



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NUMBER 604 OF 2017

BETWEEN

MUNYOKI KITHEKA.....CLAIMANT

VERSUS

BRINKS SECURITY SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Osewe & Company Advocates for the Claimant

M. M. Kimuli & Company Advocates for the Respondent

RULING

1. The Claim herein was dismissed for non-attendance by the Parties and their respective Advocates, when the Claim was scheduled for hearing on 10th December 2018.
2. The hearing date was taken in Open Court, by the Advocates for the respective Parties, on 7th March 2018.
3. The Claimant filed an Application dated 18th January 2019, seeking to have the Claim reinstated.
4. The Application is supported by an Affidavit sworn by Ms. Laura Mbithe Mwadime, Advocate for the Claimant, on 18th January 2019.
5. She deposes that the Advocate having conduct of the Claimant's case, fell gravely ill on the hearing date. The said Advocate was unable to attend Court, and to inform the other Advocates in the Law Firm about this inability to attend Court.
6. The Respondent filed Grounds of Opposition on 14th February 2019. Its position is that there is no evidence showing Claimant's Advocate fell sick on the hearing date. The Claimant himself did not attend Court.
7. Parties agreed on 14th February 2019, to have the Application considered and determined on the basis of their Affidavit, Grounds of Opposition and Submissions. They confirmed filing of Submissions on 15th March 2019.

The Court Finds:-

8. The position taken by the Claimant in arguing his Application under consideration, is very unpersuasive.
9. Hearing of the Claim was fixed for 10th December 2018. The date was taken in Open Court by Ms. Osore Advocate for the Claimant, and Mr. Mkomba Advocate, holding brief for Ms. Mutua Advocate for the Respondent.

10. On 10th December 2018, none of the Parties, or their Advocates attended Court.
11. The Court dismissed the Claim for non-attendance. Rule 22(2) of the Employment and Labour Relations Court (Procedure) Rules 2016, mandates the Court, where a Party fails to attend Court on the day fixed for hearing, to dismiss the Claim. If the Court has good reasons not to do so, the reasons must be recorded. The first judicial instinct, under the Rule, should be dismissal of the Claim in the absence of notified Parties.
12. The Claimant explains in the Supporting Affidavit that Claimant's Advocate fell gravely ill on the hearing date, and could not attend Court.
13. This Affidavit is sworn by Ms. Laura Mbithe Mwadime, an Advocate working for the Law Firm of Otieno Asewe & Company.
14. She does not disclose which Advocate fell gravely ill.
15. The nature of the grave illness is not disclosed.
16. There are no medical records showing any Advocate at Otieno Asewe & Company Advocates, fell ill on the hearing date.
17. There is no Affidavit filed by the Advocate alleged to have fallen ill on the hearing date.
18. The Claimant himself has not sworn any Affidavit to indicate where he was, on the hearing date.
19. The Grounds on the face of the Notice of Motion do not entirely agree with the Affidavit of Ms. Mwadime.
20. Ground (b) alleges the Claimant's Advocate was unable to attend Court in time. This suggests late attendance, rather than non-attendance.

IT IS ORDERED:-

a) Claimant's Application filed on 18th January 2019, seeking to have the Claim reinstated is rejected.

b) No order on the costs.

Dated and delivered at Mombasa this 28th day of March 2019.

James Rika

Judge