



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 53 OF 2019**

**EMMANUEL NYIRO CHAI.....CLAIMANT/APPLICANT**

**-VERSUS-**

**INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT**

**PRINCIPAL SECRETARY MINISTRY OF INTERIOR.....2ND RESPONDENT**

**THE ATTORNEY GENERAL.....3RD RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 29th November, 2019)**

**RULING**

The claimant filed a notice of motion on 15.05.2019 through Agina & Associates Advocates. The application was under Article 47(1) of the Constitution of Kenya 2010, section 11(2) of the Fair Administration Action Act and all enabling enactments. The application basically sought orders including mandamus for satisfaction of the orders made in **Emmanuel Nyiro Chai –Versus- the National Police Service Commission and 4 Others ELRC Petition No. 4 of 2015**. The application was heard ex parte on 16.05.2019 and the court ordered that it be served for inter partes hearing on 13.06.2019 at 9.00am before any Judge of the Court. On 13.06.2019 both parties were absent and the Court dismissed the application with no orders on costs for want of attendance.

The applicant has filed another application on 18.07.2019 under Article 159(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Industrial Court (Procedure) Rules 2010 and Article 48 of the Constitution of Kenya and all enabling laws. The substantive prayer is that the ruling and order by the Court given on 13.06.2019 and all consequential orders thereto be set aside ex debito justitiae. The applicant also prayed that costs be to the applicant and for other or further reliefs as the Honourable Court deems fair and expedient to grant in the circumstances of the case. The application is supported by the affidavit of Ojwang Agina Advocate. The main reason advanced is that at filing the application (the suit) the relevant court clerk assigned the file as Miscellaneous No. 54 of 2019 and when the applicant's counsel went back for hearing the file could not be traced. Counsel did not have knowledge that the file number had been changed to Miscellaneous No. 53 of 2019. Thus, in that mix-up orders for dismissal were made on 13.06.2019 because counsel for the applicant was not present in Court.

The Court has perused the Court file and it is apparent that the initial pleadings in the matter bear a crossed "54" and below it "53" is inserted. Subsequent papers on the file as well as the file folder bear Miscellaneous No. 53 of 2019. The Court therefore observes that there is no reason to doubt that the registry clerk must have made the error as urged for the applicant.

The respondents have opposed the application by filing the replying affidavit of the learned State Counsel Leah Odhiambo. It is stated that the applicant's counsel should have been more vigilant to ensure the correct file number because equity aids the vigilant and not the indolent. On the parent application it is submitted that the applicant has never served upon the Attorney General a certificate of order against the Government to enable the Attorney General to offer legal advice on the settlement. Thus the application of 13.05.2019 is an academic waste of judicial time. The applicant having not obtained necessary documents 2 years after the orders to be enforced, the applicant is indolent and has failed to comply with section 21 of the Government Proceedings Act.

The Court has considered the parties' respective cases. It is clear that the applicant was not guilty of the circumstances leading to dismissal of the application for want of attendance. It has not been established that the claimant's counsel or the claimant was not vigilant leading to the mix-up in the number of the file at the time the matter was presented for registration. In such circumstances, the Court returns that the applicant is not guilty of want of due diligence and the applicant has established a good reason to reinstate the earlier application.

The Court has considered the respondents' grounds of opposition to the application sought to be reinstated and returns that such grounds of opposition will be properly ventilated after the reinstatement of the application.

In conclusion the application filed on 18.07.2019 and dated 10.07. 2019 is hereby determined with orders:

- a) The ruling and orders given by the Court on 13.06.2019 are reviewed and set aside together with all processes flowing from the order.
- b) The costs of the application dated 13.06.2019 be in the cause.
- c) Parties to take steps for expeditious hearing and determination of the application dated 13.05.2019 and filed on 15.05.2019 now reinstated.

**Signed, dated and delivered in court at Nairobi this Friday, 29th November, 2019.**

**BYRAM ONGAYA**

**JUDGE**