



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 148 OF 2013

COLLINS OTIENO OWINO.....CLAIMANT

VERSUS

RIFT VALLEY AGENCIES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th May, 2014)

RULING

The claimant **Collins Otieno Owino** filed the memorandum of claim on 2.03.2011. The respondent Rift Valley Agencies Limited appears not to have filed a memorandum of response because none is on record.

The claimant and the claimant's counsel did not attend court on 9.10.2012 despite the case being called out twice for hearing as scheduled. In the circumstances, the court ordered the dismissal of the suit for want of prosecution with costs to the respondent. On 9.07.2013, the court upheld the order of 9.10.2012 and ordered thus, **“That parties to extract the relevant decree and the matter is now marked as determined accordingly.”**

On 28.11.2013, the claimant filed an application under section 26 of the Labour Institutions Act 2007, Rule 32 of the Industrial Court Procedure Rules, 2010, section 16 of the Industrial Court Act 2011 and all other enabling provisions of law. The application was supported by the affidavit of Gladys Ndeda Advocate for the claimant. The claimant prayed for orders:

- a. **That the honourable court be pleased to review and rescind its decision dismissing the matter herein unheard.**
- b. **That the matter herein be reinstated and exclusively heard before the honourable court as was intended by the claimant.**
- c. **That dismissing the matter unheard is bad in law, totally unfair to the claimant.**
- d. **That cost of the application be in the cause.**

The main ground for review and setting aside as applied is that on the material date when the court dismissed the suit the parties' Advocates had arranged that the matter be placed aside as counsel for the claimant was attending to another case before a judge in another court. It was urged for the applicant that without the making of an application for dismissal by counsel for the respondent, the court proceeded to dismiss the suit with costs. It was submitted that the claimant was prejudiced and unheard so that the order for dismissal of the suit with costs ought to be set aside.

The respondent opposed the application by filing on 04.04.2014, the replying affidavit of Francis Mwangi Njuguna Advocate for the respondent. The Advocate has stated that on the date the suit was dismissed, he had not applied for dismissal but the court dismissed the suit of its own motion and upon the view that the claimant had been negligent in that, he had fixed the suit for hearing and then failed to attend the hearing. Further, the application for review had been filed after lapsing of one and a half years so that it had been filed after inordinate and inexcusable delay.

The court has considered the intention of the parties on the material date when the suit was dismissed and finds that the intention was not to have the suit dismissed. The court has considered that the application was filed after considerable delay that was unexplained and the court has weighed that delay against the absence of a defence or memorandum of response on record. Despite the considerable delay, the court finds that in absence of the response or defence, the claimant's case enjoys high probability of success.

In the circumstances and in conclusion, the application for review is allowed with orders:

- a. That the order of 9.10.2012, dismissing the matter with costs for wants of prosecution is set aside.
- b. That the order of 9.07.2013 thus, **“That parties to extract the relevant decree and the matter is now marked as determined accordingly,”** is set aside.
- c. That the matter herein is reinstated for hearing and determination by the court in the normal manner.
- d. Parties to fix a mention date for directions on the hearing.
- e. The applicant will pay costs of the application in any event.

Signed, dated and delivered in court at **Nakuru** this **Friday 30th May, 2014.**

BYRAM ONGAYA

JUDGE