where he deposed that the application is incompetent by dint of Order 9 Rule 9 of the civil Procedure Rules because, the claimant did not seek leave to act in person or serve his former Advocate after the suit was dismissed. In addition, he deposed that the claim had been given a last chance on 15.10.2018 to comply with court order dated 21.11.2017 which required him to pay the respondent witness expenses. He therefore deposed that the claimant does not deserve the discretionary orders sought because he disobeyed the said court orders for over a year.

5. The applications were disposed of by written submissions, which basically reiterated the averments made in the said affidavits and cited three authorities. However, the claimant in Cause 1599 of 2013 indicated to the Court, and it was not denied by the defence, that he paid the said witnesses expenses totaling to Kshs.64,754 on 18.12.2018.

6. After careful consideration of the Application, Affidavits, and Submissions, the main issues for determination are whether the applications are incompetent, and secondly whether they have merits and warranting the discretionary orders sought.

**Analysis and determination**

## Whether the Applications are incompetent

7. The respondent objected to the applications alleging that they offend order 9 rule 9 of the Civil Procedure Rules which provides as follows:-

***“When there is a Change of Advocate or when a party decides to aver in person having been previously engaged on Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court:-***

***(a) Upon application with notice to all the parties; or***

***(b) Upon a consent filed between the outgoing Advocate and the proposed advocate or party intending to act in person as the case may be.”***

***(emphasis added)***

8. The foregoing provision is clear that for order 9 rule 9 to be invoked, judgment must have been passed before the change of Advocate or acting in person. The term judgment has not been defined.

9. Cause 1600 of 2013 was dismissed for non attendance of the parties while cause 1599 of 2013 was dismissed for want of prosecution. The question that arises is whether said order dismissing the two suits amounted to judgments within the meaning of order 9 rule 9 of the Civil Procedure Rules. The said question is not new to Kenyan Courts. In **Njue Ngai Vs Ephantus Njiru & Another [2016]eKLR** the Court of Appeal had the following to say:

***“18. Another issue may arise as to whether a dismissal of a suit for non attendance or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend Court in the case of Peter Ngome vs Plantex Company Limited[1983]eKLR.”***

10. In the instant case, I do not think that it necessary to belabour the point but agree with the cited precedent that a dismissal of a suit for want of prosecution or for non attendance by the claimant amounts to a judgment in that suit. Consequently, I find that the judgment was passed in the two suits herein on 17.10.2018 and 18.10.2018 when the suits were dismissed for non attendance and for want of prosecution respectively. It follows therefore that the claimants were barred from acting in person from the date of the said judgments except with leave of the court pursuant to order 9 Rule 9 of the Civil Procedure Rules.

11. In view of the foregoing I do not hesitate to hold that applications dated 9.11.2018 by the claimants are incompetent because their Notice to act in person had not taken effect. I therefore strike the applications out with no order as to costs. That does not mean that all is lost because the claimants need only to comply with order 9 rule 9 of the Civil Procedure Rules and thereafter file a fresh application for review and/or setting aside of the dismissal and for reinstatement of the suits.

## Conclusion and disposition

12. I have found that the dismissal of the suits herein for want of prosecution and for non attendance amounted to judgment in the suits. I have further found that the claimants did not comply with order 9 Rule 9 of the Civil Procedure Rules before filing the instant applications. Consequently, the said applications are struck out for being incompetent. Each party to bear his or her own costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 5th day of July, 2019.**

**ONESMUS N. MAKAU**

**JUDGE**