



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 817 OF 2019

CATHERINE MBINYA MUSEMBI.....CLAIMANT

VERSUS

PAKSA CONSTRUCTION LIMITEDRESPONDENT

RULING

1. In the application dated 27th October, 2021, the respondent/applicant seeks the Court do issue an order to stay/arrest the delivery of judgment scheduled for 24th February, 2022 and that the claimant's case be re-opened and its witnesses be recalled for the limited purpose of cross-examination on the basis of the evidence already on record.
2. That the respondent be permitted to give its evidence in response to the claim and be cross-examined and costs be in the cause.
3. The application is premised on grounds set out on the face of the Application and in the supporting affidavit of the advocate for the respondent Paul Kimani Mwangi sworn to on 27th October, 2021 the nub of which is that the firm of advocates for the respondent highly regrets a mistake in the firm's registry in that though the hearing date on 21st September, 2021 was taken by consent, the date was not diarized or brought to the attention of the advocate handling the matter and as a result neither the Respondent nor his advocate attended the hearing scheduled for 21st September, 2021. That upon realization of the mistake, the respondent has moved with speed to have the error rectified before judgment has been delivered. That it is in the interest of justice that the application be allowed.
4. The claimant filed a replying affidavit sworn to by Samuel Maina, advocate for the claimant in which they pray that the application to re-open the matter be not allowed since the matter proceeded exparte and a judgment date granted for 24th February, 2022. That the applicant has not provided evidence of mis-diarization or errors alleged and so the application lacks merit and it be dismissed.
5. The Court has carefully considered the deposition by the parties and the submissions filed and has come to the conclusion that failure by the respondent and their advocates to appear before Court was occasioned by genuine error on the part of the advocates for the respondent which error should not be visited on the innocent respondent.
6. The Court is well guided by the dictates under Article 50 and 159 of the Constitution of Kenya, that the overriding objective of the Court be to deliver substantive justice to the parties upon giving them a fair hearing.
7. In a case like this, where there is a clear and sincere acceptance of a mistake and in good time, it would be inimical to dispensation of justice for the Court not to allow the application.
8. Accordingly, the application is granted and the Court re-opens the claimant's case for the limited purpose of cross-examination of the claimant on the evidence already adduced and the respondent is also granted leave to call its witnesses in defence of the case. The hearing date to be fixed on the date of delivery of this Ruling. The intended exparte judgment to be delivered on 24th February, 2022 is arrested accordingly.
9. The respondent to pay thrown away costs in respect of the hearing of 21st September, 2021 and submissions already filed by the claimants in the sum of Kshs 10,000 before the hearing of the suit on the merits.

Dated and delivered at Nairobi (virtually) this 17th day of February, 2022.

Mathews N. Nduma

Judge

Appearances

Mr. Wetangula for Respondents/Applicants

Mr. Kithi for claimant/Respondent

Ekale – Court Assistant