



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1497 of 2011**

**JANET KHAYUMBI MWANZA ..... CLAIMANT**

**-VERSUS-**

**PAMMI THATTHI ..... RESPONDENT**

**RULING**

By a Notice of Motion dated 21<sup>st</sup> February 2013 and filed in Court on 25<sup>th</sup> February 2013, the Claimants seeks the following orders:-

- (i) The Claimant's dismissal be declared wrongful and unfair.
- (ii) The Claimant be paid her terminal benefits as set out in paragraph 8 hereinabove.
- (iii) The Respondent be ordered to compensate the Claimant for wrongful dismissal at the equivalent of twelve (12) months gross salary.
- (iv) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- (v) The Respondent to pay the costs of this claim.
- (vi) Interest on the above at Court rates.

The Respondent filed a Replying Affidavit of **PAMMI THATTHI** on 12<sup>th</sup> march 2013 in which he opposes the application.

The parties appeared before me on 12<sup>th</sup> March 2013 and agreed to canvas the application by way of written submissions.

In the Claimants written submissions, it is alleged that the case was fixed for hearing on 21<sup>st</sup> March 2012 before Hon. Justice Kosgei, that the Court was not sitting on that day, that Counsel for the Claimant was ready to proceed and sent a Court Clerk with instructions to have the matter placed aside until 11.00 a.m. That the Clerk reported back that the case was not cause listed and the file was not in Court.

That thereafter the file went missing. That when the file was traced Counsel for the Claimant invited the Respondent for fixing hearing date and it was then that the Respondent's Counsel informed him that the

case had been dismissed on 21<sup>st</sup> March 2012.

The Respondent opposes the application. It is submitted for the Respondent that the case was fixed for hearing on 21<sup>st</sup> March 2013 when the Claimant and her Counsel failed to attend Court leading to the case being dismissed, that the application is made by the Claimant's advocate and not the Claimant as the affidavit is not sworn by the Claimant, but by the advocate and the application is therefore incompetent. It is further submitted that the reasons given for failure to attend is lame and inexcusable, and that the Respondent will be prejudiced if the suit is reinstated. It is further submitted for the Respondent that there was inordinate delay in filing the application. The Respondent referred the Court to the following authorities in support of its submissions:-

- i) KISYA INVESTMENTS & OTHERS VS KENYA FINANCE CORPORATION LTD NAIROBI HCCCA NO.3504 OF 1993.**
- ii) SIMON ISAAC NGUI VS OVERSEAS COURIER SERVICES LTD (NRB HCCC 1632 OF 1997).**
- iii) KENYA HORTICULTURAL EXPORTERS (1977) LTD V TRANSAMI KENYA LIMITED NAIROBI HCCC NO 1405 of 2009.**
- iv) ALICE MUMBI NGANGA V DANSON CHEGE NGANGA & ANOTHER [2006] eKLR.**
- v) FATUMA HAMED MOHAMMED & ANOR VS ISMAEL OLE PASHA (MACHAKOS HCCA NO.88 OF 2009).**
- vi) SYSTEM RELIABILITY LTD VS THE ATTORNEY GENERAL NAIROBI HCCA NO.927 OF 1999.**
- vii) HOTWAX HOTELS LTD, VERSUS NAIROBI CITY COUNCIL [2005] eKLR.**

I have perused the Court record. It shows that both parties appeared before Hon. Justice Rika for mention on 14<sup>th</sup> October 2011 when the case was fixed for hearing on 21<sup>st</sup> March 2013 at 2.30 p.m. It does not show which Court was to hear the case.

I have also looked at the on-line cause list for 21<sup>st</sup> March 2011. The case was not listed before any Court on that day.

There is no explanation why the Claimant assumed that the case would be heard before Hon. Justice Kosgei in Court No.4 at 10.00 a.m. or how the case was called before Hon. Justice Mukunya in Court No. 2 at 2.30 p.m. on 21<sup>st</sup> March 2011 yet the matter was not listed in that Court or any other Court.

Under the circumstances I find that it was not appropriate for the Court to dismiss the case as it was not listed for hearing before the Court.

I however find that there was delay on the part of Counsel for the Claimant in following up on the case. Having confirmed that the case was not listed for hearing on 21<sup>st</sup> March 2012, the Claimant's Counsel took no action to fix the case for hearing until 31<sup>st</sup> July 2012. Again, having been informed of the dismissal of the case on 13<sup>th</sup> September 2012, they did not apply for setting aside of the orders of 21<sup>st</sup> March 2012 until 25<sup>th</sup> February 2013, a delay of almost 4 months.

I find that both parties are guilty of impropriety in this case. The Respondent had no justification to apply for dismissal of a case that was not cause listed and was up for hearing for the first time. Again after successfully applying for dismissal of the case in the absence of the Claimant, they took no steps to inform the Claimant's Counsel about the dismissal of the case until they were invited for fixing a hearing date. On their part, the Claimant was also not diligent in following up the case and applying for setting

aside of the orders dismissing the case within a reasonable period.

On a balance I find that it is just and equitable to grant the orders to re-instate the case. The Claimant should not be made to suffer due to impropriety of both her Counsel and the Respondents Counsel.

I therefore set aside the orders of 21<sup>st</sup> March 2012 dismissing the Claimant's claim for non-attendance and re-instate the case to be heard and determined on merit.

There shall be no orders for costs.

Orders accordingly.

24<sup>th</sup> April

Read in open Court and signed on this \_\_\_\_\_ day of \_\_\_\_\_ 2013.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

Janet Khayumbi

In the presence of :- \_\_\_\_\_ Claimant

Mrs. Rawal

\_\_\_\_\_ Respondent