



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 1784 OF 2014

CATHERINE AWUOR OTIENO.....1st CLAIMANT

MUNYIVA NDAVI.....2nd CLAIMANT

BETTY ANGAIA KIDAHA.....3rd CLAIMANT

VERSUS

VAJAS MANUFACTURERS LIMITED.....RESPONDENT

RULING

1. This Cause proceeded to hearing on 13 March 2019 in the absence of the Respondent and its advocates. The Respondent was represented in Court on 21 January 2019 when the Deputy Registrar fixed the hearing date.
2. All the 3 Claimants testified and after the close of hearing, the Court deemed the Respondent's case closed and directed the Claimants to file submissions before 15 March 2019 ahead of judgment on 19 March 2019.
3. On 15 March 2019 the Respondent moved the Court under certificate of urgency seeking orders
 - (a) ...
 - (b)
 - (c) **THAT** this Honourable Court be pleased to set aside the orders directing that the hearing proceeds ex parte, that the delivery of judgment be made on 19/03/2019 and all other consequential orders made or issued in default of attendance by the Respondent/Applicant and its advocate on record.
 - (d) **THAT** the Honourable Court be pleased to grant leave to the firm of Simiyu and Partners Advocates who are on record for the Respondent/Applicant to cross examine the Claimants and to proceed with the hearing of the Respondent's witnesses.
 - (e) **THAT** this Honourable Court be pleased to issue an order granting the Respondent/Applicant leave to participate in a full hearing by calling witnesses in support of the defence.
 - (f) **THAT** this Honourable Court be pleased to make such further and or other orders as it may deem just, fair, reasonable and appropriate in the circumstances in order for the ends of justice to be met.
 - (g) **THAT** the costs of this application be in the cause.
4. On 18 March 2019, the Court directed the Claimants to file/serve a response to the application on or before 22 March 2019, and fixed *inter partes* hearing for 26 March 2019.
5. The Claimants did not comply with the order. Nevertheless, the Court took brief oral submissions on 26 March 2019.
6. The grounds advanced by the Respondent in support of the application were that failure to attend the hearing was due to misdiarisation of the hearing date; that it had a very good defence; that the application was brought without inordinate delay; that the Claimants would not be

prejudiced if the orders sought were allowed and that the interests of justice and fairness tilted towards allowing the application.

7. The Respondent urged that the Court should not visit a mistake of its advocates upon it.

8. The facts as presented by the Respondent remained unchallenged as the Claimants did not file any affidavit in reply thereto.

9. The question however begs whether the unchallenged facts demonstrate *sufficient cause* to warrant the Court to exercise its discretion in favour of the Respondent.

10. The main reason advanced by the Respondent was a *misdiarisation* wherein it was asserted that the advocate who appeared before the Deputy Registrar diarised the hearing as 14 March 2019 instead of 13 March 2019.

11. It was also stated that the advocate attended Court on 14 March 2019, the date entered in the diary as the hearing date and was informed by the registry staff that hearing had proceeded the previous day.

12. Although contending that the advocate attended Court on 14 March 2019, there was no disclosure as to whether the Respondent had come prepared for hearing on that date.

13. The Court was not informed whether the Respondent's 2 witnesses named in paragraph 2 of the supporting affidavit Christopher Ndambuki and Moses Onyango had also attended on the *misdiarised* date, ready to testify.

14. Equally, there was no averment that the advocate on record had notified the Respondent and/or the witnesses of the *misdiarised* hearing ahead of the hearing. Not even the mode of informing them was revealed.

15. It is the duty of an advocate to notify his client of the progress of a dispute and scheduled hearing is part of the process.

16. *Misdiarisation* is one of the most common grounds advanced by advocates seeking the setting aside of *ex parte* proceedings in this Court.

17. In the view of this Court, *misdiarisation* alone cannot be sufficient to set aside *ex parte* hearing.

18. An advocate asserting *misdiarisation* of a hearing date should disclose whether the advocate advised the client of the *hearing date*, when the client was notified and how, and whether the advocate was ready for the hearing.

19. In short, frank and candid disclosure is necessary to demonstrate that save for the *misdiarisation*, the advocate had taken prior steps to prepare for the *hearing*, and would have been ready to proceed with the hearing. If witnesses had been informed, an affidavit from the witnesses could fortify the *candidness* of the assertion. *Misdiarisation* cannot be an automatic or standalone ground to set aside *ex parte* proceedings.

20. In the circumstances herein, this Court is not satisfied the Respondent has shown sufficient reasons to set aside the proceedings of 13 March 2019.

21. The application is dismissed with costs.

Delivered, dated and signed in Nairobi on this 5th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimants Musyoka Muigai & Co. Advocates

For Respondent Wekesa & Simiyu Advocates

Court Assistant Lindsey