



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.255 OF 2017

LUCY MARETE KARANU.....CLAIMANT

VERSUS

HARVEST LIMITED.....RESPONDENT

RULING

The claimant filed application dated 14th October, 2019 and seeking for orders that the orders issued on 5th February, 2019 be set aside as this had the effect of dismissing the suit for non-attendance and that the matter be reinstated and be heard on the merits.

The application is supported by the affidavit of Purity Makori, advocate for the claimant and on the grounds that the claimant filed the claim on 13th June, 2017 and a defence filed on 4th August, 2017. The claimant's advocate wrote letter dated 6th September, 2017 seeking a mention date for taking hearing date but the registry declined to grant a date.

The claimant's advocate wrote letter dated 4th April, 2018 seeking a mention date for taking a hearing date and matter was placed for mention on 31st July, 2018 when the court allocated hearing on 5th February, 2019. The person who took the hearing date failed to diarise and there was no attendance.

On 15th July, 2019 the claimant's advocate wrote letter seeking a mention date to take a hearing date but found the suit had been dismissed for non-attendance on 5th February, 2019.

The claimant is interested on the suit and the mistake of advocate should not be visited against the client.

In reply the respondent filed Relying Affidavit of Teddy Enos Ochieng Onyango, advocate of the respondent and who avers that on 5th February, 2019 one of the advocates for the respondent was in court with the witness for hearing but due to the non-attendance of the claimant and or his advocate the suit was dismissed with costs. The current application was filed 8 months later which delay is not explained.

Upon the dismissal of the suit the respondent moved on and it would be an uphill task to have the relevant witnesses availed for any fresh hearing of the suit and in essence prejudice the respondent. The application should be dismissed with costs.

Both parties filed written submissions.

Under **Order 12 of Civil Procedure Rules** consequences of non-attendance by a party to a suit are stated.

Rule 13 is specific that when only the defendant attends and admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court. See **Bilha Ngonyo Isaac versus Kembu Farm Ltd & another & another [2018] eKLR**.

In **Utalii Transport Co. Ltd and 3 Others versus N.I.C. Bank and Another (2014) e KLR**, the court held that:

It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.

In this case, parties attended court on 31st July, 2018 and a hearing date was allocated by mutual consent for the 5th February, 2019. On the due date the respondent attended and the claimant failed to attend when the matter was dismissed with costs to the respondent.

The claimant's advocate at paragraph 9 and 10 in the supporting affidavit avers that there was inadvertence as the matter was not diarised for the 5th February, 2019 and that a hearing notice had been served upon the respondent for the 24th of August, 2019.

These averments are not correct as the hearing date had been allocated by consent and hence no need to serve a Hearing Notice. What is attached as annexure "PM3" is indeed a hearing notice for the 5th of February, 2019. Where indeed the claimant's

advocate had made a mistake with regard to the hearing dates why then serve the respondent with the correct Hearing Notice for the 5th February, 2019 and then fail to attend court?

There is a serious lapse that is not explained.

More fundamentally, the application is supported by the affidavit of Ms Makori yet the advocate attending on 31st July, 2018 to take hearing dates was Mr Bosire holding brief for Mr Mogeni Advocate. Where there was a mistake by Mr Bosire or Mr Mogeni, such details are not outlined.

Upon the claimant and or the advocate failing to attend court on the scheduled hearing date on 5th February, 2019 there was inaction until 15th October, 2019 when the instant application was filed. Even in a case where the advocate inadvertently diarised the hearing for the 24th of August, 2019 and the date arrived and it was realised that this was in error, there is a time lapse until 15th October, 2019 to file the instant application.

The delays herein are not excusable.

The dismissal of the suit for non-attendance was justified and to take back the respondent who was in court for hearing and be required to start preparing for the hearing afresh after the delays noted above would be to visit injustice and occasion prejudice. This would defeat the court objections outlined under section 3 of the Employment and Labour Relations Court Act, 2011.

Accordingly, the court finds no matter to justify the sitting aside of its orders of 5th February, 2019 dismissing the suit for non-attendance. Application dated 14th October, 2019 is hereby dismissed. Costs to the respondent.

Delivered at Nakuru this 13th day of February, 2020.

M. MBARU

JUDGE

In the presence of: