

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 441 OF 2017

DOUGLAS MAINA KAMAU.....CLAIMANT/ RESPONDENT

VERSUS

KIBIRIGWI FARMERS

CO-OPERATIVE SOCIETY LIMITED....RESPONDENT/APPLICANT

RULING

1. The application before me is the Respondent/Applicant's notice of motion application dated 18th March 2019 seeking to reopen the Claimant's case due to inadvertence of the Respondent's counsel to attend court on the date scheduled for hearing which was on 11th March 2019 and on the subsequent date the matter was heard which was on 12th March 2019. The motion is premised on the grounds on the face of the motion and the affidavit of K. M. Maina, an advocate.

2. The application is opposed by the Claimant who deposes in his replying affidavit that he was to be heard on 11th March 2019 and because the matter was not reached on that day it was rescheduled for the next day and at the time neither the Respondent nor the advocate were present in court. He asserts that the Respondent is undeserving of the exercise of discretion of the court and that the court should proceed to prepare judgment as the case for the Respondent had been closed on the 12th March 2019.

3. The case was scheduled for hearing on 11th March 2019 but could not be reached and in absence of counsel for the Respondent, the case was fixed for hearing the next day. The absence of counsel for the Respondent is explained to have been on account of a hearing of an appeal No. 132 of 2017. The case he refers to, Civil Appeal No. 132 of 2017 was to be heard at Nyeri though it emanated from the Nakuru Registry. Upon enquiry by this court about the said appeal at the Court of Appeal Registry at Nyeri, it was confirmed that the matter was taken out of the hearing list on 11th March 2019 meaning that the appeal did not proceed. The advocate was therefore less than candid in asserting that he failed to attend court before of a matter that was proceeding before the Court of Appeal.

4. In setting aside, a court has to consider various principles which are all geared to ensuring that in the exercise of the said discretion there is a free exercise of discretion that is neither capricious or arbitrary. First, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties. Secondly, this discretion to be exercised by the judge is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Counsel for the Respondent clearly is deliberately by evasion or otherwise seeking to obstruct the course of justice or delay the matter. If he was in the court precincts on that day, it was a deliberate effort to delay the case if he did not appear. He does not assert he was unwell or otherwise indisposed to an extent he could not attend court. His client the Respondent did not avail any representative or witness further demonstrating there was no intention to participate in the hearing scheduled for 11th March 2019. As there is no basis to reopen the Claimant's case, the matter will proceed to final submissions pending judgment. Application is dismissed with costs to the Claimant. The court will give further directions on the closing stages for the matter on the issue of submissions and a judgment date upon delivery of this ruling.

It is so ordered.

Dated and delivered at Nyeri this 24th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar