



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 341 OF 2013**

**SYLVIA NYOKABI NDEA.....CLAIMANT**

**VERSUS**

**TOPAZ PETROLEUM LIMITED.....RESPONDENT**

**RULING**

1. On 4<sup>th</sup> April 2017 I dismissed the Claimant's claim and on the same day the Claimant filed a Notice of Motion seeking orders to set aside the dismissal.
2. The application which is supported by the affidavit of Samuel Ngari, Advocate is based on the following grounds:
  - a. That a hearing notice was received in the offices of S.N Thuku & Associates on 23<sup>rd</sup> March 2017;
  - b. That on 4<sup>th</sup> April 2017, the Claimant got to Court at 9.00 am but proceeded to look for Court No 3 on 3<sup>rd</sup> Floor in the High Court at Milimani Law Courts;
  - c. That by the time Mr. Thuku, Advocate arrived in Court No 3 at Milimani Commercial Courts at around 9.35 am the matter had been called out and dismissed;
  - d. That Counsel sought indulgence of the Court but was advised to file the requisite application;
  - e. That the Claimant is interested in pursuing his claim and was in court on 4<sup>th</sup> April 2017;
  - f. That Counsel was late because he was looking for the Claimant who had gone to the High Court building;
  - g. That the Claimant seeks another opportunity to be heard.
3. The Respondent filed grounds of opposition on 29<sup>th</sup> May 2017 stating that the Claimant's application is an abuse of the court process. The Respondent adds that the Claimant appears to have lost interest in the case having made no effort to prosecute it from 13<sup>th</sup> March 2013 when it was filed.
4. A perusal of the court record reveals that prior to the dismissal order, the Claimant had fixed the matter for hearing twice on 23<sup>rd</sup> July 2013 and 7<sup>th</sup> October 2014 and on both dates the matter was adjourned at the Claimant's instance.

5. The Court however notes that what was served on the Claimant's Advocates on 23<sup>rd</sup> March 2017 was a hearing notice and not a notice to show cause. This application therefore turns on the reasons advanced for non-attendance by the Claimant and his Counsel.

6. In the supporting affidavit sworn by Samuel Ngari Thuku, Advocate on the 4<sup>th</sup> April 2017, the same day the claim was dismissed, Counsel gives a detailed account of what led to the failure to attend court. It is not unusual for parties to confuse Milimani Law Courts with Milimani Commercial Courts and it is also not unusual for their Advocates to go looking for them. The application to set aside the dismissal order was filed promptly on the same day of the dismissal.

7. In the circumstances, I find that the Claimant's failure to attend court on 4<sup>th</sup> April 2017 was caused by an excusable mistake and therefore set aside the order dismissing the claim. I direct that the parties set down the matter for hearing on priority basis.

8. The costs of the application will be borne by the Respondent.

9. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14<sup>TH</sup> DAY OF JULY 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Thuku for the Claimant

Mr. Gitonga for the Respondent