



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2356 OF 2012

PETER ODHIAMBO OTIENO.....CLAIMANT

VERSUS

MULTI-PACKAGING LTD.....RESPONDENT

RULING

1. By this application which is brought by Notice of Motion dated 10th April 2017, the Claimant seeks orders to reinstate the claim which was dismissed on 5th April 2017.

2. The application, which is supported by an affidavit sworn by Protas Saende Gathege, Advocate is based on the following grounds:

a) That the Claimant had filed a suit on 21st November 2012;

b) That on 3rd April 2017 when the matter was set down for notice to show cause, the Claimant's Advocates on record failed to appear in court due to inadvertent wrongful diarizing of the matter;

c) That the Claimant's Advocates on record were unable to prosecute the suit on 21st November 2017 due to no fault of the Claimant;

d) That the parties were pursuing out of court negotiations and therefore the suit had not been canvassed on merit;

e) That the Claimant should be granted an opportunity to canvass the issues in the suit on merit;

f) That it is in the interest of justice and fairness that the suit be heard on merit.

3. The Respondent filed grounds of opposition on 28th September 2017 stating that:

a) The Claimant filed his Memorandum of Claim on 21st November 2012 and did not make any effort to set down the suit for hearing;

b) There was inordinate delay by the Claimant in prosecuting the claim which delay has not been explained;

c) There is no explanation or reasonable grounds disclosed by the Claimant as to why the matter was not prosecuted for close to five years;

d) A notice to show cause was duly received by Counsel for the Claimant;

e) Reinstatement of the suit shall prejudice the Respondent in finding witnesses who were present during the cause of action in September 2012, over five years ago.

4. Counsel for the parties have proceeded on the basis that when the matter came up on 3rd April 2017, it was for notice to show cause why it should not be dismissed for want of prosecution. The court record however reveals that the Court issued a hearing notice on 8th March 2017. This is also confirmed by the ruling by my brother **Radido J**, delivered on 5th April 2017, which is the subject matter of the current application.

5. The test set in *Ivita v Kyumbu [1984] KLR 441*, which dealt with dismissal of a suit for want of prosecution is therefore not applicable in this case. The question before me is whether the Claimant's failure to attend court on 3rd April 2017 is excusable in the circumstances.

6. In his affidavit in support of the application, Counsel for the Claimant depones that the matter had been misdiarized. He went ahead to produce a copy of his diary showing the matter as coming up for hearing on 4th April 2017 instead of 3rd April 2017. This is a common mistake made by Advocates in the course of their work and as held by the Court of Appeal in *CMC Holdings Limited v Nzioki [2004] 1 KLR, 181* the discretion of the Court should be exercised to avert injustice or hardship as a result of an excusable mistake.

7. It seems to me that this is one such case and I am therefore persuaded to allow the Claimant's application. The result is that the claim dismissed on 5th April 2017 is reinstated for hearing at a date to be taken at the Registry on priority basis.

8. The costs of the application will be in the cause.

9. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Wanda for the Claimant

Miss Kanyiri for the Respondent