



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL NO. 6 OF 2017

(Originally Nairobi High Court Civil Appeal No. 706 of 2012)

SIMON MAKAU NDAYA

CLAIMANT

v

DEL MONTE KENYA LIMITED

RESPONDENT

(Being an appeal from the ruling and order of Honourable Orimba (Mr) Principal Magistrate in the Chief Magistrate's Court at Thika, Civil Suit No. 789 of 1997 dated and delivered on 27th November 12)

JUDGMENT

1. Simon Makau Ndaya (Appellant) commenced legal proceedings against Del Monte (K) Ltd (Respondent) before the Chief Magistrates Court in Thika alleging *malicious* termination of employment contract.
2. After an *ex parte* hearing, a judgment was delivered on 30 June 2004, in which the trial Court entered judgment for the Appellant.
3. The *ex parte* judgment was set aside on 1 June 2006 on the application of the Respondent and new hearing date of 31 July 2007 was fixed at the request of Mr. Agina, Advocate, on behalf of the Appellant.
4. When the suit came up for hearing on the scheduled date, the Appellant sought an adjournment which was granted.
5. Several hearings aborted thereafter until 19 January 2009 when the Appellant's advocate fixed hearing for 13 March 2009.
6. On 13 March 2009, the Appellant was not in Court to prosecute the suit and the Respondent successfully moved Court to dismiss the Suit.
7. On 28 April 2009, the Appellant filed an application dated 20 April 2009 seeking
 1. ...
 2. THAT the dismissal of the Plaintiff's suit for non-attendance be set aside *ex-debitito* *justiciae*.
 3. THAT the Plaintiff/Applicant suit be and is hereby reinstated.

4.

8. In a ruling delivered on 20 November 2012, the Honourable Magistrate dismissed the application prompting the Appellant to lodge the instant appeal with the High Court.

9. The Appellant listed 7 grounds of appeal viz

1. The Learned Magistrate erred in law and in fact in failing to set aside the order dated 13th March 2009 dismissing the appellant's case for non-attendance.

2. The Learned Magistrate erred in law and in fact in holding that the grounds on which the appellant's application were premised were not convincing without considering the grounds.

3. The learned Magistrate erred in law and in fact in holding that the appellant's application was brought 12 months after the date of dismissal of the appellant's case.

4. The Learned Magistrate erred in law and in fact in failing to consider the facts of the case as enumerated in the appellant's application and affidavits.

5. The Learned Magistrate erred in law and in fact in failing to consider the principles governing the exercise of the discretion to set aside dismissal orders.

6. The Learned Magistrate failed to consider and evaluate the weight of the evidence in the Appellant's Affidavit in support of the application sworn on 29th May 2012.

7. The Learned Magistrate erred in law and in fact in failing to evaluate the evidence in support of the Appellant's case.

10. On 8 May 2017, the High Court directed that the Appeal be transferred to this Court, and on 1 November 2017, the parties were ordered to file and exchange submissions within 30 days.

11. The Respondent filed its submissions on 11 January 2018 while the Appellant filed his submissions on 16 January 2018.

12. The Court has given due consideration to the grounds of appeal and the submissions.

Role of Court on first appeal

13. The role of the Court on first appeal was outlined in the case of *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being a first appeal, it was the duty of the Court...To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

14. The Court has re-evaluated and assessed the evidence tendered before the trial Court.

Evaluation

15. The order the Appellant sought before the subordinate Court (reinstatement of suit/setting aside order of dismissal) was a discretionary order.

16. It is not in dispute that both the Appellant and his advocate then on record were not in Court when the suit was called out for hearing before the subordinate Court on 13 March 2009.

17. The record also show that the hearing date of 13 March 2009 was taken at the instance of and in the presence of a Ngesa from the law firm representing the Appellant.

18. The explanation which was tendered by the Appellant in seeking the setting aside of the order for dismissal for non-attendance was that he did not see the case in the daily cause list, and therefore he called the advocate and told him not to attend Court.

19. The Appellant however admits that the case was in the cause list.

20. The Appellant's advocate knew that the suit had been fixed for hearing and the explanation by the Appellant that it was him who advised the advocate not to attend does not seem genuine.

21. The advocate had a professional obligation to be in Court by 9.00am when the Court was scheduled to commence sitting and not wait for the Appellant to inform him of the cause listing.

22. In any case the objective and/or purpose of a cause list is to confirm on the material date that a case that had been scheduled will be called out if the judicial officer is available.

23. The Court also notes that the particulars of the clerk who established that the case had been dismissed or the date thereof was not disclosed by the Appellant in the supporting affidavit.

24. In the view of the Court, the subordinate Court did not exercise its discretion wrongly or err either in law or fact as the explanation given by the Appellant for the failure to attend Court was not sufficient.

25. The upshot being that the Appeal is dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 26th day of January 2018.

Radido Stephen

Judge

Appearances

For Appellant Musyoki & Muigai Advocates

For Respondent Dola Magani & Co. Advocates

Court Assistant Lindsey