



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 459 OF 2017

MARTHA WANJIRU MUNGAI.....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT PIONEER SCHOOL.....RESPONDENT

RULING

1. Through the notice of motion application dated the 6<sup>th</sup> August 2018, Claimant moved the court for reinstatement of the suit the same having been dismissed for non-attendance on 14<sup>th</sup> May 2018. The Claimant asserts that the date for hearing was fixed in the absence of the Claimant and her counsel. She deponed in her affidavit sworn on 6<sup>th</sup> August 2018 states in 6 brief paragraphs that her advocate informed her of the dismissal for non-attendance on 14<sup>th</sup> May 2014. She assert that the dismissal condemned her unheard and that there was no mistake attributable to her.

2. The Respondent was of course opposed and in the replying affidavit deponed to by Ivy Mumbi Kathugu Advocate stated that the hearing notice was served through G4S Courier services and received by Jelulah at the Claimant's lawyer's firm on 2<sup>nd</sup> March 2018. She states that the failure to attend court on various occasions was indicative of the unwillingness of the Claimant to prosecute her case. The Respondent sought the dismissal of the Claimant's notice of motion application asserting that equity does not aid the indolent but the vigilant.

3. In her submissions filed on 19<sup>th</sup> November 2018, the Claimant submits that the waybill presented as evidence does not disclose what was sent to the Claimant's advocate's chambers included a hearing notice. The Claimant submits that only a response to claim was served dated 26<sup>th</sup> February 2018. The Claimant asserts that the Respondent did not prove the service of the hearing notice. The Claimant relied on the cases of **Maersk (K) Limited & Another v Prafula Enterprises Limited [2018] eKLR** and **Gold Lida Limited v NIC Bank Limited & 2 Others [2018] eKLR** where the court allowed an application seeking similar orders.

4. The Respondent submitted that based on the maxim that equity aids the vigilant and not the indolent, the motion should not be allowed. The Respondent submitted that upon filing the suit it was incumbent upon the Claimant to follow up on the case and the fact that she failed to follow up with her advocate to ensure the case was prosecuted demonstrates laxity. The Respondent submits that a wait of 5 months is too long a period for someone who is keen to have her case determined. The Respondent relied on the case of **Josephat Muthui Muli v Ezetec Ltd [2014] eKLR** for the proposition that the court should not exercise its discretion to a party who is undeserving of the exercise of that discretion. The Respondent argued that the Claimant had brought the application after unreasonable delay. The Respondent relied on the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** where the decision of Mwera J. (as he then was) in **Godfrey Ajuang Okumu v Nicholas Odera Opinya Kisumu High Court Civil Case No. 337 of 1996** held that an aggrieved party seeking review of a decree or order for whatever basis must apply without unreasonable delay.

5. The parameters for exercise of discretion in such a case as the one before me have been set in precedent. The court should not exercise its discretion so as to lead to an injustice. The court in setting aside must consider the timeliness of the filing of the motion. The matter was in court on 28<sup>th</sup> January 2018 when directions were issued with a mention date set for 14<sup>th</sup> February 2018. On 28<sup>th</sup> January 2018 counsel appeared holding brief for Mr. Thibaru for the Claimant. At the mention on 14<sup>th</sup> February 2018 there was no appearance for the Claimant and date for hearing was fixed for 14<sup>th</sup> May 2018. The court ordered that a notice to issue to the Claimant. No affidavit was filed from the court record. Despite the Respondent asserting that it served the Claimant with a hearing notice, no replying affidavit was filed. This is the saving grace for the Claimant who seemed to have not been served. In the premises I will allow the motion and allow the reinstatement of the suit. The costs of the motion will be costs in the cause. A hearing date will be fixed immediately upon the delivery of this ruling.

It is so ordered.

Dated and delivered at Nyeri this 11<sup>th</sup> day of December 2018

Nzioki wa Makau

JUDGE