



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**  
**CAUSE NO 221 OF 2017**

**RAHAB NJERI KAGUTHI .....CLAIMANT**

**VERSUS**

**MEAS AGRICULTURAL CENTRE LIMITED..... RESPONDENT**

**RULING**

The respondent, Meas Agricultural Centre Limited by application and Notice of Motion dated 25<sup>th</sup> February, 2019 is seeking for orders that the judgement delivered herein on 14<sup>th</sup> February, 2019 be set aside together with all other related orders issued to allow for the hearing to star de-novo.

The application is made on the grounds that the non-attendance in court on 30<sup>th</sup> January, 2019 was not intentional and there is a good defence which should be heard. The advocate instructed to hold brief for the respondent arrived late and found the matter had concluded.

The respondent should not be condemned unheard for mistake of his advocate. The mistake related to an oversight from the advocate.

In the affidavit of Jane Wambui Ndung'u advocate for the respondent she avers that the matter came up for hearing on 30<sup>th</sup> January, 2019 but could not attend due to being indisposed. The resulting judgement and proceedings ex-parte should be set aside and hearing commence de-novo as the advocate instructed to hold brief only arrived in court late and found the matter had concluded. The non-attendance was not intentional, there is a good defence and the respondent should not be condemned unheard. The mistake which arose was due to human error on the part of the advocate and should not be visited on the client.

The claimant filed Replying Affidavit sworn by Lucy Nekesa Cheloti advocate for the claimant and who avers that the application is in abuse of court process as the matter was set for hearing on 30<sup>th</sup> January, 2019 and it was the professional obligation on the respondent's advocate to communicate to the client. The averments that there was an advocate who was sent to hold brief are not supported by affidavit to confirm the same. The alleged indisposition and that advocate was sent to hold brief are matters only stated to circumvent justice.

Ms Cheloti also states that the application seeking to commence hearing *de novo* on a matter heard and conducted on its merits shall cause immense prejudice to the claimant who travelled to court on several occasions to have her matter heard and concluded. No effort was taken by the respondent to have the defence heard before judgement was delivered.

On 17<sup>th</sup> December, 2017 the respondent was invited to attend court for taking hearing directions but failed to attend. A hearing date was allocated and service effected on 23<sup>rd</sup> January, 2019 for the 30<sup>th</sup> of January, 2019.

On the due date the respondent was absent and the claimant was heard on her case and hearing closed. Judgement was reserved and delivered on 14<sup>th</sup> February, 2019.

Two issues arise for the non-attendance of the respondent at the hearing on 30<sup>th</sup> January, 2019. First the application is that the respondent's advocate was indisposed. However there is no evidence of any nature in this regard.

Secondly, the application is that there was an advocate sent to hold brief but found the hearing concluded.

Where indeed the respondent's advocate sent counsel to hold brief and found the matter had proceeded ex parte on 30<sup>th</sup> January, 2019 nothing was done to address such lapse until judgement was delivered on 14<sup>th</sup> February, 2019. the application now being urged was filed after the fact of the judgement on 25<sup>th</sup> February, 2019.

It is not just sufficient for an advocate to state that she was indisposed and this passes as truth without effort to support such allegations. It is

equally not sufficient that an advocate was sent to hold brief and found the matter had concluded. The supporting evidence is most crucial in a matter which proceeded for hearing on good cause and after the court was satisfied that the respondent had been made aware of the hearing and failed to attend court.

The advocate sent to hold brief and found the matter concluded is unknown. No affidavit is attached in this regard.

The respondent has relied on the case of Geraldine Musabi Oriedo versus Rose Masaku t/a Ojay Hostels Cause No.309 of 2013 but the facts leading to the judgement being set aside are completely different from herein. In the cited case the clerk who received the hearing notice ailed to file it or diarise the matter and the advocate had been faithfully attending to the matter until clerk failed to file and diarise the matter.

In the case of **Richard Ncharpi versus IEBC & others Civil Appeal No.18 of 2013** the Court of Appeal has outlined the reasons leading to the dismissal of the petition by the High Court and the fact that the there were two issues in issue, a notice of Motion and the Petition and had the Notice of Motion been heard and dismissed, the Petition should not have been dismissed.

In this case, there is no effort whatsoever to give the court any material with regard to the alleged indisposition of counsel or the advocate sent to hold brief on the material date of the hearing. Citation of the case above put into account, the applicants therein went to great lengths to address the reasons causing their non-attendance which is not the case herein.

The claimant filed suit herein to urge her case and did everything required of her to have the matter heard. She too has a right to a hearing and to receive justice.

In **Zubheir Abdalla versus Yussuf Juma [2018]eKLR** the court dismissed the suit due to the non-attendance of advocate and when invited to set aside the order dismissing the suit held as follows;

*The other interesting aspect is what the appellant and his advocate deponed as to what happened on that day. They state that Mr. Kiogora went to attend to a matter before Gikonyo J. He has not disclosed what case, if any, he was attending to before the good judge nor has he produced the Cause List of Gikonyo J for that day to buttress his assertions. The least he was expected to do was; to state the case he had before Gikonyo J, annex a copy of his or the firm's diary for the day as well as the Cause List for Gikonyo J for that day. This he failed to do and his allegations remain just that, mere allegations that are not supported by any evidence. [underline added]*

It behoves on a party alleging any matter to prove. Mere allegations cannot sway justice as they remain such. Mere allegations, good and plausible reasons should be given for the court to find basis to set aside judgement is has procedurally been delivered.

In this case, Due process was applied to have the matter heard and concluded. The court finds no good reason or grounds to commence the hearing *de novo* or to set aside the judgement delivered on 14<sup>th</sup> February, 2019. No good cause has been shown by the respondent as to why such drastic action on a matter since concluded should be taken after failing to attend court on a date they were aware of. there is no justification for the same.

**Accordingly, application dated 25<sup>th</sup> February, 2019 is hereby dismissed. Costs to the claimant.**

**Delivered at Nakuru this 25<sup>th</sup> day of April, 2019.**

**M. MBARU JUDGE**

In the presence of: .....