



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 216 OF 2015

(Before Hon. Justice Mathews N. Nduma)

PETER OKELLO OKELLO.....CLAIMANT

VERSUS

THE CHAIRMAN BOARD OF GOVERNORS

ST. LUKE'S ODIADO SECONDARY SCHOOL.....1ST RESPONDENT

THE SECRETARY BOARD OF GOVERNORS

ST. LUKE'S ODIADO SECONDARY SCHOOL.....2ND RESPONDENT

R U L I N G

1. The Claim was filed on 1st July, 2015 and a defence was filed on 24th July, 2015. A reply to the defence was filed on 17th August, 2015 by the Claimant.
2. Upon many mentions fixed; hearing dates set and adjournments the matter was set down for hearing again on 28th November, 2016. The Respondent sought adjournment and the court granted same reluctantly for the matter to proceed on 30th March, 2017. Again the respondent sought adjournment and was granted. Matter was set down for hearing on 20th September, 2017.
3. On 20th September, 2017, the Respondent did not turn up for the hearing nor did it pay thrown away costs awarded on two previous occasions.
4. The matter proceeded ex parte and Claimant closed his case. Written submissions were filed by the Claimant and served on the Respondent.
5. This application was filed on 16th October, 2017 by the Respondent seeking to reopen the Claimant's case on grounds that –
 - (i) The Advocate on record has now sufficient instructions to proceed with the claim.
 - (ii) The non-re-opening shall cause great prejudice to the applicant.
 - (iii) The Respondent shall be compensated with costs.
6. The Application is also supported by an affidavit of one Erick Jumba an advocate of the High Court in which he states that the defence filed by the Respondent was a bare denial and the Respondent was granted leave to file a substantive reply to the claim and file list of documents but the Respondent had failed to give the advocate necessary information until 7th September, 2017. That the Advocate then filed an application to stop acting for the Respondent but has now sufficient instructions to file a proper defence and documents.
7. The Application is opposed vide a Replying Affidavit of Mr. Andrew Lugonvu Mshindi Advocate for now deceased claimant stating that the application lacks merit, is on grounds not known in law and is an abuse of the process of the court and it be dismissed with costs.

Determination

8. The application as filed by the Respondent/Applicants lacks any justifiable reason to re-open the case of the deceased Claimant, having failed without any explanation to attend the hearing. No explanation is made in the grounds set out in the Notice of Motion and the supporting affidavit for the failure to attend court on 20th September, 2017 when the matter proceeded ex parte.

9. The Respondent admits that it filed a bare defence with no list of documents, was granted leave severally to amend its defence and file list of documents but had failed to do so up to the time of hearing.

10. No draft defence has been attached to the application. The Respondent has not demonstrated that it has an arguable defence.

11. The case has taken over three years to conclusion and the Claimant died upon hearing and closure of his case. An order to reopen the case would occasion grave injustice to the deceased Claimant and his successors.

12. The court has considered all the facts and the law on setting aside of ex parte judgment laid out in **Shah v. Mbogo** and subsequent authorities following the decision and has concluded that this application is frivolous, vexatious and an abuse of the court process by an able public institution which failed to defend its case.

13. Court cannot sympathize with a party who has failed to file its proper defence and documents more than two (2) years from the date of service and upon being indulged severally by the court. **See Kyalo v Bayusuf Brothers Limited Civil Appeal No. 38 of 1981 [1983] E.A 229.**

14. The application is dismissed with costs.

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

Mathews N. Nduma

Judge

Appearances

Mr. Balongo for Respondent/Applicant

Mr. Mushindi for Claimant

Chrispo – Court Clerk