



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 453 OF 2014

PAUL KISELI MWONGA.....CLAIMANT

v

REALMAST LIMITED.....RESPONDENT

RULING

1. On 19 December 2017, the Cause herein came up for hearing and Mr. Wathome appeared for the Claimant (applicant) while the Respondent and its advocate were not present.
2. The Court not being satisfied that the applicant had served the Respondent with a hearing notice adjourned the hearing and directed that a new date be taken in the registry.
3. On 3 April 2018, the Deputy Registrar scheduled the Cause for hearing on 20 April 2018, and a hearing notice was served upon the applicant's advocate on 3 April 2018, and on the Respondent's advocate on 9 April 2018.
4. When the Cause was called for hearing on the scheduled date, the applicant's advocate sought an adjournment on the ground that he knew the case was coming up for a mention and not a hearing.
5. The Court was not convinced with the explanation and dismissed the Cause, for the notice served by the Deputy Registrar clearly indicated that the Cause was coming up for hearing.
6. On 13 September 2018, the applicant filed an application seeking orders
 1. The Honourable Court do exercise its discretion and set aside the dismissal orders issued in this case on the 20th April, 2018 be set aside.
 2. The suit be reinstated for hearing and disposal on merit.
7. According to the applicant, although a hearing notice had been served upon it, a pupil in the law firm had diarised the Cause as coming up for mention and not hearing, and that the applicant ought not to be punished for the mistake of counsel.
8. The applicant contended that he had been waiting diligently from the time of filing of the Cause for the hearing and that the Respondent would not be prejudiced if the orders sought were granted.
9. In opposing the application, the Respondent contended that there had been inordinate delay in filing the application.
10. It was also asserted that the applicant had not met the test as set out in the case of *Mbogo v Shah* (1968) EA 93.
11. The Court has considered the material placed before it.
12. The pupil who allegedly received the hearing notice and entered the hearing date as a mention date did not file any affidavit to narrate what happened. The failure to have her depose an affidavit was also not explained.
13. It took the applicant about 5 months to file the instant application. Inordinate delay would depend on the circumstances of each case.

14. In the present case, the Court finds the 5 month interlude as constituting inordinate delay. There was no attempt to explain why it took the 5 months before filing the application.

15. For the above reasons, the Court declines to exercise its discretion in favour of the applicant. The application is dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 13th day of December 2018.

Radido Stephen

Judge

Appearances

For Applicant Namada & Co. Advocates

For Respondent Kahuthu & Kahuthu Advocates

Court Assistant Lindsey