



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.944 OF 2018

ZAVERIO BUNDI M'THIRUAINÉ CLAIMANT

VERSUS

NATIONAL CEREALS AND PRODUCE BOARDRESPONDENT

RULING

The claimant filed application dated 19th February, 2021 seeking for orders that the order given on 26th January, 2021 dismissing the claim for want of prosecution be set aside on the grounds that on the said date the respondent's application dated 22nd July, 2020 coming up for hearing the claimant or his advocate did not attend as counsel had mis-diarised the matter for hearing on 25th February, 2021 instead of 26th January, 2021 when the suit was dismissed for want of prosecution.

Prior to 26th January, 2021 the claimant had requested for a mention date for directions on 1st December, 2020 and on such date the advocate was handling an ELC matter and this led to the confusion.

On 26th January, 2021 the claimant was condemned unheard and should not be punished for mistake of advocate.

In reply, the respondent filed the Replying Affidavit of John Ng'etich the company secretary and head of legal services and avers that there is no sufficient ground for the grant of the application and no good reason is given as to why there was non-attendance in court on 26th January, 2021. The reason given that the advocate mis-diarised the matter cannot be verified and such matter is manufactured. The claimant failed to demonstrate what steps had been taken to secure a date for hearing to prosecute his case.

The claimant cannot claim he was condemned unheard since he was allocated a date and failed to attend to protect his interests. There is still no good cause of action given to justify the grant of the application and should be dismissed with costs.

Parties addressed the application by way of written submissions.

The claimant submitted that the mistake and error of advocate should not be visited against the client and relied on the case of **Shah v Mbogo [1967] EA; Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR** and that there shall be no prejudice against the respondent if the claimant is heard on his case.

The respondent submitted that the claimant had failed to demonstrate sufficient cause for his nonattendance in court on 26th January, 2021 when the suit was dismissed for want of prosecution as held in **Captain Philip Ongom v Catherine Nyero Owotta**

[2003] KLR; Wachira Karni v Bildad Wchira [2016] eKLR; Rose Wambui Gikonyo v Ismael Juma Matiku [2019] eKLR and that to set aside judgement must be on sufficient and good cause and cannot issue automatically. The claimant has failed to demonstrate why he deserves he orders sought.

Determination

The claimant filed his Memorandum of Claim on 13th June, 2018 and the respondent filed a response on 26th July, 2018.

on 1st December, 2020 parties were allocated a hearing date for respondent's application dated 22nd July, 2020 seeking for dismissal of the claimant's case for want of prosecution. A hearing date was allocated for 26th January, 2021. On the due date the claimant did not attend. The application was allowed and suit dismissed for want of prosecution.

The claimant was required to attend court on 26th January, 2021 to answer as to why he had not prosecuted his case. There is no Repling Affidavit to challenge this application. No effort is taken to secure his rights herein.

The Supporting Affidavit attached to the application is that of the claimant. The advocate who failed to attend court on 26th January, 2021 and whose alleged diary had a mis-diarisation has not attached his/her affidavit and the diary extract is not that of the claimant. He cannot speak to the facts of such a diary.

Matters of fact cannot be addressed by a third party. The diary extract is not primary evidence.

Failure to attend court on a date appointed is key to access to justice and rule of law. Justice cuts both ways. Non-attendance to secure ones right cannot be draconian or being condemned unheard since the claimant was given an opportunity for a hearing but failed to attend and the court finds no good cause to justify his non-attendance and the materials attached to support the application do not belong to him and cannot be relied upon.

The suit herein was dismissed for good cause. The court finds no matter for setting aside the order of dismissal of suit.

Application dated 19th February, 2021 is hereby dismissed. Costs to the respondent.

DELIVERED AT NAIROBI IN OPEN COURT THIS 10TH DAY OF MARCH, 2022.

M. MBARU

JUDGE



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