



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 34 OF 2018

LUCY WANJIRU NYAGA.....PETITIONER

VERSUS

BATIMENT GROUP LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th October, 2019)

RULING

The Court delivered the judgment on 14.06.2019 and ordered:

- a. It is declared that the respondent discriminated against the petitioner on account of the petitioner's pregnancy.
- b. It is declared that the termination of the petitioner's contract was unfair.
- c. The respondent shall pay the petitioner damages for pregnancy discrimination at Kshs.1, 250, 000.00; notice at Kshs.30, 000.00; salary arrears at Kshs.30, 000.00; pro-rata leave at Kshs.20, 898.00; an equivalent of 2 months' salary in compensation for unfair termination Kshs.60, 000.00 – total Kshs.1, 390, 898.00.
- d. Certificate of service.
- e. Costs to the petitioner.
- f. Interest allowed at 14% per annum from the date of judgment till payment is made in full.

The respondent has filed an application for review on 10.07.2019 through S.Ndege & Company Advocates. It is by notice of motion under rule 32(1) (a), (c), & € (2), (3), (4), (5), (6) and (7) of the Industrial Court Procedure Rules, Order 22 rule 22 of the Civil Procedure Rules and all enabling provisions of law. The substantive prayer is for the Honourable Court to be pleased to set aside its exparte judgment delivered on 03.06.2019 and all consequential orders; and costs of the application be provided for.

The application is supported by the affidavit of Alex Monari, the respondent's Director and upon the following grounds:

- a. Counsel for the respondent inadvertently failed to file a response to the petition.
- b. The mistake by Counsel should not be visited upon the respondent.
- c. The respondent has a good defence to the petition that raises serious triable issues.
- d. The judgment is due for execution.
- e. The application was filed expeditiously after learning about the judgment.
- f. The application be granted in the interest of justice.

The supporting affidavit states that the respondent appointed Tito & Company Advocates to act in the case and the appearance was filed on

31.05.2018. The advocates failed to file a response to petition. The hearing notice was served on 03.04.2019 and counsel for the respondent failed to attend and hearing was ex parte. The information given to respondent is that Daniel Mwesigwa of Tito & Company Advocates who was assigned the file failed to file and serve the response to petition.

The petitioner has opposed the application by filing her replying affidavit on 15.07.2019 through Omongo Onenga & Company Advocates. It is urged as follows:

- a. The judgment has not been exhibited and parts to be reviewed have not been highlighted at all.
- b. The petition was filed on 30.04.2018. The petition was served and the respondent appointed Tito & Company Advocates to act in the matter. All processes in the case were dully served. On 19.07.2018 the petitioner's counsel wrote to Tito & Company Advocates to serve a response in time and Tito & Company Advocates replied by the letter dated 03.08.2018 that the letter of 19.07.2018 had been forwarded to the respondent and they would revert in a timely manner as soon as the respondent reverted.
- c. The case proceeded ex parte and judgment was delivered on 14.06.2019 and the petitioner's counsel wrote to Tito & Company Advocates on 14.06.2019 notifying delivery of judgment and on without prejudice basis proposing costs at Kshs.300, 000.00. Costs were due for taxation on 23.07.2019 and consent between Tito & Company Advocates and S.Ndege & Company Advocates was filed on 10.07.2019 allowing the latter to come on record for the respondent. The application was filed the same 10.07.2019.

The parties have filed their respective submissions. The Court has considered the parties' respective positions and makes findings as follows:

a. There is no reason to doubt that the letter by Tito & Company Advocates dated 03.08.2018 and copied to the respondent to ensure timely response to the petition was indeed delivered to the respondent as copied and despite the letter, the respondent did not file or provide instructions for filing a response. It is curious that the respondent (applicant) wishes to visit blame on the advocate in circumstances whereby the advocate appears to have acted professionally. Thus, the alleged case by the respondent that it was an inadvertent mistake by Tito & Company advocates that the response was not filed will collapse. As submitted for the petitioner, it was a case in which the respondent failed to discharge its obligations under section 3 of the Employment and Labour Relations Court, 2011 towards implementing the rules and directives of the Court for efficient, effective, just and proportionate determination of the suit. The Court returns that the applicant is squarely responsible for the failure to file a response to the petition and cannot shift that burden to its former advocates.

b. As submitted for the petitioner the respondent has failed to exhibit the judgment and to show, upon the prescribed grounds, the pronouncements in the judgment that would be liable for review. The possible grounds for review are stated in rule 32 of the Court's former rules and presently in rule 33 of the Court's rules and none of the grounds have been established to exist in the present case. They are: new evidence not available, with due diligence, as at the time of hearing; mistake or error apparent on the face of the record; if judgment requires some clarification; or for any sufficient reason. In terms of obligations of litigants under section 3 of the Employment and Labour Relations Court, 2011, the Court considers that it is not sufficient reason to review a judgment in a petition upon allegations that the respondent has a response in circumstances that the respondent deliberately failed to file the alleged response like in the instant case. The Court finds accordingly. The Court follows the submission for the petitioner that the Court of Appeal in Mugo Muiru Investments Limited –Versus- E.W.B & 2 Others [2017]eKLR (Visram, W. Karanja, G.B.M. Kariuki, Azangalala & Mohamed JJA.) held that a party who is served to attend the hearing of the suit but fails to appear and the suit consequently proceeds in that party's absence cannot be said to have been ex parte hearing in relation to such a party.

In conclusion, the application dated 09.07.2019 and filed for the respondent on 10.07.2019 is hereby dismissed with costs.

Signed, dated and delivered in court at **Nairobi** this **Friday, 25th October, 2019.**

BYRAM ONGAYA

JUDGE