



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 300 OF 2016

LINUS IKABUTENI.....CLAIMANT

VERSUS

EXCELLENT SECURITY SERVICES LIMITED.....RESPONDENT

RULING

1. This ruling flows from the Respondent's twin applications dated 20th and 24th September 2018, seeking orders of stay of execution and setting aside *ex parte* judgment entered against the Respondent on 10th May 2018. The application, which is supported by the affidavit of Eric Munzyu, Advocate is based on the following grounds:

- a) That the matter came up for hearing on 6th March 2018;
- b) That Counsel for the parties had agreed to take another date as the Claimant had not arrived in Mombasa from Kisii;
- c) That the Respondent's Counsel went to the High Court to handle a Succession Cause;
- d) That the Claimant arrived after Counsel had agreed to take another date;
- e) That the Claimant prevailed upon his Advocate to proceed with the hearing;
- f) That the hearing was therefore conducted in the absence of the Respondent and its Advocate;
- g) That the Claimant has obtained judgment and has initiated execution proceedings against the Respondent;
- h) That the Respondent stands to suffer irreparable loss;
- i) That it is only fair, just and equitable that the prayers sought be granted.

2. The Claimant's response is contained in his replying affidavit sworn on 28th September 2018. He depones that the Respondent was duly served with a hearing notice dated 6th March 2018. The Claimant adds that Counsel for the Respondent has not provided proof that he was indeed held up on the date of the hearing.

3. The Claimant challenges the veracity of the deponement by Counsel for the Respondent that there was an agreement that the matter be adjourned. He points out that the matter had been previously adjourned at the Respondent's instance.

4. The Claimant also takes issue with the time taken by the Respondent to file its application. He states that having been informed of the proceedings on 6th March 2018 by letter dated 9th March 2018, the Respondent should have filed its application expeditiously. The Claimant terms the present application as a move calculated to delay him from enjoying the fruits of his rightfully earned judgment.

5. The Claimant further depones that the Respondent's Advocate was duly served with a mention notice for 10th April 2018 on which date parties were to confirm filing of submissions. Additionally, the Respondent's Advocate was served with a Judgment Notice of 10th May 2018, Bill of Costs dated 18th June 2018, Taxation Notice dated 2nd July 2018 and Ruling Notice dated 19th July 2018.

6. The Claimant goes on to depone that on 28th August 2018, the Respondent and its Advocates were informed of the decretal sum plus costs. The Respondent failed to make good the judgment which necessitated commencement of execution proceedings.

7. The orders sought by the Respondent are discretionary and the purpose of this discretion, which must always be exercised judiciously, is to save a party from injustice or hardship occasioned by an inadvertent or excusable mistake (see *Mbogo & another v Shah [1968] EA 93.*)
8. From the evidence on record, the Respondent had notice of all milestones in this case from the hearing on 6th March 2018, judgment on 10th May 2018 through to ruling on taxation on 16th August 2018. There is obviously inordinate on the part of the Respondent which has not been explained.
9. In the circumstances, the Court finds no reason to exercise its discretion in favour of the Respondent. The applications dated 20th and 24th September 2018 are therefore dismissed with costs to the Claimant. The interim orders granted on 24th September 2018 are vacated.
10. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF NOVEMBER 2018

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JUDGE

Appearance:

Mrs. Kariuki for the Claimant

Mr. Munzyu for the Respondent