



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 141 OF 2017

GODWIN SUNDAY ODHIAMBO.....CLAIMANT

VS

FRANCIS MULINGE MUNYAO

T/A CLUB WHISPERING.....RESPONDENT

RULING

1. By Notice of Motion brought under Certificate of urgency dated 4th April 2018, the Respondent seeks the following orders:

- a) Setting aside of the proceedings conducted on 7th March 2018 and all other consequential orders;
- b) Re-opening of the suit for purposes of further hearing and cross examination.

2. The application is supported by the Respondent's affidavit and is based on the following grounds:

- a) That the Respondent's Counsel made an application for adjournment on the basis that the Respondent was attending burial of his close relative, the late Alphonse Kiilu Soo;
- b) That the application for adjournment was disallowed and the matter marked as closed;
- c) That there is proof from the Respondent's affidavit that he was indeed attending the burial of his close relative and therefore the application for adjournment ought to have been allowed;
- d) That it is in the interest of justice that the Respondent be allowed to testify and be cross examined on his evidence;
- e) That the Claimant stands to suffer no prejudice if the application is allowed but the Respondent stands to suffer great injustice if he is not allowed to challenge the evidence of the Claimant.

3. The Claimant's response is contained in a replying affidavit sworn by his Advocate, Philip Muganda Mabele on 27th April 2018. Counsel states that the Respondent is the author of his own misfortune. He points out that on 27th September 2017, the Court had, with the Claimant's consent, set aside proceedings in which the Claimant had testified and the matter closed to allow for filing of final submissions.

4. The Respondent was thereby directed by the Court to file his Response within 21 days which were to end on 21st October 2017. When the matter came up for mention on 23rd November 2017, the Respondent had not filed any documents. No explanation was given for the lapse.

5. Counsel depones that the Respondent's application is premised on a lie as the grounds on the face of the application are to the effect that the Respondent's Counsel sought an adjournment on the basis that her client was attending a burial, when in fact no such information was given to the Court.

6. The discretion of the Court to set aside proceedings is intended to avert an injustice or hardship resulting from an inadvertent or excusable mistake. It should by no means be used to delay or obstruct the cause of justice (see *Mbogo & another v Shah [1968] EA 93*).

7. A perusal of the court record reveals that this matter was first heard by way of formal proof, by my brother **Makau J** on 13th July 2017. The *ex parte* proceedings were subsequently set aside by consent of the parties on 27th September 2017 and the Respondent given time to file his reply to the Claim.

8. The matter came up for mention on 23rd November 2017 by which time the Respondent had not filed any response and the Court fixed the matter for formal proof on 7th March 2018. The Respondent filed a Memorandum of Reply on this very day, which the Court, with the consent of the Claimant, admitted.

9. The Respondent did not file any supporting documents or witness statement and did not attend the hearing. His Counsel told the Court that he had traveled and she could not reach him.

10. By his application, the Respondent is asking the Court to set aside proceedings one more time. Given the chronology of events which I have set out above, this is a clear abuse of the court process. Not only did the Respondent severally fail to comply with the clear directions of the Court, he also failed to keep his Advocate informed of his whereabouts. In any event his application is premised on falsehoods because at no time did his Advocate inform the Court that he was attending a burial. All she said was that her client had travelled and she could not reach him.

11. In the circumstances, there is nothing in this application to move the Court to exercise its discretion in the Respondent's favour.

12. The Respondent's application dated 4th April 2018 is therefore dismissed with costs to the Claimant.

13. The Respondent is directed to file his final submissions on the main claim within the next fourteen (14) days from the date hereof.

14. These are the orders of the Court.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MAY 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Muganda for the Claimant

Miss Omboga h/b Miss Abuodha for the Respondent