

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 489 OF 2017

(As consolidated with Causes Nos. 490, 491, 492, 493, 494, 495, 496, 497, 498, 499 all of 2017)

GALGALO WAKO BORU & 10 OTHERS.....CLAIMANT/RESPONDENTS

VERSUS

JIANXI ZHOGMEI ENGINEERING

CONSTRUCTION COMPANY LIMITED.....RESPONDENT/ APPLICANT

RULING

1. The Notice of Motion application before me is the Respondent's application dated 31st May 2018 seeking setting aside of the hearing that took place *ex parte* on grounds that the Respondent had filed documents in related files and that it had a bona fide defence. The Respondent asserts that the reply in the other causes being on a consolidated cause were filed on the premise that the consolidation affected all the files including the bundle before court being causes No. 489 of 2017 as consolidated with 490-499 of 2017. The Respondent asserts that the mistake was inadvertent and an excusable error on the part of the advocate. The Respondent thus sought the reset and commencement of the matter *de novo*. The Respondent filed submissions in which it cited the Court of Appeal decision in the case of **Lingam Enterprises Ltd & 4 Others v Radio Africa Limited [2015] eKLR** where the court held that blame lay with the applicant's advocate and that the Court of Appeal was of the view that the learned judge punished the applicants unduly. The cases of **Pacifica Moraa Nyambariga & Another v The Clerk Suneka Town Council & 2 Others [2014] eKLR** and that of **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** were also cited. The Respondent argued that the mistake should not be visited on the applicant and cited the cases of **Fursys (K) Limited v Systems Integrated Ltd t/a Symphony [2005] eKLR** and **P.M.N v Kenyatta National Hospital & 6 Others [2015] eKLR** for the argument that the Respondent should not be unseated from the seat of justice due to this mistake.

2. The Claimants were naturally opposed to the grant of the motion and filed a replying affidavit through their lawyer. The gist of the affidavit was that there was no reason for the confusion alleged by the Respondent's counsel as the summons were duly served and that prior notice was given to the Respondent's counsel of the hearing of the matters and therefore the assertion that the matters proceeded without notice to counsel was a lie. He urged the dismissal of the motion.

3. The court has to consider various factors in setting aside. In this case a hearing took place in absence of the Respondent. The Respondent was duly served according to the record before me. The affidavit of service clearly indicates there was notice of the hearing duly notified to the Respondent. No mistake on the service of the notice is given and the Respondent/Applicant only wants to muddy the waters by alleging that the consolidation caused some confusion. Be that as it may, the court will allow the Respondent to procure attendance of its witness for purposes of hearing at a date to be set after delivery of this ruling. However the Claimants will not be recalled nor will the hearing start *de novo* as that would be a waste of precious judicial time. The Respondent will also pay to the Claimants thrown away costs of Kshs. 50,000/- in total, being Kshs. 5,000/- for each of the 10 files, for the delay occasioned to the causes being determined. The sum must be paid within 30 days failing which the leave granted to defend the causes will stand vacated.

It is so ordered.

Dated and delivered at Nyeri this 3rd day of December 2018

Nzioki wa Makau

JUDGE