



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2007 OF 2013**

**SAMUEL MAINA GICHUHI.....CLAIMANT**

**VERSUS**

**NATURE PHARMACY LTD &.....1<sup>ST</sup> RESPONDENT**

**DR. NDUBAI NGEERA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 2<sup>nd</sup> respondent Dr Ndubai Ngeera by a notice of motion application dated 22<sup>nd</sup> June 2016, seeks the exparte judgement delivered on 12<sup>th</sup> February 2016 be set aside and the suit be re-admitted for hearing inter parties. That the respondents be given leave to file a defence and the 2<sup>nd</sup> respondent be struck out as a party in this cause.
2. The application is based on the grounds set out on the face of the application and in the supporting affidavit of the 2<sup>nd</sup> respondent as follows;
  - i. The respondent had engaged services of the firm of M/s Mutua Muthuva & Co Advocates to act for them in the matter.
  - ii. That the advocate failed to execute the instructions of the respondent and the omission should not be visited upon the respondents.
  - iii. That the respondent s came to know that the matter was heard ex-parte and judgement granted on 21<sup>st</sup> June 2016 when the 2<sup>nd</sup> respondent perused the court file and was shocked to learn that the matter had been finalized.
3. The claimant filed grounds of opposition on 8<sup>th</sup> July 2010 stating that the application lacks merit and is a clear attempt at obfuscation of issues. That there are laches in bringing the application and the maximum delay defeats equity is applicable in the circumstance of the case.
4. The 2<sup>nd</sup> respondent has not shown any authority under seal to act for the 1<sup>st</sup> respondent in the matter and has not disclosed his relationship with the 1<sup>st</sup> respondent. The application therefore lacks candour and has not been brought with full disclosure and good faith. The 1<sup>st</sup> respondent clearly did not bother to follow his case until it was concluded. That equity only aids the vigilant and not the indolent. This is a case of a mistake by both the counsel and the litigant and the application be dismissed with costs.
5. The 2<sup>nd</sup> respondent sought leave to act in person which leave was granted on 30<sup>th</sup> June 2016 pursuant

to a consent filed by Mutua Muthuve & Co Advocates to cease to act for the respondents. The suit was filed on 17<sup>th</sup> December 2013 and served on the respondent on 16<sup>th</sup> January 2014. A return of service by an authorized process server was filed in court on 23<sup>rd</sup> January 2014.

6. The advocates for the respondent did not file any defence to the claim inspite attending court on the date the matter proceeded to formal proof on 22<sup>nd</sup> October 2015. There is no indication from the 2<sup>nd</sup> respondent that he followed up this matter with his advocate or personally since he received the summons on 16<sup>th</sup> January 2014.

7. The respondents were clearly indolent inspite of having an advocate on record. It was not until 21<sup>st</sup> June 2010 when the 2<sup>nd</sup> respondent came to court to follow up the matter only to find that judgement was delivered, decree issued and a bill of costs was pending taxation. This is not a case of the advocate sleeping on the job, but the respondent did little if at all to ensure that the suit was properly defended. The claimant has waited for about two and half years since he filed this suit to get the suit heard and determined.

8. It is the court's view that the right of the respondents to be heard must be weighed against the right of the claimant to have expeditious justice done on his case. The respondent has not filed a draft defence to show that it has an arguable defence against the suit. Instead the 2<sup>nd</sup> respondent seeks to be struck off the suit so that the 1<sup>st</sup> respondent whose relationship with him he has not disclosed, be left to defend the suit. There is no indication that the 1<sup>st</sup> respondent is still operational and is ready and willing to defend the suit. In short the respondent only wants to be out of the suit to defeat the claim before the court. The remedy sought is discretionary which discretion must be exercised judiciously.

9. It is the court's considered view that this application has not been brought timeously, the same has not been brought in good faith and it has not been demonstrated by the applicant that he has an arguable defence against the suit.

10. It is equitable and in the interest of justice to let the claimant enjoy the fruits of his judgement. Consequently, the application lacks merit and is dismissed with costs to the claimant.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of September, 2016**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**