



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

CAUSE NUMBER 160 OF 2018

BETWEEN

EDWARD MWAIVU MLACHA.....CLAIMANT

VERSUS

BOB MORGAN SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Nyakoni Ratemo & Company, Advocates for the Claimant

Sindinyu Njau & Company for the Respondent

RULING

1. The Claim proceeded *ex parte*, the Respondent having failed to file a Statement of Response.
2. Hearing proceeded on formal proof on 4th March 2019. It is noteworthy, that on the hearing date, the Respondent's Advocates sought adjournment on the ground that they had on the date of hearing, filed an Application for leave to cease acting for the Respondent.
3. The Court declined the plea for adjournment, and the Claimant gave evidence closing his case on the same date, 4th March 2019.
4. Judgment was delivered on 20th June 2019, granting the Claimant terminal benefits and compensation for unfair termination, totaling KShs. 388,748. The Claimant was allowed also, the prayers for Certificate of Service, Costs and Interest.
5. The Respondent has through a different Law Firm, filed an Application dated 16th July 2019, seeking among other orders, that: there be a stay of execution of Judgment; the *ex parte* proceedings and Judgment are vacated; and the Respondent is granted leave to file its Statement of Response.
6. The Application is based on the Affidavit of Branch Manager Patrick Ochieng', sworn on 16th July 2019.
7. Ochieng' complains that the Respondent has been locked out of participating in a fair trial. He complains that his previous Advocates were lax. Further, Ochieng' states that the Respondent has a good Response to the Claim, as shown in the exhibited Draft Statement of Response.
8. The Claimant filed a Replying Affidavit sworn by himself, on 6th August 2019. His position is that the Application filed by the Respondent is frivolous, sham and aimed at denying the Claimant the fruits of his Judgment.

The Court Finds:-

9. In light of the Application on record, filed by Respondent's previous Advocates, asking for leave to cease acting for the Respondent, the

Court does not see any ground to deny prayer number 2, of the Notice of Motion filed by the Respondent on 16th July 2019.

10. Consequently, it is ordered that the Law Firm of Njeru & Company is granted leave to cease acting for the Respondent, and the Law Firm of Sindinyu Njau & Company, granted leave to act for the Respondent.

11. The Respondent blames its previous Advocates for laxity. These Advocates stated in their Application for leave to cease acting, that the Respondent stopped giving instructions to its previous Advocates, making it difficult for the Advocates to continue prosecuting the brief. The Affidavit sworn by Mr. Timothy Njeru, an Advocate of the High Court of Kenya, on 2nd March 2019 states that the Respondent had failed to supply the Advocates with details of their Response and instructions on how to proceed with the Response. Mr. Njeru states the Respondent did not reply to his letters, or visit his Chambers to issue instructions.

12. The Respondent, upon instructing the current Law Firm to replace the previous one, has not said anything about the contents of Mr. Njeru's Affidavit on record.

13. There is no refutation of those contents. Ochieng' does not exhibit any instructions note or letter, given to Njeru & Company, to proceed with Respondent's brief. The Respondent and its current Advocates must know there is an Affidavit by Mr. Njeru on record.

14. The position taken by the Claimant, that default in filing of the Statement of Response has not been explained satisfactorily, is well-founded in fact, particularly taking into account the contents of Mr. Njeru's Affidavit on record.

15. The Court does not have ground to warrant revisiting, or interference in any manner, with the *ex parte* Judgment on record.

16. Relying on *Nairobi Court of Appeal Civil Application No. 243 of 2016, Joseph Mutio Kinyambo V. Philomena Karai Mulu*, the Court concludes:-

“I think time has come, when a litigant seeks exercise of Court's discretion, while blaming the mistake of Counsel, very high standard should be placed on the litigant to demonstrate that he was not the cause of the mistake, by demonstrating with clear documentary evidence, what efforts he put to follow his own Appeal (read Cause).”

IT IS ORDERED:-

a. The Law Firm of Njeru & Company is discharged from the proceedings, and the Law Firm of Sindinyu Njau & Company granted leave to act for the Respondent.

b. Other orders sought in the application filed by the Respondent on 16th July 2019 are declined.

c. Costs to the Claimant.

Dated and delivered at Mombasa this 24th day of October 2019.

James Rika

Judge