



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 55 OF 2017**

**JECINTA WAITHIEGENI WAMBUGU.....CLAIMANT**

**VERSUS**

**EVEREST ENTERPRISES LIMITED.....RESPONDENT**

**RULING**

1. As the motion seeks to reverse the cause of the proceedings the Respondent/Applicant in essence seeks the exercise of discretion of this Court. Mr. Alekeen for the Respondent/Applicant points out that Counsel wished to proceed at 11.00 am and the said Counsel therefore proceeded on the premise that Court would indulge them and allow hearing at 11.00am. Unfortunately for him, he asserts, he came to Court at 10.19am and found matter had been scheduled for hearing at 10.00am and was heard and the Claimant's case closed. He argues that the Counsel who held brief Mr. Gisemba correctly sought time allocation as the Respondent/Applicant had desired but this was not granted. He thus urges Court to allow a reopening of the case and a cross-examination of the Claimant and the evidence of the Respondent's witness be taken as well.

2. Mr. Kiget for the Claimant/Respondent points out that he did not file a Response to the application or grounds in opposition. He asserts that the proceedings had closed and matter was sent for Judgment and that it is upon Court to exercise discretion to re-open if there are grounds for this. He asserts that the Respondent/Applicant should pay costs if the case is re-opened as they were the one who did not come to Court on the allocated time. He points out affidavit is erroneous as Patrick Maina is said to be deponent and not Counsel before Court.

3. Mr. Alekeen in a brief rejoinder asserts that the Respondent/Applicant had an administrative lapse and incorrectly indicated Patrick Maina instead of Benson Alekeen the Advocate who swore the affidavit. He prays that Court pardons the error and allows the motion as prayed. On costs he states the Court should condense them to 5,000/- as the Respondent/Applicant had indulged the Claimant/Respondent previously and therefore the sum would suffice as costs. He urged the Court to grant the motion.

4. The Applicant seeks reprieve for not participating in the trial. The Respondent had sought time allocation for 11.00am but Court did not accede to the request and heard the Claimant at 10.00am. The short answer to this conundrum is that the Court is required to commence sittings at 9.00am and at the time set for commencement, this Court faithfully sat and settled the cause list assigning matters time allocation and giving the rest of the cases direction as well as delivering a determination made in one case. The Respondent/Applicant cannot therefore expect that a time proposed for hearing will automatically be granted by the Court. In this case the hearing was scheduled for 10.00am and proceeded. As the discretion is sought so as to avoid visiting consequences on an innocent party for mistake, inadvertence or excusable error, the Court will exercise discretion and pardon the mistake of Counsel in assumption that 11.00am would be allocated. It is clear the mistake was not an attempt to deliberately delay the cause of justice and therefore court will grant application on the terms that Counsel pays Kshs. 10,000/- as thrown away costs to the Claimant as well as Court adjournment fees of Kshs. 5,000/- to be paid within 7 days in default of which the matter will proceed to Judgment. Hearing will be on a date to be set after this Ruling.

It so ordered.

**Dated and delivered at Nyeri this 28<sup>th</sup> day of May 2019**

**Nzioki wa Makau**

**JUDGE**