



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.131 OF 2017

[formerly Cause No.552 of 2014 (Nakuru)]

STEPHEN MUSINYA.....CLAIMANT

VERSUS

KEN-KNIT LTD.....RESPONDENT

RULING

1. The ruling herein relates to application and Notice of Motion by the respondent, Ken-Knit Ltd dated 5th June, 2018 and seeking for orders that;

This court do order stay of execution of the court judgement dated 31/5/2018 and the respondent be granted leave to file defence and defend the claim.

Costs of the application be in the cause.

2. The application is supported by the affidavit of George Masese and Gregory Suter Advocates and on the grounds that he claimant filed the claim alleging unfair termination from the employment of the respondent and the respondent entered appearance but failed to file a defence as the matter was transferred to Eldoret, ELRC registry. When the matter came up for mention and directions before the judge at Eldoret, Mr Suter advocate who had been instructed to hold brief for the respondent's advocate, Mr Masese on behalf of FKE failed to communicate the allocated hearing dates to the respondent. when the matter came up for hearing the respondent was not aware of the allocated hearing dates and therefore did not attend to defend the suit and claims made by the claimant.

3. Other grounds in support of the application are that it will serve justice for both parties to be heard on their merits and the orders sought be allowed.

4. In his affidavit, Mr Masese avers that as advocate for the respondent, there is a good defence with triable issues and if allowed such shall be addressed at full hearing. The non-attendance at the hearing arose out a mistake of advocate and failure to be notified of the hearing dates.

5. In his affidavit, Mr Suter avers that he attended court and confirmed the hearing dates but upon leaving court forgot to inform the respondent's advocates of the same and thus they failed to be at the hearing of the claim. Such mistake should not be visited upon the client.

6. In reply the claimant filed his Replying Affidavit and avers that the application by the respondent should be dismissed as it is in abuse of court process. The movement of the file from Nakuru to Eldoret did not stop the respondent from filing defence which was not done at the time the matter came up for hearing directions.

7. The claimant also avers that where the respondent is allowed to file defence and attend at the hearing, half of the judgement amount should be paid to him and the rest deposited in a jot interest earning account of both parties and such will serve as security pending fresh hearing of the claim. Such orders should issue noting both parties attended court on 25th April, 2018 and a hearing date was allocated by consent and the advocate in attendance does not state why he neglected to inform the respondents of the agreed dates.

8. In further reply, Mr Masese avers that the application before our is filed in good faith and there is no need to deposit security as set out by the claimant as the respondent is an established business within Eldoret and where there are orders issued to pay the judgment amount the respondent shall comply.

9. Both parties made their oral arguments in court.

Determination

10. The essence of the respondent’s application is seeking to set aside the judgement delivered herein on 31st May, 2018 and that time be allowed to file defence. The reasons given in support of the application an orders sought are when the matter came up for mention to take hearing dates on 25th April, 2018 the respondent’s advocates sent Mr Suter advocate to hold brief but he failed to inform the respondent of the agreed upon hearing dates. The respondent also avers that there was no defence filed since the file was moved from Nakuru to Eldoret registry.

11. Why did the responding not file any defence herein?

12. The claim herein was filed on 24th October, 2014. The respondent was served on 7th November, 2014 and who entered appearance but no defence was filed.

13. On 11th December, 2014 the matter came up in court for hearing directions but the respondent was absent.

14. On 2nd February, 2015 the matter again came up in court for hearing directions and the court noted that the respondent had been s3rved with notice but was absent. The court proceeded and allocated a hearing date for 3rd December, 2015. The respondent was issued with a hearing notice and again on the due date was absent. There are returns on service. on the due date the matter could not be reached for hearing and a new herring date was allocated for 14th July, 2016.

15. On 8th February, 2017 the court directed that the file be moved to Eldoret, ELRC registry and a notice to issue to the parties. On all the allocated dates at Eldoret the respondent failed to attend until 25th peril, 2018 when Mr Suter attended and informed the court that he was holding brief for Mr Masese advocate for the respondent.

16. On these presentations by Mr Suter, an advocate and officer of the court, I take it all along the respondent was aware of the matters before the court and the movement of the file from Nakuru to the court registry at Eldoret and hence the instructions to hold brief and take hearing dates. Such instructions to proceed and address the court for and on behalf of the respondent’s advocates have not been challenged.

17. Section 3 of the Employment and Labour Relations Court Act, 2011 requires parties before the court and including advocates to attend and participate in the proceedings and to assist the court in meeting its principle objectives and thus to comply with issued directions. Section 3(3) provides that;

(3) The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.

18. In this regard, the respondent upon service of summons on 7th November, 2014 and well aware of the applicable rules of the court at the time and the failure to attend and file defence as required ought to have known of the consequences. The averments by counsel that the file was moved from Nakuru to Eldoret registry and thus could not file the defence I find is not a candid and honest presentation of facts.

19. Such findings dent the respondent’s application as they have come to court with unclean hands. Such compromises the court discretion to allow the application seeking orders of stay of judgement and for the time extension to file defence.

Accordingly, application dated 5th June, 2018 is found without merit. The same is dismissed with costs to the claimant.

On record is also application dated 28th May, 2018 seeking to reopen the case and such application is overtaken by events.

Delivered in open court at Eldoret this 26th day of September, 2018.

M. MBARU JUDGE

In the presence of:

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