



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 106 OF 2014

(Originally Nakuru High Court Civil Case No. 237 of 2007)

JAMES ARCHIMEDES GICHANA

CLAIMANT

v

PYRETHRUM BOARD OF KENYA

1ST RESPONDENT

JOHN M. NGUNJIRI T/A TANGO

AUCTIONEERS & GENERAL MERCHANTS

2ND RESPONDENT

RULING NO. 2

1. In a ruling delivered on 19 February 2016, the Court dismissed the Cause herein because the Claimant and his advocate were not in Court on the day fixed for hearing. The dismissal was pursuant to an application by the Respondents advocates.
2. The ruling went to great lengths to outline the conduct and record of proceedings up to the point of dismissal.
3. The order of dismissal aggrieved the Claimant and he moved Court on 22 February 2016 seeking
 1. *THAT the orders made by the Honourable Court on 19th February 2016 be set aside and the claim be reinstated for hearing on merit.*
 2. *THAT the cost of this application be provided for.*
4. The Respondents filed replying affidavits opposing the application on 4 March 2016 and 7 March 2016.
5. Before the motion could be determined, the Claimant filed another motion under certificate of urgency on 25 August 2016 seeking certain interim injunctive reliefs against the Respondents.
6. When this latter application was placed before Court on 29 August 2016, the Court declined to certify it as urgent or grant any of the orders sought on the basis that the application had no legal foundation, the Cause having been dismissed.

7. The motion of 22 February 2016 seeking setting aside was urged on 4 October 2016 and is the subject of this ruling.
8. The reasons advanced by the Claimant and his advocate for failing to attend Court when the Cause was fixed for hearing are that the failure was due to an excusable mistake in that he (Claimant) heard that the Cause had been fixed for hearing on 17 December 2015 and not 8 December 2015.
9. The Claimant in his supporting affidavit deposed that indeed he attended Court on 17 December 2015 together with an advocate Caleb Nyamwange who had instructions to hold brief for the advocate on record, (Mr. Nyakundi) and that they found the Cause was not in the cause list for that particular day.
10. In submissions, Mr. Nyakundi urged that the power to set aside an order of dismissal was discretionary and that the information he received from the Claimant was that the hearing was scheduled for 17 December 2015, and not 8 December 2015.
11. Mr. Nyakundi urged the Court to exercise its discretion in a way that would not shut out the Claimant without having his case determined on the merits.
12. The 1st Respondent in opposing the application contended that there was an advocate who held brief for Mr. Nyakundi when the hearing date was scheduled and the said advocate had not sworn an affidavit as to the date of hearing given in Court, and that there was no evidence that Mr. Nyakundi himself travelled to Court on 17 December 2015 when the Cause was purportedly coming up for hearing as alleged.
13. Mr. Murimi submitted that the Claimant had not acted in good faith, by misleading the Court that he was in Court on 17 December 2015 without placing evidence before Court.
14. The 2nd Respondent on his part contended that he was wrongly enjoined in the proceedings and that the reasons advanced by the Claimant were weak.
15. **Order 12 rule 13 of the Civil Procedure Rules provide that when a suit is called out for hearing and only the Defendant is present and there is no admission of any part of the Claim, the suit shall be dismissed except for reasons to be recorded.**
16. The record indicates that an advocate (Mr. Nyamwange) held brief for Mr. Nyakundi when the hearing date was fixed.
17. In the normal/ordinary course of things, it is that advocate who holds brief who should communicate to the instructing advocate the outcome of the day's proceedings. That is a professional obligation.
18. In the case at hand, there is absolutely no disclosure as to whether the said advocate communicated with Mr. Nyakundi.
19. The Claimant has also not brought any evidence from the advocate who held brief as to what he (advocate) understood transpired on the day the Cause was being scheduled for hearing.
20. A measure of disclosure from the advocate who held brief was, in the view of the Court, relevant and material as to his understanding of the hearing date, to enable the Court exercise its discretion in favour of the Claimant.
21. The Court cannot speculate as to whether the advocate who held brief also misunderstood/misapprehended the scheduled hearing date.
22. The Court also notes that the Claimant has failed to disclose which official in the registry gave him the information as to the proceedings of 8 December 2015, and the scheduling of a ruling date.

23. The Court regrettably reaches the conclusion that the Claimant has failed to provide sufficient reasons to explain the failure to attend Court during the date scheduled for hearing, with the consequence that the motion dated 22 February 2016 is dismissed with costs to the Respondents.

Delivered, dated and signed in Nakuru on this 11th day of November 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyakundi instructed by Nyakundi & Co. Advocates

For 1st Respondent Mr. Murimi instructed by Murimi, Ndumia, Mbago & Muchela Advocates

For 2nd Respondent Mr. Mburu instructed by Lawrence Mwangi & Mwangi Advocates

Court Assistant Nixon/Daisy