



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1105 OF 2015

(Consolidated with 1104 of 2015)

(Before Hon. Justice Hellen S. Wasilwa on 5th June, 2018)

SAMMY MBUVI MUTHANGA &

MICHAEL IRERI NDWIGA.....CLAIMANTS

VERSUS

SOKO SWEETY LIMITED.....RESPONDENT

RULING

1. The Application before Court is dated 9.2.2018. This application is filed by the Respondent/Applicant herein who seeks orders that this Court be pleased to set aside the proceedings of 17th January 2018 and all consequential orders and decrees so that the suit is set down for hearing on priority basis.
2. The Application is premised on the grounds that in July 2017, the Respondent's Advocates were served with a hearing notice notifying them that this case will be heard on 17.1.2018. That however due to some inadvertence on the Respondent's Advocates, the said date was not diarized or filed in the correct file. In the circumstances when the matter came up for hearing, the Respondents and their advocates never attended Court.
3. The Respondent's advocates were served with submissions on 27th January 2018. That is when it became apparent that the case had proceeded exparte. The Respondents perused the cause list and found that the case was indeed heard on 17.1.2018 in their absence and the Court was scheduled to deliver its final judgement on 20.3.2018.
4. The Respondents aver that it was due to the inadvertent mistake and subsequent failure to attend Court pm 17.1.2018 that the matter proceeded exparte and they did not have a chance to present their evidence or challenge the veracity of the Claimants' testimony in cross examination.
5. The Respondents aver that they stand to suffer irreparable loss and damages and will have been condemned unheard due to a mistake/error that is not of its own making.
6. The Respondents submitted that they are ready to offer such security and comply with any condition imposed by this Court for grant of orders sought. They also submit that it is in the interest of justice that

the orders sought be granted.

7. The Claimants opposed this application. They also submitted that the application is not warranted as the Respondents have been guilty of delaying this matter on previous occasions. They also submit that they will be greatly prejudiced if the orders are granted as they are no longer employed.

8. I have examined the averments of both parties plus their respective submissions.

9. It is true that the Respondents failed to attend Court as expected but relate this to inadvertent mistake or error on their Counsels part.

10. In the case of **Three Ways Shipping Services (Group) Limited vs Mitchel Colts Freighters (K) Limited (2005) eKLR** the Court held that:

“the question of advocates’ mistakes being visited on the client has been raised from time to time. Retired Hon. Lord Denning M.R “In The due process of law”. London Butterworths at page 93 said: “whenever a solicitor by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him as for instance when a solicitor does not issue a writ in time or serve it in time or does not renew it properly...”

11. The above statement notwithstanding it would have been easy for this Court to ascribe the blame on Counsel fully who having been served failed to diarise the same and also not attend Court. However such a mistake should not be visited against an innocent litigant in any case. It is not proper to have a litigant condemned unheard.

12. Bearing in mind that the Respondents are ready to compensate the Claimants for this mistake, I will allow this application and allow the Respondents to cross examine the Claimants and also present their case on condition that they pay Kshs30,000/= as thrown away costs.

13. Costs in the cause.

Dated and delivered in open Court this 5th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kangethe for Claimants- Present

Respondent – Absent