



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2071 OF 2015

MARK KIMUTAI SUGE.....CLAIMANT

VERSUS

UNILEVER KENYA LIMITED.....RESPONDENT

M/s Mutua for the claimant/applicant

M/s Weru for respondent

RULING

1. By a notice of motion application filed on 2nd December 2016, the claimant/applicant seeks for orders:
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(i) That the Honourable Court be pleased to set aside and/or vary the orders issued on 21st July 2016, dismissing the claimant's suit and all other consequential orders therefore:

(ii) That the suit be reinstated.

2. The application is based on grounds that: -

a. The suit was dismissed as a result of a mistake of the advocate on record then for the claimant. That it is settled law that mistakes of advocates should not be visited upon the client.

b. That the claimant has an arguable case with probability of success and it is in the interest of justice that it be reinstated.

c. That no substantial prejudice will be suffered by the respondent by fact of the reinstatement of the case.

Grounds of Opposition

3. The claimant filed grounds of opposition on 25th January 2017 to wit: -

(i) That the application is ill –conceived and an outright abuse of court process.

(ii) That the suit herein was struck out by an order of this Honourable Court for being improperly

on record for violation of Sections 31 and 34 of the Advocates Act. Its invalidity and effectiveness has not changed and the suit remains lifeless and the claimant cannot seek to revive it through a different firm of advocates.

(iii) That the claimant has filed a similar suit under ELR Cause No. 1928 of 2016 raising the same issues and remedies as those pleaded in the present struck out suit and no reasons have been advanced as to why the issues between the parties herein cannot be ventilated under the fresh suit.

(iv) That it is evident that the claimant is seeking to circumvent compliance with the terms of the court order dated 21st July 2016, requiring him to pay costs to the respondent on account of the defective suit.

(v) That no basis exists and none has been demonstrated for reinstating the defective suit when the client has filed a complaint suit. The claimant's application should be dismissed with costs.

Determination

4. This suit, Cause No. 2017 of 2015 was dismissed pursuant to an application made by the firm of Iseme, Kamau and Maema Advocates dated 17th May 2016 on grounds *inter alia* that: -

The claimant has misrepresented to the court that he is represented by the firm of Mutunga and Company Advocates and proceeded to file a fraudulent notice of appointment and a statement of claim allegedly drawn by the said firm of advocates.

5. The court struck out the pleadings upon being satisfied that they were improperly on record.

6. It is now apparent that the claimant had properly instructed Mutunga and Company Advocates to institute this suit on his behalf and that the said firm of advocates had inadvertently refused to receive the memorandum of response from counsel for the respondent. That this error led to the application for dismissal which was granted by the court.

7. It was enunciated in the case of **Shah –vs– Mbogo 1967 EA 116** and upheld in the case of **Kabiru Ndaiga and Company Advocates –vs– Kenya Tea Development Agency Ltd [2002] eKLR** that courts have discretion to set aside orders or judgment obtained ex-parte to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

8. In the present case, it is clear from the supporting affidavit and the annexure thereto that the claimant had a valid client/advocate agreement with Mutunga and Company Advocates for the firm of advocates to represent the claimant in this matter.

9. The mistake of the advocate should not be visited on the claimant to deny the claimant the right to a hearing as was stated by the Court of Appeal at Mombasa in **J. M. K –vs– M.W.M and Another Civil Appeal No. 15 of 2015. [2015] eKLR**.

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

10. This application has been brought without undue delay and it is evident that the inadvertence by the advocate, in this matter cannot be permitted to obstruct the right of the claimant to a fair hearing in the circumstances of this case.

11. The application is allowed, the order of the court dismissing the suit dated 21st July 2016, is set aside and the suit is reinstated. Costs in the cause.

Dated, Signed and Delivered on this 31st day of October, 2017

MATHEWS NDERI NDUMA

JUDGE