



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC CAUSE NO. 153 OF 2015**

**BENARD MOCHAMA ONDUMA.....CLAIMANT/RESPONDENT**

**VERSUS**

**BONTANA HOTEL NAKURU T/ARIFT VALLEY**

**ADVENTURES AND HOTELS.....RESPONDENT/APPLICANT**

**RULING**

1. Before me for determination is the Respondent/ Applicant application dated 27<sup>th</sup> October, 2021 filed under certificate of urgency on 4<sup>th</sup> November, 2021 pursuant to Section 3 and 3A of the Civil Procedure Act, Order 51 Rule 1, Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules, seeking the following orders That;

- a) The application be certified urgent and service be dispensed with in the first instance.**
- b) The Court Order closing the Respondent's case on 21.10.2021 and all consequential order be set aside**
- c) That the Honourable Court be pleased to give the Respondent a chance to tender its defence**
- d) The costs of this application be provided for.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn on 27<sup>th</sup> October, 2021 by **Lucy Nekesa Cheloti**, the Respondent's advocate ceased of the matter herein and based on the following grounds: -

- (a) The defence case hearing was scheduled for 21.10.2021 however the Court closed their case for non-attendance.
- (b) The reason for non-attendance was that their office master diary was inadvertently mis-diarized to reflect the defence hearing to be on 29.10.2021.
- (c) That they informed the applicant's witness of the hearing date as 29.10.2021 informing their absence in court on the date of hearing.
- (d) The Respondent/Applicant urged this Court in the interest of justice to allow its application and admit its defence and re-open this case for defence hearing.
- (e) It is stated that no prejudice will be visited upon the claimant as the claimant will be accorded an opportunity to cross-examine the witnesses.

3. In opposing the application, the Claimant/Respondent herein, Benard Mochana Onduma filed a replying affidavit deposed upon on 15<sup>th</sup> November, based on the following grounds;

- i. That the application is frivolous, vexatious and has been brought in bad faith with the sole intention of delaying the expedition of this suit.
- ii. The claimant avers that when the matter came up for hearing on the 21<sup>st</sup> July, 2021, where the Respondent's advocate sought for

an adjournment and confirmed to court that the 21.10.2021 was convenient and therefore cannot claim to have mis-diarized the said date.

iii. The claimant avers that litigation has to come to an end and that he will be prejudiced if the application is allowed as he has already filed his final submission to the suit.

iv. The claimant blames the Applicant for being indolent and urged this court not to aid it rather proceed with the case and give a judgment date.

4. Both parties opted to rely on the affidavits on record and did not file any submissions.

5. I have examined the averments of the parties herein. On 27/7/2021 this matter proceeded for hearing and the claimant closed their case.

6. The respondents requested for adjournment and the court granted them a last adjournment and set the case for hearing on 21/10/2021.

7. On 21/10/21 the respondents didn't attend court and so the court directed that the defendant case be closed and gave direction on filing of submissions.

8. The respondents contend that their failure to attend court was due to misdiarizing their case for 29/10/21 instead of 21/10/21. For the sole reason that a man should not be condemned unheard and given that the claimant will not be prejudiced by the calling of the respondents witness, I will allow the applicant to re-open the case and allow respondents to call their witness on condition that they pay the claimant kshs.10,000/= thrown away costs within 7 days.

9. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 18TH DAY OF JANUARY, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**IN THE PRESENCE OF:-**

**AWUOR FOR CLAIMANT – PRESENT**

**NO APPEARANCE FOR RESPONDENTS**

**COURT ASSISTANT - FRED**