



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2226 OF 2014

BONIFACE MWANGANGI MWENGA.....CLAIMANT

v

AEGIS (K) LIMITED t/a LEOPRARD BEACH RESORT & SPA.....RESPONDENT

RULING

1. On 31 October 2018, the Claimant's advocate on record appeared before the Principal Judge and caused the Cause to be listed for mention on 7 November 2018.
2. The Claimant was directed to serve an appropriate notice.
3. When the parties appeared before the Deputy Registrar on 7 November 2018, both parties were represented and the Deputy Registrar directed the parties to appear for pre-trial directions on 19 November 2018.
4. The Cause was duly mentioned on 19 November 2018 but the Respondent's advocate on record did not bother to attend Court (no explanation for the absence was tendered).
5. As part of the directions, the Court directed that *Agreed Issues* be filed before 30 November 2018 after which the parties would fix a hearing date in the registry.
6. On 3 December 2018, the Claimant's representative appeared in the registry and had the Cause fixed for hearing on 11 February 2019.
7. According to an affidavit of service filed in Court on 11 February 2019, a hearing notice was served upon the Respondent's advocate on 6 December 2018.
8. Despite acknowledging service, the Respondent's advocate and witnesses did not attend the hearing and the Court being satisfied that service of hearing notice had been effected allowed the hearing to proceed.
9. The Court took the Claimant's evidence and reserved judgment to 22 March 2019.
10. On 15 February 2019, the Respondent filed an application seeking orders
 1. ...
 2. **THAT** these proceedings be and are hereby stayed pending the hearing and outcome of this application.
 3. **THAT** the Honourable Court be pleased to set aside and/or vary the *ex parte* proceedings of 11th February, 2019.
 4. **THAT** in the result, the Court be and is hereby pleased to re-open the Claimant's case for hearing de novo and grant the applicant an opportunity to participate in the trial by defending this suit. 6. **THAT** the costs of the application be in the cause.
11. The Claimant's advocate filed a replying affidavit in opposition to the application on 28 February 2019, and the Court eventually heard arguments on 6 March 2019.
12. The main reasons relied on by the Respondent in support of the application were that its advocate/representative arrived in Court after call over wherein the case had been confirmed for hearing; that the advocates on record had agreed that the parties proceed through the record and submissions to be filed; that the Respondent's advocate was before the Land & Environment Court in Embu and that the

Respondent stood to suffer grave injustice if the orders sought were not granted.

13. In opposing the application, the Claimant asserted that the Respondent was aware of the hearing date but did not attend Court for hearing at the scheduled time; that the Respondent only made an attempt to get an adjournment when the Claimant was on the witness stand ready to start testifying; that the Respondent had not demonstrated through a cause list that he was before another Court; that the Office Assistant who was sent to Court did not file any affidavit as to what happened on the date of the hearing, and that the Respondent's advocate had not shown it had notified his client of the hearing date.

14. The Court has considered the rival assertions by the parties.

15. The Respondent and/or advocate did not produce any evidence that he was before the Court in Embu or that he had notified the Respondent to present witnesses on the day of the hearing, or that the witnesses were in Court.

16. An agreement or accommodation by parties outside the Court should not be a reason or excuse for an advocate not to attend Court. An advocate has a professional obligation to attend Court even during *mentions*.

17. In the view of the Court, the Respondent failed to show sufficient reasons for the setting aside of the proceedings taken in its absence.

18. However, in order to be seen to do substantive justice the Court will allow the application on the following terms

(i) Respondent to pay the Claimant thrown away costs of Kshs 15,000/- within 7 days from today.

(ii) In default of compliance with (i) above, the application will stand dismissed and the Court will proceed to deliver judgment.

(iii) Mention on 29 March 2019 to confirm compliance and for further directions.

Delivered, dated and signed in Nairobi on this 22nd day of March 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kiluva instructed by Kivuva Omuga & Co. Advocates

For Respondent Mr. Wachira instructed by Kipkenda & Co. Advocates

Court Assistant Lindsey