



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 855 OF 2013**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 13<sup>th</sup> June, 2017)**

**JESSE MUHORO KARIUKI.....CLAIMANT**

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED.....RESPONDENT**

**RULING**

1. The Application dated 4<sup>th</sup> April 2017 filed by Kinyua Mwaniki and Wainaina Advocates seeks this Court to set aside the order dismissing the suit for want of prosecution and non-attendance by Counsel for the Claimant and reinstate the suit.

2. The Application is based on the following grounds:

*a. That the suit was dismissed on the 4<sup>th</sup> of April 2017 for want of prosecution and non attendance by Counsel for the Claimant when it came for hearing.*

*b. That the Claimant's advocate on the material day went to the Chief Magistrate's Court No. 203, after being informed at the registry, that the matters listed before Chambers 401 were proceeding there.*

*c. That the Claimant's advocate later learnt that there were two cause lists for Chambers 401 and this matter was among the matters which were proceeding before Chief Magistrate's Court no. 104 and not the ones proceeding before Chief Magistrate's Court no. 203.*

*d. That the Claimant's advocate later proceeded to the Chief Magistrate's Court no. 104 only to find that the suit had been dismissed for want of prosecution and non-attendance.*

*e. That the Claimant's advocate addressed the Court of the reason for non attendance before the cause list was over and the Honourable Judge was kind enough to record his address to Court.*

*f. That the Honourable Judge declined to reinstate the suit because the Counsel for the Respondent who had moved the Court to dismiss the matter was not in Court.*

*g. The Application was made without unreasonable delay.*

***h. That it is in the interest of justice that the Application be allowed.***

3. The Application is supported by an affidavit sworn by KEVIN NG'ETHE an advocate of the High Court of Kenya practicing in the firm of M/S KINYUA MWANIKI & WAINAINA ADVOCATES who are on record for the Claimant in stating that he was the one attending Court for this matter on 4<sup>th</sup> April 2017.

4. That he relied on the online cause list which indicated that the matter was to be heard in Chamber 401 which was locked up on the said date by 9:00 am. He inquired from the registry and was referred to Chief Magistrate Court No. 203 which was not the right Court. When he later confirmed from the cause list at the notice board he realized that there were two different cause lists for Chamber number 401, his matter was listed in Court No. 104 and not 203.

5. When he proceeded to Court no. 104 he found that the matter had already been dismissed and with permission of the Honourable Judge he informed the Court his predicament of attending the wrong Court but the Court declined to vary the orders of dismissing the suit in the absence of the Respondent's advocate who moved the Court to its decision.

6. In response the Respondent filed grounds of opposition dated 26<sup>th</sup> April 2017 through the firm of MUNGA KIBANGA & CO. ADVOCATES on grounds that:-

***1. The Application lacks merit and is an abuse of the Court process.***

***2. The Application is frivolous and vexatious.***

7. The Claimant's advocate demonstrated his predicament by filing documentary evidence of the two cause lists that led to his confusion. It is on record that the Claimant's advocate addressed the Court on the 4<sup>th</sup> April 2017 at 9:49 a.m some minutes after the case had been dismissed and explained to the Honourable Judge his predicament but the Court could not vary its decision *ex parte*.

8. Order 12 Rule 7 of the Civil Procedure Rules 2010 provided that:-

***"7. Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."***

9. It is in the interest of justice that a man should not be condemned unheard. Since Applicant appeared in Court, it is an indication he wished to defend the claim.

10. Under Article 159 (2) (2) of the Constitution, the Court is to ensure justice is administered to all without undue technicalities. Locking out the Applicant from prosecuting his case will prejudice him and it is my view in the interest of Justice to allow the Application. The order dismissing the suit for want of prosecution and non attendance by Counsel for the Claimant is set aside and the suit is reinstated.

11. The costs of the Application shall be in the cause.

Read in open Court this 13<sup>th</sup> day of June, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ngethe holding brief Mwaniki for Claimant - Present

No appearance for Respondent