



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 806 OF 2016

JOSEPH GACHOKA.....CLAIMANT

- VERSUS -

KISIWA GUEST HOUSE LODGE LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th March, 2021)

RULING

The Court (Rika J.) delivered judgment in the suit on 31.01.2020 for the claimant against the respondent for orders:

- a) Termination was unfair.
- b) The respondent shall pay to the claimant: compensation for unfair termination, equivalent of claimant's 12 months' salary at Kshs.180, 000; notice at Kshs. 15, 000, 000; annual leave at Kshs. 48, 462; and service at Kshs.3, 750 – total Kshs.247, 212.
- c) Certificate of service to issue.
- d) Costs to the claimant.
- e) Interest granted at 16% per annum from the date of judgment till payment is made in full.

The respondent (applicant) had filed a statement of response on 01.12.2016 but did not attend at the hearing of the suit. The respondent has therefore filed a notice of motion on 16.07.2020 through Gikandi & Company Advocates. The application is under Order 12 Rule 7, Order 22 Rule 25 of the Civil Procedure Rules, section 1A, 1B and 3A of the Civil Procedure Act Cap.21 and all other enabling provisions of the law. The application is for orders:

- 1) That the Honourable Court be pleased to set aside the ex-parte judgment entered herein on 31.01.2020 against the respondent or applicant and all consequential orders and proceedings thereto and the matter be heard on merit.
- 2) That the costs of the application be provided for.

The application is based upon the annexed affidavit of Samuel Waweru, the respondent's Managing Director. It is urged for the applicant as follows:

- a) The applicant entrusted the conduct of the suit to their former Advocates S.W Ndegwa & Company Advocates who unfortunately did not attend to the case for the reason that the Advocate was unwell.
- b) The respondent has a very good case or strong defence that the claimant was employed by the respondent as a chef and he had formed a habit of stealing the respondent's goods.
- c) On 23.06.2016 the respondent reported the claimant to Central Police Station upon which the claimant offered to return the stolen goods to the respondent and requested the respondent to withdraw the police case against the claimant, which the respondent agreed to.
- d) The claimant never returned the said stolen goods and was then summarily dismissed from work by the respondent and the claim for terminal dues had no basis.

e) The ex-parte judgment was entered because the respondent's previous failed to handle the case diligently.

f) The judgment be set aside in the interest of justice and suit be reopened for hearing as the applicant should not suffer due to mistake of the Advocate.

The claimant filed on 10.09.2020 grounds of opposition to the application as follows:

a) The application is belated, ill-conceived, misinformed and tainted with mala fides for reasons that it seeks orders that are untenable in the circumstances; it is vexatious and does not meet the threshold requirements for grant of the orders; it is bad in law and an abuse of court process in light of the rules of procedure and practice; it is fatally defective; it bears grounds not supported by the facts in the supporting affidavit; and it is poorly concocted after-though only meant to delay the claimant's access to and enjoyment of justice herein.

b) The application is grossly incompetent, fatally defective, frivolous, vexatious, wholly unmerited and ought to be struck out ab initio for being an abuse of the court process.

c) The application be dismissed with costs to the claimant.

The application was heard on 09.03.2021. Counsel for the applicant submitted that the reason the matter proceeded ex-parte was that Counsel for the respondent was unwell and he could not arrange to attend court by himself or notify the respondent to attend court. Thus the orders sought be granted in the interest of justice so that the applicant does not suffer injustice in the circumstances of the case. Further, Counsel submitted that the applicant was ready to pay thrown away costs if the suit is reopened for hearing.

For the respondent it was submitted that the suit had been in Court for many years and the application was a delaying tactic. Further, at all material times the applicant's counsel or a person at his office had never written or informed the Court or Counsel for the claimant about the predicament of the applicant's counsel.

The Court has considered the submissions and the material on record. The Court finds as follows:

1) The exhibits on the supporting affidavit show that indeed the Counsel for the Applicant at the material time was unwell and the doctor confirms that the ill health seriously impaired Counsel's capacity to perform his usual work and duties. The Court has considered the medical reports on record and returns that in the circumstances, despite service of the hearing notices, Counsel for the applicant was unwell. Considering the exhibited medical reports, there is no reason to doubt that in the circumstances, Counsel was not able to communicate the hearing dates to the respondent. Such amounts to a good reason to exercise the Court's discretion in favour of the applicant as urged and submitted for the applicant.

2) The record shows that the applicant had filed a defence raising serious triable issues together with the relevant witness statement. The Court finds that the applicant was not only ready and willing to defend the suit but also had a genuine defence on record as urged for the applicant.

3) The supporting affidavit shows that once the applicant discovered that judgment had been entered, the applicant promptly moved to appoint another Counsel and filed the present application. The applicant is not therefore guilty of unreasonable delay in filing the application.

4) The Court therefore returns that the applicant has established that it is fair, just and proportionate to allow the application. The applicant agreed to paying the costs of the application.

In conclusion, the application dated 15.07.2020 and filed on 16.07.2020 for the respondent in the suit is hereby determined with orders:

1) That the ex-parte judgment entered herein on 31.01.2020 against the respondent or applicant and all consequential orders and proceedings thereto is hereby set aside and the matter be heard on merit on a date to be fixed on priority basis.

2) That the applicant to pay the claimant's costs of the application in any event.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 12TH MARCH, 2021.

BYRAM ONGAYA

JUDGE