



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**Cause No. 168 Of 2015**

*(Before Hon. Justice Mathews N. Nduma)*

**MOSES OMONDI BISERA .....CLAIMANT**

**- VERSUS -**

**CHAIRMAN B. O. G. ST. LINUS GIRLS HIGH SCHOOL ETAGO...RESPONDENT**

**R U L I N G**

1. The suit was filed on 26<sup>th</sup> May, 2015 and was amended on 7<sup>th</sup> October, 2015 and 13<sup>th</sup> March, 2017. Statement of defence was filed on 26<sup>th</sup> January, 2017.
2. Hearing date was set on 10<sup>th</sup> July, 2017 by Maureen Onyango J. for the hearing to proceed on 29<sup>th</sup> January, 2018, more than eight (8) months later. Hearing notice was served on the Advocates for the Respondent Aboki Begi & Co. Advocates on 12<sup>th</sup> July, 2017 by Geoffrey Onderi Nyanga, a court process server and a return of service with the hearing notice attached duly stamped and signed by Aboki Begi & Co. Advocates on 12<sup>th</sup> July, 2017.
3. The Respondent did not appear for the hearing of the suit. The same proceeded ex parte. The Claimant filed written submissions thereafter. The court considered the statement of defence and list of documents filed in determining the matter.
4. Judgment was entered in favour of the Claimant in the sum of Kshs.889,116.85 in respect of retirement and terminal benefits due and owing to the Claimant in respect of 13 years of service, he had rendered to the Respondent.
5. The Respondent filed application under certificate of urgency on 8<sup>th</sup> May 2018, on grounds that on the date of hearing, counsel for the Respondent/Applicant was engaged in Kisii High Court Election Petition No. 3 of 2017.
6. That Respondent/Applicant had instructed another counsel to seek the indulgence of the court but the said counsel did not manage to get to court.
7. The Respondent states that the Respondent is entitled to a fair hearing since failure to attend court was due to circumstances beyond his control.
8. The application is further supported by one Francis Asugo Obuto, the chairman B.O.G of the Respondent, school.
9. The application is opposed by the Claimant/Respondent by a replying affidavit filed on 28<sup>th</sup> June, 2016.

**Determination**

10. The Claimant had waited for several years to have his day in court. The hearing date was granted on 10<sup>th</sup> July, 2017 and promptly served on the Respondent on 12<sup>th</sup> July, 2017. The Respondent did not call or write at all to the advocate for the Claimant to inform them that they would be attending another case at the High Court in Kisii on 29<sup>th</sup> January, 2018 as alleged. The hearing took place more than eight (8) months from the time the date was taken and served on the advocates for the Respondent.
11. The Advocate for the Respondent alleges to have sent an unnamed advocate to hold his brief on the hearing date. None such advocate appeared before court to hold his brief.
12. In his oral submissions before court, counsel for the Respondent Mr. Begi contradicted the grounds set out in the Notice of Motion and

the Supporting Affidavit and told the court that he was unaware of the hearing date even though the hearing notice was received and stamped by his court clerk.

13. Clearly, the Applicant is not candid with the court as to why the Applicant/Respondent failed to appear before court.

14. In **Maina Mugiria Civil Appeal No. 27 of 1982**, the Court of Appeal elucidated the principles governing the exercise of the judicial discretion to set aside an *ex parte* judgment obtained in default of either party to attend hearing as follows-

a. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice see **shah v Mbogo [1967] EA 116 at 123 B. Shabir Din v Ram Parkash Anand (1955)22 EACA 48.**

15. The Applicant/Respondent was clearly not candid with the court and gave two contradictory versions as to why there was no attendance at the hearing of the case. In the notice of motion and supporting affidavit, the applicant stated that counsel was engaged in another court and that he had sent unnamed counsel to hold his brief. In his oral submissions, he changed this version and blamed his court clerk for failure to make him aware of the date. The Advocate had no courtesy of informing the Claimant, if at all, he was engaged in another court. The Claimant had waited for 8 months from the time date was taken to the date of hearing. The court however took into consideration the defence filed by the Respondent in its considered judgment and found that there were no specific responses to the claim for retirement benefits sought by the Claimant.

16. Considering all the circumstances of the case, there is no excusable mistake or error shown by the applicant. Instead the conduct by the applicant is intended to cause delay to the course of justice. Setting aside the judgment would in my view cause grave injustice to the Claimant who has not been paid his retirement and terminal benefits for service rendered for thirteen (13) years to date.

17. Accordingly, the application lacks merit and is dismissed with costs.

**Dated and Signed in Kisumu this 20th day of September, 2018**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Begi Advocate for the Respondent/applicant

Mr. Omwoyo Advocates for the Claimant/Respondent

Chrispo – Court Clerk