



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 18 OF 2013

PATRICK MENGE MARAGIA

CLAIMANT

v

KENYA KAZI SERVICES LIMITED

RESPONDENT

RULING

1. Patrick Menge Maragia (applicant) moved the Court on 9 January 2013 and he stated the issue in dispute as unfair and unlawful summary dismissal, and failure to pay terminal benefits.
2. The Respondent filed a *Reply to the Memorandum of Claim* on 18 April 2013.
3. On 4 January 2016, the Respondent moved the Court seeking an order to dismiss the Cause for want of prosecution, and when the application came up for hearing on 15 February 2016, the applicant was not in Court to oppose the application. The Court proceeded to dismiss the Cause for want of prosecution.
4. On 29 February 2016, the applicant moved the Court seeking that the order dismissing the Cause be set aside and on 14 March 2016, the Court allowed the application but subject to payment of court adjournment fees and Respondent's thrown away costs of Kshs 10,000/-.
5. When the Cause came up for hearing on 25 September 2017, it was brought to the attention of the Court that the applicant had not met the conditions set out on 14 March 2016. The Court was also informed that the parties were negotiating an out of court settlement.
6. During the same appearance, the applicant also applied for leave to amend the Memorandum of Claim.
7. The Court directed the applicant to comply with the orders of 14 March 2016 and file an *Amended Memorandum of Claim* within 14 days, and further directed that a consent, if any, arising from the negotiations be filed within 30 days.
8. When the Cause next came up for mention on 31 October 2017 to confirm compliance, the applicant was absent (and there was no *Amended Memorandum of Claim* on record). The Court directed that a hearing date be taken in the registry.
9. The Cause then came up for hearing on 8 February 2018 and upon an application by the Respondent that the Cause be dismissed for non-compliance with previous Court orders, the Court ordered for the dismissal of the Cause.
10. This second dismissal prompted the applicant to move the Court on 30 July 2018 seeking orders
 1. **THAT** there be a review and/or variation of the decision of the Honourable Court made on **8th February 2018.**
 2. **THAT** the Honourable Court be at liberty to make and/or issue such orders as it may deem fit and fair to grant.
 3. ...
11. The Respondent's advocate filed a replying affidavit in opposition to the application on 6 September 2018, and the Court took arguments on 18 October 2018.
12. The Court has given due consideration to the grounds and affidavit in support of the application, the replying affidavit, the submissions and authorities relied by both parties.
13. The applicant's case in brief was that the failure to comply with the orders of 14 March 2016 were because the parties were attempting an

out of court settlement and that the failure was not deliberate but a mistake of counsel which should not be visited upon him.

14. The Court was urged to consider the overriding objectives in order to administer justice.

15. In opposing the application, the Respondent submitted that failure to comply with Court orders cannot be equated to a mistake warranting setting aside and that the applicant had not come to Court with clean hands.

16. In the view of the Court, failure to comply with Court orders cannot be equated to the mistake of counsel as contemplated in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Ors* (2013) eKLR or Nairobi High Court Civil Case No. 622 of 1995, *Transami (K) Ltd v Sokhi International (K) Ltd*.

17. Equally, the fact that parties are negotiating an out of court settlement cannot and should not excuse compliance with peremptory Court orders.

18. In the instant case, the Court indulged the applicant on 29 September 2017 when he was directed to comply with the orders of 14 March 2016 and therefore he should not seek refuge in the provisions of section 3A of the Civil Procedure Act.

19. The Court finds no merit in the application dated 30 July 2018 and orders that it be dismissed with costs to the Respondent.

Delivered, dated and signed in Nairobi on this 23rd day of November 2018.

Radido Stephen

Judge

Appearances

For applicant Ms. Ochogo instructed by Gakoi Maina & Co. Advocates

For the Respondent Mr. Kamau instructed by Waruhiu K'Owade & Nganga, Advocates

Court Assistant Mambo