

REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 926 OF 2013

GRACE WANJIKU NDUNGU.....CLAIMANT/APPLICANT

VERSUS

HIGHLANDS MINERAL WATER COMPANY LIMITED....RESPONDENT

RULING

1. The Claimant/Applicant's through her notice of motion application dated 19th June 2015 and filed on 22nd June 2015 seeks that the Court be pleased to set aside the conditional order made on 4th March 2015 and reinstate the Claimant's suit to hearing. The Claimant sought that the time to comply with the order made on 4th March 2015 be extended as well as costs. The application was premised on grounds on the face of it and the Claimant's advocates affidavit in support. The Claimant asserted that at the time the Ruling was made, neither the Claimant nor her advocate were in Court and that the Claimant's advocate learnt from the Court clerk that the application had been allowed but that they were not informed of the conditions imposed by the Court. In his affidavit sworn on 19th June 2015, Mr. Eric John Mutemi deposed that the Claimant's cause was reinstated to hearing on 4th March 2015. On that day he had several matters coming up for mention both in the High Court and the Magistrates Court and assumed that the Court would go through the list before reading the ruling. He came back to Court at 10.00am to find that the ruling had been delivered and was informed by the clerk that the Claimant's application had been allowed. He did not go into the details of the ruling and therefore never became aware that the reinstatement was conditional to payment of 30,000/- by the Claimant as thrown away costs. He as a result informed the Claimant the suit had been reinstated but did not inform her of the conditions since it was outside his knowledge. He deposed that the failure to fulfill the condition set by the Court was not intentional and that he had now informed the Claimant and that she was ready to abide by the orders of the Court.
2. The Respondent filed in opposition a Replying Affidavit sworn by Miss Awa Muhindi advocate for the Respondent. She deposed that the matter was listed for hearing on 29th October 2014 and the Claimant's suit was dismissed for non-attendance. The Claimant subsequently filed a notice of motion for reinstatement of the suit and ruling was delivered on 4th March 2015 on which date the Claimant's claim was reinstated on condition that the Claimant paid thrown away costs of Kshs. 30,000/- within 14 days failing which the claim would stand dismissed. That the thrown away costs were not paid and on 14th March 2015, the Respondent requested for directions on the counterclaim and a judgment date was set. She deposed that she was not aware of any attempt by the Claimant to have the matter listed for mention or taking any steps and that the Claimant belatedly filed the instant application seeking that the suit be reinstated 3 months after the automatic dismissal of the claim for non-compliance with the orders of 4th March 2015. She deposed that the foregoing was clear indication that the Claimant was guilty of laches and was undeserving of the Court's discretion. She believed that the Respondent would stand to suffer prejudice should the orders sought by the Claimant herein be allowed and an award of costs would not be sufficient remedy.
3. Mr. Mutemi urged the application before me on 8th July 2015. He sought that the conditional order

of 4th March be set aside and the Claimant's case be reinstated to hearing and in the alternative sought that the time to comply with the orders of 4th March be extended. He submitted that he was not present when the ruling was delivered as he had attended other matters before the High Court and even the Magistrates Court. He thus was unaware that the reinstatement was conditional on the Claimant paying thrown away costs within 14 days. He thus sought the mistake be not visited on the Claimant as it was his failure to ascertain the particulars of the Ruling. He submitted that the Claimant has always been willing to abide the orders of the Court. He urged the Court to allow his application.

4. Miss Muhindi on her part stated that the Claimant's application was opposed and relied on her replying affidavit of 7th July 2015. She submitted that the reinstatement was being sought for a second time on grounds that it was on account of an inadvertent mistake. She stated that the facts of the case do not show an inadvertent mistake but inevitable failure of the Claimant to conduct her case with any diligence or keenness. She submitted that the ruling date was not a surprise and that counsel did in fact come to court, albeit after ruling as delivered and there was no suggestion that the file was not in court. She submitted that no reason has been given why counsel did not seek to read ruling or even the last paragraph if he was in a hurry. This was so because reinstatement is hardly without condition. She submitted that the application for reinstatement was filed 3 months after the dismissal of the claim and the delay was unreasonable and inexcusable. She urged the dismissal of the application as reinstatement of the suit would compound costs.
5. In his reprise, counsel for the Claimant submitted that the party in a suit had the right to move the court by notice of motion and that he had been accused of laxity. He admitted that the application was filed on 22nd June 2015 and that it was 7 days after he became aware of the costs imposed upon the Claimant and he submitted that this was not inordinate delay.
6. The grounds for reinstatement of a suit are well settled. Under Order 12 Rule 7 of the Civil Procedure Rules 2010 provision is made as follows:-
 12. (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.
7. This means that a court may grant an order setting aside the dismissal but must do so on terms that are just. Judicial precedent also abounds. In the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75** the Court of Appeal per Duffus President of the Court stated thus:-

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given it by the rules.....the principle obviously is that unless and until the Court has pronounced judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any of the rules of procedure”
8. The Court reinstated the Claimant's suit but with condition and the default clause on the ruling was that if the condition was not satisfied the suit would stand dismissed. The Court is yet to make a final determination as the decision was stymied by the myriad applications after the dismissal on 29th October 2014. The Claimant has asserted that no prejudice will be suffered by the Respondent while the Respondent asserts that it will stand to suffer prejudice if the suit against it is reinstated. The Claimant's counsel has been guilty of dilatoriness and manifests a disinterest in the conduct of the suit. He has been absent on two occasions with dire consequences on the Claimant. Her suit was dismissed the first time and second time round, upon reinstatement on condition he was not present and never bothered to ascertain the reasons given in the reinstatement nor did he care to ascertain what conditions, if any, had been imposed by Court. The Claimant is stated to be keen to prosecute her case. The main concern of the Court is to do justice to the parties notwithstanding

the conduct of counsel. As was held in the case of **CMC Holdings v Nzioki [2004] 1 KLR 173**, in an application before a court to set aside an *ex parte* judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and judiciously and that the discretion on whether or not to set aside an *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error.

9. Clearly the law is not meant to shut out a party who commits an inadvertent mistake or error and in the dicta of the Court of Appeal, there is a matter I cannot ignore. A matter which might very well amount to an excusable mistake visited upon the applicant by her advocate. He is constant in failing to turn up when critical steps are being taken. This should not be visited on her. In the premises I will order a reinstatement of the suit which was automatically dismissed after lapse of the conditional reinstatement. I will however order that she pays an additional Kshs. 20,000/- as the costs for the application herein to the Respondent. The conditional reinstatement that presently will hold is that she pays Kshs. 50,000/- to the Respondent within 14 days of this Ruling failing which her suit is dismissed with costs to the Respondent. As a consequence of the chequered history the matter has had and the fact that a hearing will be necessary should she comply, I will refer the matter to the Principal Judge of this Court to give directions in the new term on which Court to hear the case as I recuse myself from hearing the claim. Parties are at liberty to apply.

Orders accordingly.

Dated and delivered at Nairobi this 29th day of July 2015

Nzioki wa Makau

JUDGE