



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 1286 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**MARK GITENGA NYAGWACHI.....CLAIMANT**

**VERSUS**

**MIMOSA PHARMACY LIMITED.....RESPONDENT**

**RULING**

Vide a Notice of Motion filed on 31<sup>st</sup> January 2019, the Applicant seeks the following orders:

1. That the Court be pleased to review and or set aside Orders made on 24<sup>th</sup> October 2018 dismissing the Claimant's case.
2. That the Court be pleased to reinstate the suit and set the matter herein for hearing
3. That the Court be pleased to make such further orders as are necessary for the ends of justice.
4. That costs of the application be in the cause.

The application supported by the following grounds:

1. The Order of dismissal made on 24<sup>th</sup> October 2018 was made through no fault or wrongdoing of the Claimant and that the failure by both the Claimant and Counsel to attend Court on 24<sup>th</sup> October 2018 was not deliberate as it was caused by a miscommunication and disorganisation of the counsel's office.
2. The Claimant is desirous to prosecute its case to the fullest and that mistake of counsel should not be visited upon an innocent litigant.
3. The application is made without undue delay and that no prejudice will be occasioned to the Respondent by the grant of the orders sought.
4. It is in the interest of justice that the application for reinstatement of the Claimant's case be allowed to enable it be heard and determined on merit.

The application is supported by the affidavit of Patrick Waiganjo Wachira, the Claimant's counsel, sworn on 29<sup>th</sup> January 2019 in which he reiterates the grounds set out in the application.

In response to the application, the Respondent filed a Replying Affidavit sworn by Edel Ouma, the Respondent's Counsel, on 29<sup>th</sup> April 2019. He avers that the hearing date of 24<sup>th</sup> October 2018 was fixed by consent of all the parties on 24<sup>th</sup> July 2018. That the court rightly dismissed the suit for want of prosecution and non-attendance of the claimant, that on 24<sup>th</sup> October 2018 neither the Claimant nor his counsel attended court and that the reason advanced by counsel holding brief was that Counsel Waiganjo was unable to trace the claimant.

He urged the court to dismiss the Claimant's application as it is a delaying tactic and a waste of the court's time.

**Submission by the Parties**

Counsel for the Applicant submitted that it is only fair that the suit be reinstated as the failure to inform the Claimant of the hearing date was

a genuine mistake. Counsel submitted that the Claimant has been keen on securing hearing dates and that the failure to attend Court should not be a ground to negate his efforts to fix the case for hearing.

Counsel for the Respondent submitted that the suit was filed on 13<sup>th</sup> August 2013 and the parties have on several occasions received summons inviting them to fix a mutual hearing date but the matter has failed to proceed on the mutually agreed dates. Counsel submitted that the Claimant filed the instant application 3 months after it was dismissed which is a show that the Claimant is not interested in this cause. Counsel further submitted that no good reason has been given for not availing the Claimant on the hearing date. He urged the Court to dismiss the application.

In a brief rejoinder Counsel for the applicant submitted that indeed the hearing date of 24<sup>th</sup> October 2018 was taken by consent and maintained that the Claimant is desirous of prosecuting his case. Counsel submitted that though litigation must come to an end the finality should only be after each party has had an opportunity to be heard.

### **Determination**

Upon consideration of the application, the response thereto and submissions by the parties, the main issue for determination is whether there is sufficient reason for the Court to reinstate this suit by setting aside the Order issued on 24<sup>th</sup> October 2018 dismissing the suit for want of prosecution.

The Applicant avers that the failure to attend the Court on the mutually agreed hearing date was due to his Advocate's mistake occasioned by the lack of proper communication to enable him attend court. The Respondent avers that there is application reveals mischief as the hearing date was mutually agreed upon.

From the record, Counsel holding brief informed Court that the Counsel was unable to trace the Claimant/Applicant. This reason varies from that advanced by the Applicant in the application that there was no proper communication from Counsel's office and that there was miscommunication and disorganisation of the Counsel's office. In determining whether to reinstate a suit, the Court is called upon to weigh whether there is good reason to grant the Order for reinstatement. In this instance, Counsel for the Claimant submitted that non-attendance was occasioned by his mistake and such mistake should not be visited upon the client. In **Shabir Din v Ram Parkash Anand (1955) 22 EACA 48** Briggs JA stated:

*“I consider that under order IX rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.”*

I have considered the record which shows that in fact there has been activity on this file. I will give the claimant the benefit of doubt and exercise my discretion in his favour this once to give him a final opportunity to have his case heard and determined on the merits.

However, in view of the fact that the respondent has been prejudiced by the claimant's failure to attend court, on the date when the suit was dismissed, the claimant will pay respondent's costs for the application.

I thus make the following orders –

1. I set aside the orders made on 24<sup>th</sup> October 2018 dismissing the claimant's suit and reinstate the same.
2. Hearing date will be taken in court at the time of the ruling in view of the age of the file.
3. The claimant will pay the respondent throw away costs in the sum of Kshs.10,000/= within 30 days from date of order failing which suit will be dismissed for non-compliance.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**