



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO. 293 OF 2015

RAPHAEL AKANGO SIKALO.....CLAIMANT

VERSUS

LUCY WANJIRU T/A RED ROSE RESTAURANT.....RESPONDENT

RULING

The claimant by application and Notice of Motion dated 6th September, 2018 is seeking for orders that the court do set aside order given on 18th November, 2016 and issued on 23rd November, 2016 and that the matter go to full hearing. The application is made on the ground that the claim was struck out without affording an opportunity to defend or respond to the application dated 23rd September, 2016. The orders made were prejudicial to the claimant as the orders were made based on oral averments without being substantiation.

Other grounds in support of the application are that the claimant was served with the application by the respondent for hearing on 25th October, 2016 but instead the respondent proceeded with hearing on 6th October, 2016.

The court record indicates that on 8th September, 2016 the court directed the respondent to serve the claimant with a hearing notice and purported notice to preliminary objections for hearing on 6th October, 2016. The scheduled hearing date was therefore overtaken by events as the court on 6th October, 2016 shelved the matter for ruling on 25th October, 2016.

The respondent did not serve the hearing notice and notice of preliminary objections as directed. The respondent filed an affidavit of service indicating it served the application.

The court on 6th October, 2016 did not proceed to hear the preliminary objection as it had earlier directed but heard the application which had been scheduled for the 25th October, 2016. Such hearing was without proper service upon the claimant.

The claimant has filed his affidavit in support of the application.

In reply, the respondent filed Replying Affidavit sworn by Lucy Wairimu and avers that the court on 18th November, 2016 issued orders striking out the claimant's suit. Before such ruling the claimant had been fixed for hearing on 20th July, 2016 but the claimant was not ready for hearing. The respondent brought to the attention of the court that the claim had been settled. The court ordered for an out of court consensus and if none the court would address the preliminary issue on 8th September, 2016. Such directions issued in the presence of the claimant's advocates.

On 8th September, 2016 when the matter came up in court the respondent's advocate was absent. The respondent had however filed Notice of Motion dated 23rd September, 2016 and a hearing date allocated for the 6th October, 2016. The claimant was served with the application.

On the due date the court was satisfied that there was proper service upon the claimant and heard the application ex-parte as the claimant was absent from court. The claimant had also filed a response to the application and ruling was reserved for the 18th October, 2016. Such process cannot be faulted and the orders made were valid and just. The application seeking to set aside the issued orders should be dismissed with costs.

The claimant filed a Supplementary Affidavit and avers that the directions issued on 8th September, 2016 were in the absence of the claimant and thus the court directed the claimant be served with a hearing notice which was not done. The application dated 23rd September, 2016 was filed contrary to the court directions.

Parties filed written submissions.

On 18th November, 2016 the court delivered ruling with regard to application by the respondent filed on 23rd September, 2016 seeking to strike out the suit dated 8th October, 2015. The court considered the merits of the application and allowed it by striking out the suit with costs to the respondent.

These are the orders the claimant is seeking to set aside and allow for the full hearing.

In setting aside an order of the court, the court must be satisfied that the same is deserved and intended to avoid injustice or hardship as held in **Richard Nchapai Leiyangu versus IEBC & 2 Others**, where the Court expressed itself as follows:-

we agree with the noble principles which goes further to establish that the court's discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

However, mere assertions without any material evidence or justification cannot sway the court as held by the **Court of Appeal decision in the case of JOHN WANAINA KAGWE versus HUSSEIN DAIRY LTD – MOMBASA CIVIL APPEAL NO. 215 OF 2010;**

That a mere defence without any evidence to support the positions taken by the defendants is nothing...parties must tender evidence in support of the allegations.

On 8th September, 2016 the court directed the filing of preliminary objections before 16th September, 2016 and the claimant to respond thereto by 30th September, 2016 for hearing on 6th October, 2016. The respondent was to serve the claimant with notice as the claimant was absent in court on this day.

On the due date the claimant was absent. The court relied on the Affidavit of Service filed on 6th October, 2016 sworn by Elizabeth Mukira and attaching notice of motion dated 23rd September, 2015 and acknowledged by the claimant's advocates. Such notice of motion indicated that the application was due for hearing on 25th October, 2016.

The orders of the court on 8th September, 2016 were to the effect that preliminary objections be filed and notice issued to the claimant for scheduled hearing on the 6th October, 2016.

To therefore serve an application and notice of motion indicating that hearing was on 25th October, 2016 was to steal a match against the other party. It was not possible for the claimant to attend court on a date that was notified to him by error. The returns filed in court and the basis upon which the court heard the respondent in their application was premised on a misleading notice.

The claimant however fails to explain why he has taken over two years to move the court with his application. Even on 25th October, 2016 when the claimant learnt that the matter had proceeded and reserved for ruling on 18th November, 2016 he did nothing. Such delay only serves to obliterate his case but the orders issued were premised on misleading return. No reply has been filed by the claimant despite knowledge of the application that was heard in his absence on 6th October, 2016. Is there any defence to this application?

Accordingly, in the interests of justice the application dated 9th September, 2018 is allowed, the orders issued on 18th November, 2016 are hereby set aside, the court shall hear the respondent's application dated 23rd September, 2016 in the presence of the claimant upon the claimant paying the respondent costs assessed at ksh.20,000.00.

Dated and delivered in Nakuru this 15th day of November, 2018.

M. MBARU JUDGE

In the presence of: