



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**  
**CAUSE NO.264 OF 2015**

**JAMES MACHARIA WAIRIMU.....CLAIMANT**

**VERSUS**

**CATHOLIC DIOCESE OF NAKURU.....RESPONDENT**

**RULING**

The ruling herein relates to application dated 11<sup>th</sup> June, 2018 by the respondent, Catholic Diocese of Nakuru and brought under the provisions of Rule 17(1), 26(2), 28(1)(b) and (g) of the Employment and Labour Relations Court (Procedure) Rules, 2016 seeking for orders that

*This court be pleased to re-open the claimant's case for hearing de novo Costs for this application be met by the claimant*

The application is supported by the affidavit of Fr. Bernard Ngaruiya and on the grounds that the matter was fixed for mention on 14<sup>th</sup> June, 2018 and the respondent had been served with a hearing notice for 15<sup>th</sup> March, 2018 when no hearing took place since the court did not sit. The respondent is seeking to have the claimant reopen his case for examination and the respondent be allowed to prosecute the defence. There will be no substantial loss to the claimant or prejudice where the orders are allowed.

In the affidavit, Fr. Ngaruiya avers that on 5<sup>th</sup> June, 2018 the respondent was served with written submissions noting the claimant had closed his case but the same received under protest as there was no participation of the respondent at the hearing. The hearing had been scheduled for 15<sup>th</sup> March, 2018 but the court was not sitting.

On 18<sup>th</sup> May, 2018 the respondent was served with a mention notice for the 14<sup>th</sup> June, 2018 and the respondent reasonably believed that on such date the claim would be fixed for hearing. Upon perusal of the court file on 5<sup>th</sup> May, 2018 the respondent noted that the case proceeded for hearing in the absence of the respondent and there was no advice on the mention for 14<sup>th</sup> June, 2018.

The claimant filed a Replying Affidavit sworn by George Korongo, Advocate for the claimant and avers that averments made by the respondent in support of their application are fictitious as on 15<sup>th</sup> March, 2018 only one of his matter was for mention, Cause No.428 of 2018 and which did not proceed as court was not sitting and annexures to the respondent's affidavit should be investigated.

The respondent was on 27<sup>th</sup> November, 2017 invited to take hearing dates and failed to attend and a date was fixed and notice served for hearing on 15<sup>th</sup> May, 2018 and there are returns to this effect. The claimant was heard and judgement is due.

There were no submissions and both parties opted to rely on the filed affidavits.

On the record, the court proceeded and heard the claimant on his evidence on 15<sup>th</sup> May, 2018 on the strength of the Affidavit of Service by John Abuom and averments that the respondent was dully served. Mr Abuom stated in the affidavit that on 29<sup>th</sup> November, 2017 he served the respondent's advocates with a hearing Notice and which was accepted and a note made in acknowledgement.

Going back to these records and Affidavit of Service filed on 14<sup>th</sup> May, 2018 I note the Hearing Notice attached thereto related to Hearing Notice for **15<sup>th</sup> March, 2018**. Indeed the respondent's advocates have accepted the notice with an acknowledgement stamp of 29<sup>th</sup> November, 2017.

Indeed on 15<sup>th</sup> March, 2018 the court did not sit.

On the court record, it is noted that on 27<sup>th</sup> November, 2018 a representative of the claimant attended at the registry and where the

respondent was absent, a hearing date was allocated for the 15<sup>th</sup> of May/April, 2018 with such dates of 5/4 being overwritten. A Hearing Notice was to Issue.

On 15<sup>th</sup> May, 2018 when the court proceeded on the strength of the Affidavit of Service by Mr Abuom as noted above, the respondent had no notice as the notice issued was for 15<sup>th</sup> March, 2018 and even where a proper hearing date had been issued, the overwrite on the court record is misleading.

On this strength, the hearing conducted on 15<sup>th</sup> May, 2018 was without the requisite notice to the respondent.

The proceedings of equal date are hereby set aside. The claimant shall be recalled for hearing to start *de novo*. This will give the respondent a fair chance to attend and participate in the proceedings.

**Application dated 11<sup>th</sup> June, 2018 is hereby allowed, save costs shall be in the cause.**

Delivered in open court at Nakuru this 31<sup>st</sup> day of July, 2018.

**M. MBARU JUDGE**

In the presence of:

Court Assistant.....

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