



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**

**CAUSE NO. 368 OF 2013**

**PATRICK A ASOHA                      CLAIMANT**

**V**

**PAOLO ROSSI                      1<sup>ST</sup> RESPONDENT**

**VOLCANO DIANI BEACH              2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Claimant filed a Memorandum of Claim in Court on 6 November 2013 against the Respondents alleging unlawful redundancy and non compliance with the prescribed minimum wages orders. The Respondents were served and on 27 January 2014 they filed a Response.
2. The Cause was mentioned on 9 December 2013 in the presence of both parties' advocates and further mention was set for 27 March 2014 to confirm whether the Respondents had filed a Response.
3. On the said mention date, none of the parties was in Court when the Cause was called out. The Court directed the Deputy Registrar to issue a show cause notice to the Claimant to show cause why the suit should not be dismissed with a return date of 3 April 2014.
4. On 3 April 2014 none of the parties' advocates was present and the Court dismissed the Cause.
5. On 25 April 2014, the Claimant's Advocate on record Siocha Okemwa & Co. Advocates filed a motion seeking that the order dismissing the suit be varied and the suit be reinstated.
6. The Court dismissed the Motion application on 30 May 2014. The Court gave its reasons in the ruling.
7. On 16 June 2014, the Claimant, now acting in person filed another motion seeking that the order dismissing the suit issued on 30 May 2014 be set aside and the suit be reinstated to full hearing. This motion was argued on 23 June 2014 and is the subject of this ruling.
8. The Claimant stated that he was relying on the grounds stated on the face of the motion and his supporting affidavit sworn on 13 June 2014. The grounds are that the Claimant's advocate did not attend hearing on 3 April 2014 because he was attending other Court matters and that the mistake that led to the dismissal was that of the advocate. It was stated the Respondents would suffer no prejudice.
9. In the supporting affidavit, the Claimant deposed that the cause was in the course of negotiations for an out of court settlement.
10. Mr. Njoroge for the Respondent opposed the application and stated that it was *res judicata* because a similar application dated 25 April 2014 had been dismissed on 30 May 2014 and no new issues had been raised. He urged the Court to dismiss the motion with costs.
11. The Claimant is valiantly attempting to claim what he believes he is entitled to as a matter of law. He submits that he should not be punished for the mistakes of his then advocate on record and that

- the Respondent will not suffer any prejudice.
12. The Court has discretion to set aside its orders in circumstances like the one at hand where a mistake or error is shown. Previous authority has set out the principles a Court ought to consider.
13. In *Belinda Murai & others v Amoi Wainaina* [1978] LLR 2782 Madan, J.A. stated thus

*A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...*

14. Similarly, the Court of Appeal in *Philip Chemowolo & Another v Augustine Kubede*, [1982-88] KAR 103 observed that

*Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.*

15. The Claimant through his then advocate on record asked the Court to exercise its discretion to set aside the dismissal order but did not succeed. The Court did not find the explanation by the Advocate convincing or sufficient. The Claimant now acting in person has brought a similar application. He faults his advocate's failure to attend Court and submits he should not be punished for the mistake of his then advocate. The Respondent contends the application is *res judicata*, a similar application having been determined on the merits.
16. Considering the principles laid out in the two authorities cited and the fact that some of the allegations raised in the Memorandum of Claim may amount to unfair labour practices if proved and further that it not disputed that the Claimant worked for the Respondents as a security guard but was declared redundant, the Court would accede to the motion by the Claimant and set aside the order dismissing the suit and direct that a hearing date of the main Cause be fixed forthwith.
17. There will be no orders on costs.

**Delivered, dated and signed in open Court in Mombasa on this 18<sup>th</sup> day of July 2014.**

**Radido Stephen**

**Judge**

**Appearances**

Claimant in person

Mr. Njoroge instructed by Njoroge & Katisya Advocates for Respondent