



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**PETITION NO. 79 OF 2015**

*(Before Hon. Lady Justice Hellen S. Wasilwa on 14<sup>th</sup> October, 2019)*

**CHEATIT MOSES CHEMBEN & 92 OTHERS.....PETITIONERS/APPLICANTS**

VERSUS

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**RULING**

1. The Applicants filed a Notice of Motion on 15<sup>th</sup> May 2019 seeking the following Orders:-

**1. Spent.**

**2. THAT the Order made on 2<sup>nd</sup> May 2019 dismissing the Applicant's Application dated 11<sup>th</sup> April 2019 be set aside.**

**3. THAT the Applicant's application dated 11<sup>th</sup> April 2019 be reinstated for hearing.**

**4. THAT costs of this application be in the cause.**

2. The Application is premised on the grounds that:

**1. The Application dated 11<sup>th</sup> April 2019 was dismissed wrongfully as the advocate on record arrived after the matter had been called out since he was held up in another matter.**

**2. The Application was dismissed unfairly as the Respondent has not formally made a response and that the mistake was not deliberate.**

**3. No prejudice will be suffered by the Respondent if the Application is reinstated as they can be compensated by way of costs**

**4. The Advocate was ready to proceed with the hearing of the application but only for the unforeseen delay and that the mistake of an advocate should be visited on the clients.**

3. The Application is supported by the affidavit of Moses Chestit, the 1<sup>st</sup> Applicant in which he reiterates the grounds set out on the face of the application.

4. In response to the application, the Respondent filed a Replying Affidavit sworn by George Ochieng of the Respondent's Legal Services and Board Co-ordination on 29<sup>th</sup> May 2019. He states that the application herein is based on a misconceived notion that the application was dismissed for want of prosecution however the Respondent have demonstrated that the grounds upon which it was premised were indolence and an afterthought.

5. He states that the application is not properly premised on law as the affidavit is not sworn by the Advocate who was late and that the Applicant took 14 days to file this application. Further, that the application seeking leave to file an appeal out of time was brought more than 12 months after delivery of Judgement.

6. He states that the delays in bringing the application is inordinate and prejudicial to the respondent and that the respondent shall suffer

prejudice if the matter is reinstated as it is a government institution and claims against it should be brought within one year as provided under the Public Authorities' Limitations Act. He further stated that the application lacks merit and ought to be struck out with costs to the Respondent.

#### **Applicants' submissions**

7. The Applicants submitted that this Court has discretion to determine any application and grant such orders, as necessary, in the event of non-attendance. They submitted that Rule 2 of the Employment and Labour Relations Court (Procedure) Rules 2016 provides that the Court may dismiss the suit except for good reason. They submitted, that there's a proviso that the court may rescind its decision or determine not to dismiss the matter where there is a good reason.

8. They submitted that the Court in **Pramid Hauliers Ltd v James Omingo Nyaaga & 3 Others [2018] eKLR**, held that discretion was exercised favourably to allow an application similar to the instant one.

9. They submitted that the standard of determining whether or not to exercise discretion in favour of a party is to assess whether there is justifiable reason to do, whether the Applicant is guilty of obstruction of the justice and whether the respondent will suffer prejudice. They submitted that the advocate arrived after the matter had been called and that this was the first time the matter was coming up for hearing therefore there is nothing in the advocates' conduct that suggests the desire to obstruct justice.

10. They submitted that the application to get leave to file an appeal out of time is meritorious since the Advocates formerly on record for the Applicants did not inform the Applicants on time of the fact that a decision had been rendered.

11. They submitted that the Court in **Pravinchandra Jamnadas Kakad v Lucas Oluoch Mumia [2015] eKLR** set aside a judgment in default because, inter alia, the defence put in by the defendant raised triable issues.

12. They submitted that the excusable mistake of failure to attend Court ought to be treated as such an excusable mistake and the same ought to be resolved in favour of the Applicant who was present in Court.

13. They submitted that no prejudice shall be suffered by the Respondents if the application is allowed. In support of this, they relied on the decision of **Charles Ogola & 2 Others v Manson Hart Kenya Limited [2019] eKLR** and urged the Court to allow the application.

#### **Respondent's submissions**

14. The Respondent submitted that the decision in **Ivita v Kyumbu [1984] KLR 441** set the test to be applied by Courts in an application for the dismissal of a suit for want of prosecution. It submitted that the Applicant has not demonstrated that there is any excusable reason as to why they failed to attend Court for hearing of their own application or why timely attendance of the Court was impossible despite the matter clearly being among the last in the cause list for the day.

15. It relied on the case of **Leonard Oseme Karani v Sunflag Textile & Knitwear Mills Limited [2019] eKLR** where the Court held that even if it has wide discretion, the relief sought is equitable and equity does not aid the indolent.

16. It submitted that the Court should be guided by Section 3 (1) of the Employment and Labour Relations Court Act and find that granting the orders being sought is tantamount to stepping on the doctrines which are envisioned in the provisions.

17. It submitted that while a mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude. In support of this it relied on the decision in **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR**.

18. It submitted that the application was not brought without undue delay as it was filed on 15<sup>th</sup> May 2019 after its dismissal on 2<sup>nd</sup> May 2019. It submitted that the Applicant failed to provide an explanation for the 14 days delay.

19. It submitted that if the matter is reinstated as it is a government institution whose financial burdens are guided by annual budgets, the re-opening of this matter will result in accrued litigation costs which will require funds from the national treasury. It further submitted that the claims against it, are barred under the Public Authorities Limitations Act.

20. In conclusion, it submitted that it should be allowed to enjoy the fruits of its judgment, the Applicant having left his right to appeal to extinguish and further having failed to exhibit diligence in prosecuting the application that was aimed to extend the timelines despite the Application having been filed a year late.

21. I have considered the averments of both Parties. The Applicant has explained that they failed to be in Court at the time set for hearing of the application, which prompted this Court to dismiss the application for want of prosecution. The Applicant contend that the absence was due to the fact that their Counsel was held up in another Court.

22. In view of the Court's cardinal principle that a man should not be condemned unheard, I exercise my discretion and allow this application and reinstate the application dismissed for hearing as prayed.

**Dated and delivered in open Court this 14<sup>th</sup> day of October, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kosgei for Petitioner/Applicant – Present

Ochieng holding brief Nyaga for Respondent – Present