



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 476 OF 2018

JARED MARANGA OCHUNGO.....CLAIMANT

VERSUS

KENYA SAFARI LODGES AND HOTELS LIMITED.....RESPONDENT

RULING

1. On 3rd August 2018, the Claimant filed a claim against the Respondent, seeking compensation for wrongful dismissal and payment of terminal dues. On 25th August 2020, the Claimant filed an amended claim.
2. The Respondent did not file a response and the matter therefore proceeded *ex parte* on 10th December 2020.
3. Subsequent to that, the Respondent filed a Notice of Motion under Certificate of Urgency dated 2nd March 2021, seeking orders to set aside the proceedings and thus reopening of the case.
4. The Motion is supported by an affidavit sworn by State Counsel, Jesse Michael Mkok and a supplementary affidavit sworn by his colleague, Rukiya Aziz Ibrahim and is based on the following grounds:
 - a) The Respondent was not informed of the hearing date by the Claimant hence the matter proceeded *ex parte*;
 - b) The non-attendance by Counsel for the Respondent was due to no mistake or negligence on the part of the Counsel;
 - c) The failure by Counsel for the Respondent to attend court was inadvertent and was caused by failure by the Claimant to inform the Respondent's Counsel of the hearing date;
 - d) The non-participation of Counsel for the Respondent was purely caused by the Claimant in not serving a hearing notice or invitation to fix a date for hearing;
 - e) The mistake of Counsel should not be visited on the Respondent who stands to suffer prejudice if the case is not re-opened for full hearing;
 - f) The *ex parte* proceedings ought to be set aside, to allow for recall of the Claimant for cross examination by the Respondent;
 - g) The Respondent will not suffer any prejudice if the prayers sought herein are granted as prayed;
 - h) The Respondent ought to be given a chance to cross examine the Claimant and to call its witnesses;
 - i) It is in the interest of justice and fairness that the orders sought be granted.
5. In opposition to the application, the Claimant filed a replying affidavit sworn on 11th March 2021.
6. The Claimant depones that when the matter came up for mention on 9th April 2019, the Respondent's Counsel was present in court and sought leave to enter appearance and to file documents, which request was granted.

7. The Claimant also depones that the matter came up for further mention on 27th May 2019, to confirm compliance but Counsel for the Respondent was absent and the Respondent had not complied with pre-trial requirements. Subsequently, a Memorandum of Appearance was filed on 28th August 2019.

8. The Claimant adds that a further mention was set for 2nd October 2019 and a mention notice was duly served on the Respondent's Counsel.

9. The Claimant states that when the matter came up on 17th September 2020, for the purpose of fixing a hearing date, Counsel for the Respondent was present. A hearing date was given for 10th December 2020.

10. The Claimant further states that on 10th December 2020, when the matter came up for hearing, the Respondent's Counsel was absent and the hearing proceeded *ex parte*. The matter was then fixed for mention on 9th February 2021, to confirm filing of final submissions.

11. A mention notice dated 14th December 2020 was served on the Respondent on 15th December 2020. The Claimant's submissions were served on the Respondent on 18th January 2021.

12. The Claimant goes on to state that on 9th February 2021, when the matter came up to confirm filing of submissions, the Respondent's Counsel was absent, despite due notification. The Claimant served a judgment notice dated 11th February 2021 on the Respondent.

13. The Respondent's application seeking to set aside the *ex parte* proceedings and re-opening of the case is based on the assertion that the Respondent was not served with a hearing notice. Looking at the court record however, it is clearly evident that the hearing date of 10th December 2020 was taken in court on 17th September 2020, in the presence of Miss Mwainzi holding brief for Mr. Oddiaga for the Claimant and Mr. Mwandeje appearing for the Respondent.

14. It follows therefore, that the supporting affidavit sworn by State Counsel Jesse Michael Mkok contains falsehoods and in fact borders on perjury. The only conclusion to make in such a situation is that the Respondent's request for setting aside of proceedings and re-opening of the case is not grounded on anything.

15. Moreover, at the time of filing its application, the Respondent had not bothered to file a response to the Claimant's claim. A feeble attempt was made on 15th March 2021 when, without leave of the Court, a draft response was sneaked in as an attachment to a supplementary affidavit sworn by State Counsel Rukiya Aziz Ibrahim.

16. The Respondent's handling of this matter reveals a party who is not interested in participating in the matter. While the Respondent has a right to be heard, the Claimant has a *pari passu* right to expeditious determination of his claim.

17. As held in ***Mbogo & another v Shah [1968] EA 93***, the discretion of the Court to set aside proceedings is to be exercised so as to avert an injustice or hardship that may be caused by an inadvertent or excusable mistake. It should by no means be used to delay or obstruct the cause of justice.

18. In the instant application, the Respondent not only failed to demonstrate any inadvertent or excusable mistake but also soiled its hands by blatantly lying to the Court. Such a party does not merit the discretion of the Court.

19. As a result, the Respondent's application dated 2nd March 2021 is dismissed with costs to the Claimant.

20. Judgment on the main claim will be delivered on 22nd July 2021.

21. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Mwainzi for the Claimant

Miss Rukiya for the Respondent