



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO 95 OF 2017**

**(CONSOLIDATED WITH CAUSE NO. 96 OF 2017, NO. 121 OF 2017 AND NO. 220 OF 2017)**

**1. PAUL MWAI MWANGI**

**2. MOSES MWANGI WAHOME**

**3. VINCENT OMWANGE**

**4. WILSON MWANGI NJOGU & 27 OTHERS.....CLAIMANTS**

**VERSUS**

**KIRINYAGA CONSTRUCTION (K) LTD.....RESPONDENT**

**RULING**

1. The notice of motion application dated 26<sup>th</sup> March 2019 seeks to set aside this court's orders made on the 6<sup>th</sup> March 2019 dismissing the Claimant's claims herein and reinstatement of the said claims. The suit was fixed for hearing on 6<sup>th</sup> March 2019 and the suit was dismissed for non-attendance as both the advocate for the Claimants and the Claimants failed to attend court. The application is premised on the grounds that the Claimants numbering more than 40 were all in court ready to proceed however, one of them being a representative inadvertently failed to inform the court that they were ready to proceed as he did not hear their matter being called. The application is supported by the sworn in affidavit of Wilson Mwangi Njogu the Claimant in Cause No. 95 of 2017 who was to be the representative of all the Claimants in prosecuting the suit and for connected purposes. He deponed that they all passed through the advocate's office and he instructed them to inform the Court that he would be ready to proceed at 9.30am as he had other brief matters that he was handling in the high court. An extract of the diary was attached in the affidavit in support. He deponed that he together with ten other Claimants managed to enter the court room but he did not hear his name being called out. He deponed that they continued waiting in court even after the call over as they thought that their matter would still proceed at 9.30am. He deponed that unfortunately, when the advocate arrived at the agreed time of 9.30am the advocate learnt that the suit had already been dismissed. He deponed that the advocate then informed the Claimants that the person whose name was called was one Paul Mwai Mwangi since his sole claim was made the lead file. He deponed that he it was not possible for him to recall the names of all the Claimants as they were many. He deponed that the one whose name was called had remained outside the court room hence the failure to respond was inadvertent and innocent as they all attended court and were ready to proceed. He averred that it is only just that the orders sought be granted with an undertaking to prosecute the claims expeditiously as they stand to suffer irreparable prejudice if the claims are not reinstated.

2. The Respondent filed grounds of opposition and asserted that the applicants are guilty of laches as there has been inordinate delay in bringing the application to court and serving the Respondent. It argued that the Claimants' indolence has not been explained. It further argued that there is no good cause to justify why the Claimants' and their advocate failed to attend court on 6<sup>th</sup> March 2019. The Respondent averred that there is no evidence adduced to support the allegation that they were all present in court when the matter was scheduled for hearing. The Respondent asserted that the Claimants squandered their right to be heard on 6<sup>th</sup> March 2019 and have shown unwillingness to prosecute their claims for not attending on the hearing date and the court should not aid the indolent. The Respondent asserted that it has at all times been desirous of defending its interests in the matters and justice dictates that there must be an end to litigation.

3. The Claimants assert that they were in court on the material day when the matter was scheduled for hearing and were advised to attend court. They assert that they were in court. The Claimants ought to have sought to be heard since at the time the advocate is stated to have arrived at the court it was 9.30am. If they were in court this fact would have been brought to the attention of the court at 9.30am when the advocate realised the suit had been dismissed. In any event the advocate is Mr. King'ori who frequently appears in the ELRC court at Nyeri. He is aware that before the matter is dismissed for non-attendance the court calls out the party again after the court assistant has called out the cause. As the matter had been consolidated, the advocate was well aware that the cause would be called and the representative therefore is not being candid if they allege they were in court and did not respond ostensibly since the Claimant in the lead file was waiting outside. The application was made some 20 days later further suggesting that they had to contrive a reason for the failure to attend court. Not surprisingly the advocate did not swear an affidavit confirming that he sent his client to hold his brief. The motion is not merited and as stated by the Respondent the Claimants squandered their chance to be heard on 6<sup>th</sup> March 2019. The application is dismissed with no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 3<sup>rd</sup> day of July 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

**Deputy Registrar**