



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE 1420 OF 2015**

**(Before Hon. Lady Justice Maureen Onyango)**

**MARY MUSIMBI.....CLAIMANT**

**VERSUS**

**BOARD OF TRUSTEES, RAIRA COFFEE ESTATE (K.I.S.T).....RESPONDENT**

**RULING**

Before me for determination is the Claimant's Notice of Motion Application dated 23<sup>rd</sup> November 2018. It seeks the following orders:

1. That this Application herein be certified urgent and the Court do issue directions to its hearing.
2. That the Court do reinstate the suit herein and make directions for its disposal upon terms that are expedient and interest of justice.
3. That costs be provided for.

This Application is premised on the grounds that:-

- a) The Claimant has learnt that the matter was dismissed without according her a chance to be heard and or without service to her hence condemned unheard contrary to the rules of natural justice.
- b) It is in the interest of justice that the orders sought are granted.

The Application is supported by the Affidavit of MARY MUSIMBI, the applicant sworn on 23<sup>rd</sup> November 2018 in which she reiterates the grounds on the face of the motion. She further avers that she only came to learn that her case was dismissed after she was informed by her advocates that the same was dismissed even before they came on record.

The Claimant/Applicant contended that she had never been served with a notice to attend Court and therefore the decision to dismiss the matter was contrary to the rules of natural justice. She urged this Court to allow her Application and to reinstate the suit as the dismissal was not her fault.

The Application is filed under Articles 159(2)(d), 40, 41 and 47 of the Constitution of Kenya, 2010.

The Respondent opposed the Application by its Replying Affidavit sworn by RUTH WAMBUI KAMAU, the finance officer of the Respondent, on 13<sup>th</sup> December 2018 and filed in Court on 19<sup>th</sup> December 2018. In the replying affidavit, she contends that the Claimant failed to take any action on the matter after filing suit on 17<sup>th</sup> August, 2015 and inviting the Respondent for purposes of fixing the matter for hearing on 25<sup>th</sup> November, 2015.

Ms. Kamau further deposes that on 25<sup>th</sup> November, 2015 the respondent was advised that the diary was closed and that the same was to be opened in March, 2016. She deposes that despite the fact that the Claimant was aware of this position she failed to fix the matter for hearing in the year 2016.

She deposes that the Court on its own motion did serve the parties with a notice to show cause why the suit should not be dismissed for want of prosecution. The same was scheduled for hearing on 24<sup>th</sup> January 2018, when the Court proceeded to dismiss this matter for want of

prosecution.

The Respondent insists that the Claimant has been indolent and that the Court should dismiss the instant Application.

### **Submissions by the Parties**

The Application was argued orally when the Application was listed for hearing on 28<sup>th</sup> May 2019.

It is submitted on behalf of the Claimant/Applicant that the instant Application ought to be allowed as there is no evidence on the court record to indicate that the Claimant was served with the Notice to Show Cause by the Court.

The Claimant/Applicant urged this Court to exercise its discretion and reinstate the suit herein and that the same proceeds for hearing. The Claimant relied on and cited the provisions of Section 20(1) of the Employment Act and Article 159(2)(b) of the Constitution of Kenya, 2007 that gives the Court discretion to make orders without regard to technicalities.

The Claimant further submitted that she tried to fix the matter for hearing but was turned down by the Court Registry for lack of dates within the year. She further submitted that the Respondent shall not suffer any prejudice should the Court allow the Application.

The Claimant/Applicant urged this Court to allow the instant Application as prayed.

The Respondent on the other hand in opposition to the Application reiterated the averments made in its Replying Affidavit on record. It is the Respondent's submission that the Claimant has failed to explain to this her failure to fix this matter for hearing. The Respondent contended that the Claimant is not interested in her matter.

The Respondent further submitted that the Claimant has failed to show that the address as contained in the pleadings is not hers and thereby disputing service of the Notice to Show Cause served by this Court.

In the circumstances the Respondent urged the Court to dismiss the instant Application for lack of merit.

### **Determination**

After considering the parties' arguments and the evidence adduced, there is only one issue for determination being whether or not the instant Application is merited.

The supporting affidavit filed in court is not signed and is therefore not valid. However, the validity of an application is not affected by the invalidity of the affidavit. A supporting affidavit, as the name suggests, only supports the averment in the application.

I will therefore consider the application on its own without the affidavit.

On the face of the application, the applicant has stated that she learned that the case was dismissed without according her a chance to be heard and or without service of notice to show cause upon her, hence condemned unheard contrary to the rules of natural justice. She pleads that it is in the interest of justice that the orders sought are granted.

I have perused the file and note that both the claimant and the respondent were absent on 24<sup>th</sup> January 2018. The file has a notice to show cause but there is no affidavit of service to prove that it was served upon the applicant.

Further perusal of the file shows that apart from the statement of claim filed on 25<sup>th</sup> August 2015, the affidavit of service filed on 31<sup>st</sup> August 2015, the memorandum of appearance filed on 24<sup>th</sup> September 2015 and defence filed on 7<sup>th</sup> October 2015, there is no other pleading in the file other than the notice to show cause. No other action is noticed in the court file. The instant application was filed on 26<sup>th</sup> November 2018, 10 months, after the suit was dismissed on 24<sup>th</sup> January 2018. It is filed by Okemwa and Company Advocates who is not on record for the claimant as the statement of claim was filed by the claimant in person and no notice of appointment of advocates has been filed by the firm of Okemwa and Company Advocates.

From the foregoing, it is obvious that the application has no legs to stand on and must crumble. The same is apart from having been filed by a stranger, not supported by any valid grounds as the affidavit in support thereof is unsworn and thus invalid. No valid explanation has been given for the failure to take steps to set down the suit for hearing, or for the delay of 10 months after dismissal of the suit in filing this application.

I find no merit in the application and dismiss the same with no order for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3<sup>RD</sup> DAY OF OCTOBER 2019**

**MAUREEN ONYANGO**

**JUDGE**