



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 870 OF 2017**

**DANIEL MATHEKA KIOKO.....CLAIMANT**

**- VERSUS -**

**PEARL BEACH HOTEL LTD T/A HOTEL ENGLISH POINT MARINA...RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 21<sup>st</sup> May, 2021)

**RULING**

The claimant testified on 16.10.2019 in absence of the respondent and respondent's counsel. The hearing dated had been fixed on 21.03.2019 in Court and in presence of counsel for both parties. Upon close of the claimant's testimony on 16.10.2019, the claimant's counsel applied that the respondent's case is closed and the Court ordered:

- 1) Hearing is closed.
- 2) Claimant to file and serve his submissions within 21 days.
- 3) Respondent to do so within 21 days of service.
- 4) Mention on 02.12.2019.
- 5) Claimant to extract and serve these orders upon the respondent.

On 18.10.2019 the record shows that the respondent (applicant) had filed an application on 17.10.2019. The application was by the notice of motion filed through Maloba & Amalemba Advocates and brought under order 51 rule 15 of the Civil Procedure Rules, order 12 rule 7 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of law. The applicant prayed for orders:

- 1) The application is certified urgent and service is dispensed with in the first instance.
- 2) The Honourable Court is pleased to set aside its ex-parte order made on 16.10.2019 and set a fresh hearing date for the matter.
- 3) The suit be fixed for an inter-partes hearing on merits and on priority.
- 4) Costs of the application be provided for.

The application was based on the annexed affidavit of Conrad Maloba Advocate and upon the following grounds:

- 1) On 16.10.2019 counsel for the applicant was scheduled to appear before James Makau J in Constitutional Petition No. 48 of 2017, Nazir Jinnah –Versus- Aga Khan Academy & Others. Thus Counsel instructed an Advocate to appear before Rika J in the present suit in circumstances where by counsel for applicant had erroneously diarized the matter as a mention based on his clerk's information. The failure to attend the hearing on 16.10.2019 was therefore not deliberate
- 2) Orders of 16.10.2019 ought to be set aside as they are prejudicial as case will be decided without taking the evidence by the respondent's witness.

3) Counsel requested to hold applicant's counsel's brief on the material date, one Cain Mingo arrived in Court long after orders had already been made by the Court.

The claimant filed on 05.11.2019 the replying affidavit of Okeyo Florence Akinyi Advocate and through Otieno Asewe & Company Advocates. The claimant's case is that the hearing date had been taken by consent on 21.03.2019 for the hearing on 16.10.2019 and the matter proceeded ex-parte since no explanation was given for absence of the applicant. The hearing date having been taken in Court, there was no involvement of clerk to the applicant's counsel as alleged. Thus the application is an afterthought aimed at delaying justice in the case. Thus the application should be dismissed and parties to file submissions as already directed by the Court.

Parties filed their respective submissions and the Court has considered all the material on record in view of the application. The Court makes findings as follows.

1) The ex-parte hearing was on 16.10.2019 and the application was filed on 17.10.2019. Thus the Court finds that there was no delay in filing the application but it was filed promptly.

2) The respondent filed on 26.11.2019 the witness statement by Lilian Ahona. The statement was filed belatedly but it shows that indeed the respondent has a witness and is keen to be heard. The witness statement being on record though belatedly, it encourages the Court to exercise the discretion in the applicant's favour. Further, the claimant has not shown that it complied with the orders of 16.10.2019 on its part by filing and serving the submissions and as had been directed by the Court. By that failure on the part of the claimant, the Court considers that there had been and there would be delay in the suit generally, partly attributable to the claimant - so that in a way, the balance of justice favours the taking of the applicant's evidence rather than locking it out on account of expeditious determination of the suit.

3) The applicant has not explained the assertion that the clerk to the applicant's counsel was involved in the wrong diarizing of the matter as a mention whereas the date had been given in Court in presence of counsel. However, there is no reason for the Court to doubt that counsel assigned by the applicant's counsel to hold brief on the hearing date arrived in Court belatedly after the orders closing the hearing had already been given. The Court considers that counsel had taken some steps to inform the Court his predicament but it was an unfortunate day of belated actions. The Court considers that the prompt filing of the application goes to show that indeed counsel had acted as explained for the applicant.

4) In the circumstances and in view of the findings the application will be allowed but with orders that the applicant to pay the claimant costs of the application in any event.

In conclusion, the application is hereby determined with orders:

1) The orders given by the Court on 16.10.2019 are hereby set aside.

2) The case is reopened for further hearing from where it had reached and the claimant to be cross-examined and the respondent's witness to testify as the witness statement by Lilian Ahona is deemed duly filed and served or be served forthwith, as necessary.

3) Parties to forthwith fix a date for further hearing of the suit.

4) 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 21<sup>st</sup> May, 2021.**

**BYRAM ONGAYA**

**JUDGE**