



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 874 OF 2016

REBECCA WANJIKU MATHENGE.....CLAIMANT

VERSUS

ALPHINE INSURANCE BROKERS LIMITED.....RESPONDENT

RULING

1. This ruling relates to the Respondent's application brought by Notice of Motion under certificate of urgency dated 22nd October 2018 and filed in court on even date.
2. The application seeks orders to set aside *ex parte* proceedings and subsequent order made on 18th July 2018 and an order directing that the hearing of this matter do start afresh.
3. The Respondent further seeks unconditional leave to defend the suit and in that regard be allowed to cross examine the Claimant and to call evidence in response to the claim herein.
4. The application, which is supported by the affidavit of Randolph M. Tindika, Advocate is based on the following grounds:
 - a) The Respondent has always participated in the proceedings herein through its Advocates who have always attended court whenever required to do so;
 - b) The Advocate who has been attending the matter, Miss Christine K. Nthiga, left the firm of Tindika & Company Advocates for Nairobi, on 3rd April 2018;
 - c) Due to inadvertence on the part of the Advocates for the Respondent, no one attended court on 18th July 2018, when the matter came up for hearing and it therefore proceeded in the absence of the Respondent and/or its Advocates;
 - d) The Respondent's Advocates were not aware of the proceedings herein until they perused the court file while preparing for the hearing;
 - e) It is important that both parties be heard before the Court makes a final determination in the matter;
 - f) The application will not occasion any damage to the Claimant and the inconvenience, if any, will adequately be compensated by an award of costs;
 - g) Conversely, failure to allow this application will occasion irreparable loss and damage to the Respondent who will lose its opportunity of being heard by the Court;
 - h) In the interest of justice, this application ought to be allowed.
5. In opposition to the Respondent's application the Claimant, Rebecca Wanjiku, filed a replying affidavit on 29th October 2018. She deposes that the Respondent is evasive in disclosing to the Court that service was made to their office and steps taken to obtain a hearing date made known to them.
6. In this regard, the Claimant states the following:
 - a) That the Advocates for the Respondent were served with an invitation to fix a hearing date;

- b) That after a hearing date was fixed, the Respondent's Advocates were served with a hearing notice;
- c) That on the date of hearing, the Court confirmed that service upon the Respondent was due and proper and hence proceeded to hear the case;
- d) That on 25th July 2018, the Advocates for the Respondent were served with the Claimant's written submissions and a mention notice.

7. The purpose of the discretion granted to the Court to set aside proceedings is intended to aid a party who would otherwise suffer injustice or hardship as a result of an inadvertent or excusable mistake. It should by no means be used to delay or obstruct the cause of justice. This has held true since the days of *Mbogo & another v Shah [1968] EA 93*.

8. A party seeking exercise of this discretion in their favour must therefore demonstrate that failure to participate in the proceedings was as a result of an unintentional mistake which could be made by a reasonable person in the course of ordinary business. The discretion cannot be used to cure general carelessness or ineptitude.

9. In the affidavit sworn by Counsel for the Respondent in support of the application, it is deponed that failure to attend court on 18th July 2018 when the matter proceeded for hearing was as result of failure to diarize the matter. Assuming this is true, the question remains as to why the Respondent took no action even after being served with the Claimant's final submissions on 25th July 2018 together with a mention notice.

10. What emerges is a party who failed to take its obligations as a litigant seriously only to file an application for setting aside proceedings three months after closure of the Claimant's case. The delay has not been explained and the discretion of the Court is not available to such a party.

11. The result is that the Respondent's application dated 22nd October 2018 is declined with costs to the Claimant.

12. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF NOVEMBER 2018

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JUDGE

Appearance:

Mr. Maragia for the Claimant

Mr. Tindika for the Respondent