



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1048 OF 2018

DANIEL MWAURA NJIHIACLAIMANT/RESPONDENTS

VERSUS

MATHARE YOUTH ASSOCIATION1ST RESPONDENT

BON MUNRO.....2ND RESPONDENT

(Before Hon. Justice Hellen S. Wasilwa on 16th September, 2019)

RULING

1. The Applicant, Bob Munro, filed a Notice of Motion on 14th February 2019, under Section 1A and 3A of the Civil Procedure Act and Order 12 Rule 7 of the Civil Procedure Rules, seeking the following orders:

1. Spent.

2. THAT the order of this Honourable Court made on 6/02/2019 dismissing the Applicant/2nd Respondent's Notice of Motion dated 30/11/2018 be set aside and the said application be reinstated for hearing.

3. THAT the costs of this application be provided for.

2. The Application is supported by the Affidavit of Amazon Chepkirui Koech, an Advocate of the High Court of Kenya in conduct of this matter. The grounds upon which the application is based are that the Applicant's advocate gave instructions to the firm's clerk to fix a hearing date for the Application dated 30th November 2018 but the Clerk did not report to the office until 7/01/2019 when he handed over to the newly employed clerk and instructed him to draft a hearing notice for 6/2/2019.

3. In addition, that the Applicant's advocates were not informed of the date hearing date and that the office administrator diarised the set date for another application related to this suit.

4. The Respondent, in opposing the application, filed his Grounds of Opposition on 20th March 2019. He contends that the application is fatally defective as it is brought on provisions of law that are not applicable to this Court as this Court has its own Rules, the Employment and Labour Relations Court (Procedure) Rules 2016.

5. He further contends that the Respondent was complacent in the casual manner the application was handled as it was not the duty of the Court to vet the competence of the Applicant's advocate's clerk.

6. The Application was heard by way of written submissions. Each party filed its written submissions and the Applicant filed joint submissions with the 2nd Respondent in the suit.

Applicant's submissions

7. He submitted that the application is brought under the Civil Procedure Rules as the Employment and Labour Relations Court (Procedure) Rules 2016 have no explicit provision for reinstatement of an application. He therefore urged the Court to endeavour to do justice to the parties as observed in the case of **Lochab Bros Ltd v Peter Kaluma T/A Lumumba Mumma & Kaluma Advocates & 2 Others [2013]eKLR.**

8. He submitted that at the time of dismissal of the suit the Respondent had not filed a response to the application. Further, that the failure to attend court was not out of disregard of Court procedures but rather it was due to a mix up of dates in the diary.

9. He submitted that the non-attendance was a result of an honest mistake on the part of the Applicant's advocate and the Applicant should not suffer injustice. He relied on the cases of **James Mwangi Gathara & another v Officer Commanding Station Loitoktok & 2 Others [2018] eKLR**.

10. He submitted that the Applicant had given sufficient reasons which prevented the non-attendance in Court on 6/02/2019. He argued that in exercising its discretion the Court should consider whether the Applicant shall suffer prejudice of the orders sought in the application dated 14/02/2019.

11. He submitted that the Court should be guided by the case of **Ivita v Kyumbu [1975] eKLR** where the Court held that it is the duty of the defendant to demonstrate the prejudice it alleged. In conclusion, he submitted that the 2nd Applicant should not suffer for not having his application dated 30th November 2019 not heard due to blunders and honest mistakes by the advocate.

Respondent's submissions

12. The Respondent submitted that this Court set its own rules being the Employment and Labour Relations Court (Procedure) Rules 2016 hence the Civil Procedure Rules are not applicable. Further, that the statutory provisions cited in an application invokes the jurisdiction of the Court and should it not be properly invoked, an application becomes incompetent. In support of this, it relied on the decision in **Joel K Yegon & 4 Others v John Rotich & 4 Others [2004] eKLR** and **Aviation and Allied Workers Union Kenya v Kenya Airways Limited & 3 Others [2015] eKLR**.

13. He submitted that the Applicant submitted that the ELRC (Procedure) Rules do not make provision for reinstating an application and setting aside an order for dismissing an application for non-attendance but Rule 22 (2) of the Rules provides that where a party fails to attend Court on the day fixed for hearing, the Court may dismiss the suit except for good reason recorded.

14. He submitted that there is no reference to amendment of applications in the Civil Procedure Rules therefore a defective application should be withdrawn and a fresh application filed. However, the application was not withdrawn.

15. He submitted that the Court may dismiss a suit for failure to attend Court on a hearing date except for good reason to be recorded and relied on Rule 22 (2) of the ELRC (Procedure) Rules 2016. He relied on the decision in **Attorney General v Law Society of Kenya & another [2013] eKLR**.

16. He further submitted that the reasons advanced by the Applicant are insufficient to yield the prayers sought. In conclusion, he submitted it is the responsibility of advocates and clerks to ensure that a matter is diarised thus the Court's discretion should not be exercised in their favour. He therefore urged the Court to dismiss the application.

17. I have examined all the averments from both Parties. The genesis of this application is that on 5.12.2018, the 2nd Respondent herein filed an application under Certificate of Urgency seeking to have his name struck off from this claim for misjoinder.

18. The application was opposed by the Claimant and was scheduled for hearing interpartes on 6.2.2019. However, the Applicant, the 2nd Respondent failed to attend and therefore the application was dismissed for want of prosecution.

19. The Applicant now filed the current application where he seeks to have the dismissed application reinstated. The Applicant has averred that they failed to attend Court to prosecute this application because of misdiarizing the hearing date for the application by their clerk.

20. I have considered the nature of the orders sought in this application. I do not find any prejudice will be suffered by the Claimant by allowing this application. I will therefore allow the application and reinstate the dismissed application and admit it for hearing interpartes.

21. Costs in the cause.

Dated and delivered in open Court this 16th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ms. Kayugira for Applicant – Present

Respondent – Absent