



REPUBLIC OF KENYA

High Court at Mombasa

Cause 1482 of 2010

KENYA UNION OF COMMERCIAL

FOOD & ALLIED WORKERS.....CLAIMANT

VERSUS

DIANI ONE STOP SUPERMARKET.....RESPONDENT

RULING

The applicant in the Notice of Motion before me is the Respondent in the main Suit and she seeks the discretion of the Court to review, set aside and/or vary the award by Justice James Rika dated 11.10.2011.

The main ground on which the Motion stands is that the mutually fixed hearing date for the Suit that is, 28.11.2011 had been multilaterally changed to 16.8.2011 and although service of the new date was done by the court on 29.7.2011, the Clerk of the Applicant's Advocate inadvertently failed to diarise the new hearing date.

The applicant has asked me to excuse the omission and set aside the award to pave way for hearing on the merit.

The Claimant has opposed the application on grounds of procedure and merit. According to her, the motion offends the rules of procedure and lacks merits. I have perused the Motion and the Supporting Affidavit and the Claimants Replying Affidavit. I have also carefully considered the submissions by the two parties. The following issues arise:-

Whether the application is competent?

1. Whether application has merits?

With respect to first issues, this court agrees with the Claimant that the court has not been properly moved for an order of review. I will therefore not consider the request for review but instead I will proceed with the application for setting aside of the award which is properly before me. On the issue of merit, the applicant admits that service was done on 29.7.2011. It is also not denied that the applicant had able notice within which to prepare for hearing on 16.8.2011. The

only excuse given is that the clerk forgot to update the Advocate's diary. As much as I understand the magnitude of my unfettered discretion in setting aside of judgements, I do also know that such discretion should be exercised judiciously. I accordingly declined to grant the orders sought for lack of merits, otherwise the court will open a floodgate of similar application based on flimsy grounds and also discourage due diligence in handling of briefs by the parties and their advocates.

Costs to the Claimant.

Orders accordingly.

Signed, Dated and Delivered on the 22nd day of April 2013.

Onesmus N. Makau
JUDGE