



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.148 OF 2014

KEFA ASIAGO OBWOGO.....CLAIMANT

VERSUS

SEVENTH DAY ADVERTIST CHURCH....1ST RESPONDENT

BENJAMIN RANDA.....2ND RESPONDENT

JACINTA RANDA.....3RD RESPONDENT

RULING

The ruling herein relates to application and Notice of Motion filed by the respondents and dated 18th February, 2019 and seeking for orders that the *ex-parte* proceedings held on 4th December, 2018 be set aside and hearing starts *de-novo* and in the alternative the 2nd and 3rd respondents be allowed to cross-examine the claimant and to call witnesses.

The application is based on the affidavits of the 2nd and 3rd respondents and on the grounds that on the 4th December, 2018 the hearing proceeded undefended despite the advocate on record being absent and if judgement is delivered there shall be great prejudice.

The respondents in the supporting affidavit avers that the respondents have been represented by the law firm of M/S Tumuti & Co Advocates and the matter herein was scheduled for hearing on 4th December, 2018 but the advocate of record did not attend without any good reason. The defence hearing was scheduled for 20th February, 2019 without the respondents being given a chance to cross-examine the claimant. The mistake committed was that of the advocate and if hearing is concluded without the defence great prejudice shall occur to the respondents.

The claimant in reply filed his Replying Affidavit and avers that on 4th December, 2018 when the matter came up in court for hearing Akang'o Advocate held brief for Tumuti Advocate for the respondents who was said to be travelling from Murang'a. At Noon the matter was called and the 2nd respondent stood and indicated to the court that he had spoken to his advocate and that he was on the way to court. The matter was placed for hearing at 2pm.

At 3pm the matter was called again but the respondents' advocate was absent. The 2nd and 3rd respondents' remained in court when the claimant was heard and closed his case. The 2nd respondent pleaded to be allowed time to urge the defence and defence hearing was adjourned for this purpose for 20th February, 2019. On the due date the respondents' served Notice of Change of Advocates and who applied for adjournment to prepare the defence hearing. Despite proper service the respondents have not stated why there was no attendance by their advocates and the application now made is meant to delay justice and frustrate the claimant. Hearing should close and judgement delivered.

The parties made oral submissions.

On 4th December, 2018 both parties were represented in court at 9am with Akang'o advocate holding brief for the respondents' advocate. Hearing was scheduled for 2pm. At the due hour the respondents' advocate was absent but the two respondents, 2nd and 3rd remained in court when the claimant was heard on his case closed. The 2nd respondent requested for a new hearing date which was allocated for 20th February, 2019 but a day before filed application seeking as above and which then frustrated the scheduled hearing as the claimant was only served on the morning of the hearing.

The court allowed adjourned on 20th February, 2019 to allow the claimant to reply to the application.

The respondents have not given any reason(s) why the advocate failed to attend court on 4th December, 2018 when the claimant was heard and closed his case. Despite the change of advocates, no reason is given in whatever nature by the respondents as to why there was no attendance in court when the claimant closed his case save to state that the advocate had no excuse for non-attendance.

Consequently, there is no excuse why the court should have the claimant recalled in his evidence as he has since closed his case.

From the record this is a 2014 matter, the hearing has been scheduled severally where the respondents and their advocate were absent without any good reasons. In this instant, service was effected procedurally and the two respondents were in court and heard the evidence by the claimant but opted to wait for their advocate. Without any reasonable grounds being advanced as to the absence, the claimant's case shall not be opened as this has since closed on good basis.

The respondents still retain a chance to urge their defence which has since been adjourned subject to payment of costs to the claimant. Upon abiding such condition and payment of due costs plus costs due to the claimant for proceedings herein, the respondents shall have a fair chance to be heard as otherwise the court finds no good and or sufficient grounds for the application made and dated 18th February, 2019. The application is a delay to the case and shall be dismissed with costs.

Accordingly and as set out above, application dated 18th February, 2019 is hereby dismissed with costs to the claimant. As the defence hearing was adjourned, a date shall be allocated in court.

Delivered in open court at Nakuru this 29th day of April, 2019.

M.MBARU

JUDGE

In the presence of:

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