



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 1931 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**FAITH VIHENDA AGALA.....CLAIMANT**

**VERSUS**

**CHARITY MUTHONI MUYA – NGARUIYA.....RESPONDENT**

**RULING**

The Application before the Court is dated 29<sup>th</sup> May, 2018, brought under Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya & Order 10 Rule 11 of the Civil Procedure Rules, 2010 wherein the Applicant seeks for Orders:

1. That this Application be certified urgent, be heard on priority basis and priority service thereof be dispensed with in the first instance.
2. That pending hearing and determination of this Application this Court be pleased to stay any further proceedings herein.
3. That this Court be pleased to set aside the ex parte proceedings of 20<sup>th</sup> April, 2018 herein against the Defendant/Applicant and any consequential orders thereof and allow the Defendant/Applicant to unconditionally defend this matter.
4. That costs of this application be provided for.

The Application is premised on the grounds:

1. That the matter herein was coming up for mention on 20<sup>th</sup> April, 2018, but erroneously proceeded ex-parte as a hearing without the presence of the Defendant's advocate.
2. That upon the conclusion of the erroneous ex-parte hearing, the Court directed that the Defence case be closed since there was no appearance and directed that submissions be filed within 14 days.
3. That prior to the events aforesaid, the matter had initially come up for hearing on 12<sup>th</sup> March, 2018, but on the said date the Court was not sitting. The matter was therefore placed for directions before Hon. Daisy Mutai (Deputy Registrar).
4. That on the said 12<sup>th</sup> March of March 2018, the Defendant's counsel was served in Court with a Witness statement by the Claimant's counsel. The Defendant's Counsel was therefore granted leave to also file Witness Statements and bundle of documents if need be. The Deputy Registrar then proceeded to fix the matter for mention before a judge on 20<sup>th</sup> April, 2018 for directions and for the fixing of a hearing date.
5. That regrettably, on 20<sup>th</sup> April 2018, the matter had mistakenly not been diarised in the firm's diary. In fact, on the said date, the Applicant's counsel was prosecuting a hearing before E. C Mwita J. in *Constitution Petition Number 546 of 2017 George Gichuhi & 4 Others vs Catholic University of Eastern Africa* so that he would not have been able to attend to the mention in the instant suit due to the congestion of the firm's diary had he knowledge of the mention.
6. That shockingly and to their utter dismay, on 4<sup>th</sup> May 2018, the Defendant's Counsel were served with a mention notice for 9<sup>th</sup> May, 2018 to confirm filing of submissions whereas no Hearing Notice had been issued upon them.

7. That on 7<sup>th</sup> May, 2018, the Defendant's counsel were served with the Claimant's submissions which upon perusal, at paragraph 4 stated that a hearing notice had been issued to the Defendant's counsel whereas the same is not true.

8. That on 9<sup>th</sup> May, 2018, the matter was called out in the absence of both parties Counsel and was therefore stood over generally. The matter is now slated for mention this Thursday 31<sup>st</sup> May, 2018 to confirm filing of written submissions.

9. That the Defendant/Applicant stands to suffer great prejudice if the ex parte proceedings herein is not set aside as she would be condemned unheard contrary to the rules of natural justice.

10. That the ex parte proceedings against the defendant/Applicant can and should be set aside to allow the trial of the matter on merits, and any consequential orders thereto be vacated.

11. That in the premises it is only fair and in the wider interest of justice that the exparte proceedings of 20<sup>th</sup> April 2018, herein be set aside and the Defendant be granted leave to defend the suit.

The Application is supported by the affidavit of Harrison M. Mwangi wherein he reiterates the grounds on the face of the application.

The Claimant/Respondent opposes the application and has filed a Replying Affidavit wherein she admits that the matter proceeded ex-parte but denies that the same was inadvertent as the Respondent/Applicant's advocate ought to have done due diligence and been more serious in prosecuting the matter.

That it was the Court's duty to serve the parties Hearing Notices during the service week and therefore the Claim that a hearing notice was never served by the Claimant's advocates is untrue. The Claimant avers that the application raises no reasonable excuse for absconding Court apart from the Respondent/Applicant's Advocates own fault to effectively represent their client.

### **Respondent/Applicant's submissions**

The Applicant submits that she only learnt that a hearing notice had been issued upon being served with the Claimant's submissions wherein at paragraph 4 she states that a hearing notice had been issued. That no evidence of the purported hearing notice was annexed to the verifying affidavit. She maintains that service was not effected and the suit erroneously proceeded on 20<sup>th</sup> April, 2018. For the said reasons she prays that the application be allowed.

The Claimant/Respondent did not file any submission despite being granted leave to do so.

### **Determination**

From the Respondent/Applicant's application, affidavit in support and the Claimant/Respondent's replying affidavit it is not in dispute that on the date in question 20<sup>th</sup> April, 2018 the matter proceeded exparte. A perusal of the record reveals the Deputy Registrar had indeed on 20<sup>th</sup> March 2018, fixed the matter for mention before a Judge on 20<sup>th</sup> April 2018 and that the court was misled by the cause list where the matter was listed as a hearing. Had this been brought to the attention of the court the hearing would not have proceeded ex parte. It would therefore be in the interest of justice to allow the orders sought.

In the Supreme Court case of *Koinange Investments & Development Ltd v Robert Nelson Ngethe [2014] eKLR* it was held:

*“What we meant, in the earlier decision, is that Courts are the wellsprings of justice, the bastion to which recourse in law is sought. Whenever a party seeks to vindicate infringed rights at any tier of Courts in our country, the duty to do justice is always the rule of thumb. This is also a cardinal principle that flows from the Constitution, and which demands that the ends of justice be met when any Court of justice in the Republic of Kenya has been properly seized of a pertinent question...”*

For the foregoing reasons it is in the interest of justice to grant the applicant an opportunity to present its case. The application thus succeeds in part. The case is reopened so that the respondent will have an opportunity to cross examine the claimant and to present her evidence. A hearing date will be given on priority basis.

Costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**