



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 203 OF 2017

BETWEEN

DOMINIC MUTISYA SAMMY.....CLAIMANT

VERSUS

TAHIR SHEIKH SAID TRANSPORTERS LTD.....RESPONDENT

*Rika J.*

*Court Assistant: Benjamin Kombe*

*Oyugi Kitoo & Company Advocates for the Claimant*

*Muturi Gakuo & Kibara Advocates for the Respondent*

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**RULING**

1. The Claimant filed his Statement of Claim on 14<sup>th</sup> March 2017. He prays for terminal benefits and compensation for unfair termination against the Respondent, his former Employer, calculated at Kshs. 876,666.
2. The Respondent failed to file its Statement of Response, despite being granted extension of time by the Court on various occasions to comply. The record indicates the Respondent was granted 'last opportunity' and 'the very last opportunity' to file Response.
3. The dispute was scheduled for mention on 2<sup>nd</sup> October 2017. It was to be confirmed whether the Respondent had filed Response. The Court would set the matter down for formal proof, in the absence of a Statement of Response.
4. Unfortunately, neither Party attended Court on 2<sup>nd</sup> October 2017. The Claim was dismissed for non-attendance, with no order on the costs.
5. The Claimant filed an Application on 6<sup>th</sup> November 2017, asking the Court to reinstate his Claim.
6. The Application is supported by an Affidavit sworn by Claimant's Learned Counsel Ms. Mary Kitoo, on 2<sup>nd</sup> November 2017.
7. She explains she entered the wrong date in her diary, when the matter was last mentioned prior to its dismissal on 22<sup>nd</sup> September 2017. Instead of 2<sup>nd</sup> October 2017, she noted mention would be on 2<sup>nd</sup> November 2017. She realized this error on 2<sup>nd</sup> November 2017, when on attending Court, she found out the matter was mentioned and dismissed on 2<sup>nd</sup> October 2017. She has exhibited an extract of her official diary, showing the wrong entry.
8. The Respondent is opposed to the Application. Its Grounds of Opposition were filed on 13<sup>th</sup> December 2017. The Application is a gross abuse of the Court Process. The Claimant was indolent. Litigation must come to an end. The Claimant was not vigilant in prosecution of his case. The Court should not exercise its discretion in his favour.

**The Court Finds**

9. The Claimant's Counsel has demonstrated failure to attend Court on 2<sup>nd</sup> October 2017 was through inadvertence in recording of date, in Counsel's diary. The date entered was 2<sup>nd</sup> November 2017, instead of 2<sup>nd</sup> October 2017. An extract of Counsel's diary adequately shows there was an error in recoding of mention date.

10. The Respondent appears not to have filed any Statement of Response, as of 2<sup>nd</sup> October 2017. It is ingenious of the Respondent to submit that litigation must come to an end, while the Respondent has filed nothing in Response to the Claim.

11. The Claimant has adequately explained his absence on 2<sup>nd</sup> October 2017. The record shows him to be keen on prosecuting the Claim. He had prior to 2<sup>nd</sup> October 2017, attended Court, when required to do so, without fail. He filed his Application to reinstate the Claim, on the very day he realized there was an error in diarizing mention date.

IT IS ORDERED:-

***a. Claimant's Application dated 2<sup>nd</sup> November 2017 is allowed.***

***b. The Respondent shall file and serve its Statement of Response, Witness Statements and necessary Documents, within 14 days of this Ruling.***

***c. In default the Claimant to set down the Claim for formal proof.***

***d. Costs in the cause.***

**Dated and delivered at Mombasa this 20<sup>th</sup> day of March 2018.**

**James Rika**

**Judge**