



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 222 OF 2016

EDWARD WAKA OSARE.....CLAIMANT/RESPONDENT

VERSUS

INTER SECURITY LIMITED.....RESPONDENT/APPLICANT

RULING

1. This ruling is in respect of the Respondent/applicant's application dated 9th March, 2021 filed through the firm of Mboga G.G & Company Advocates seeking the following orders;

- a) **That this application be certified urgent, service be dispensed with and the same be heard ex-parte in the first instance.**
- b) **That the Honourable court be pleased to vacate and set aside the Orders made on 9th March, 2021 that proceeded with the respondents hearing ex-parte for non-attendance thus closing the defence case.**
- c) **That the Honorable Court do re-open the defence case to await hearing on merit.**
- d) **That 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 9th March, 2021 by **Ongadi Kevin Nam**, the advocate ceased of this matter and based on the following grounds: -

- (a) That, this case was slated for defence hearing on 9th March, 2021 when the parties appeared virtually in Court and time allocation was slated for later that day.
- (b) That the advocate for the respondent heard that the matter was to be heard at 10.50 am when the Court had recorded the matter to be heard at 10.15 am.
- (c) That on trying to log in at around 10.45 am , he was not let in prompting him to inquire from the court assistant who informed him that hearing was slated for 10.15 and not 10.50am.
- (d) That the mistake was not intentional and that the respondent is desirous of defending its suit and urged this Court to allow the application and reinstate the Defence case for hearing on its merit.

3. In opposing the application, the Claimant/ Respondent through its Advocate on record, **Ms. Jennifer Wachira Wanjiru**, swore a replying affidavit dated 22nd March, 2021 and filed in this Court on even date on the following grounds;

- i. That when this case came up for hearing on 9th March, 2021, the Respondent Advocate Mr. Nam was present virtually and took time allocation for Defence hearing.
- ii. That the matter was to proceed for hearing at 10.15am however Mr. Nam was not present neither was his witness and court place the file aside to enable her contact the respondent's advocates.
- iii. That she immediately sends a text message to Mr. Mboga asking him to remind his associate of the hearing in court which message did not elicit any response.

iv. That this matter initially came up for hearing on 12.2.2019 in absence of the respondent who after discussion agreed to re-open the claimant's case and the matter was head afresh on 24.2.2019.

v. That the respondent had been given a similar chance before and therefore urged this court to dismiss the application for lacking merit.

4. The application was disposed of by way of written submission with the applicant filing on 9th April, 2021 and the Respondent filed on 21st May, 2021.

Applicant's submissions

5. The applicant's advocate submitted that they misheard the time allocation and the failure to attend court was not deliberate but caused by a technical hinge which he implored upon this Court to invoke its power given under section 3A of the civil procedure Act and enabled by Order 12 Rule 7 of the civil procedure Rules to set aside the order of 9th March, 2021 and reinstate the Respondent's case for hearing on merit.

6. He reinforced his argument by citing the case of **Shah –v- Mbogo [1967] EA 116** and urged this court to exercise its discretion to avert injustice that will be visited upon the respondent who has been driven out of the seat of hearing. Further that the Court be guided by the decision in **CMC Holdings –v- Nzioki[2004] eklr** and exercise substantial justice instead of procedural technicalities contrary to the express provision of Article 159(2)(d) of the Constitution of Kenya 2010.

7. The applicant submitted further that the said message allegedly send to Mr. Mboga was never seen to enable the Advocate act on it and that the failure to appear in court at the allocated time was due to a genuine mistake that has been explained therefore beseeched the court to be guided by **Philip Keipto Chemwolo –v- Augustine Kubende [1986] eklr** and allow the application as prayed.

Respondent's Submissions

8. The respondent's counsel submitted that the application herein is a delay tactic that is employed by the Claimant to delay the disposal of this suit.

9. He argues that Justice Makau in **Joswa Kenyatta –v- Civicon Limited [2020] eklr** opined that for a court to allow an application for reinstatement of suit, the applicant has to demonstrate to the court that it has triable issue in its defence, consequently, he argues that the defence by the Respondent is a sham that is based on mere denials and no documentary evidence attached to it.

10. He submitted further that this suit has been closed twice on 12th February, 2019 and on 9th March, 2021 an indication that the respondent is delaying the disposal of this suit. He therefore prayed for dismissal of the application and the matter proceed for submissions as directed on 9th march, 2021.

11. I have considered the averments of parties herein. The applicant has explained his mistake in not logging in for court hearing which prompted this court to proceed and close the respondent's case.

12. In order to avoid a miscarriage of justice by condemning the respondent unheard, I exercise my discretion and allow the application by the respondent.

13. I will allow the respondent's case to be reopened for hearing and determination on merit.

14. Costs in the cause.

Ruling delivered virtually this 6TH day of JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Imbwaga holding brief for Wachira for claimant – present

Nam holding brief Mboga for respondents present

Court Assistants – Fred and Wanyoike