

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 763 OF 2015

GABRIEL OGOLA OLUOCH.....CLAIMANT

VS

AFRIKA PEARL & SPA LUXURY

DIANI BEACH BOUTIQUE HOTEL.....RESPONDENT

RULING

1. On 11.11.2016 I delivered ex parte judgment in this case and also in ELRCC No. 765 of 2015 and 799 of 2015. Two days later the respondent (Applicant) brought the Notices of Motion dated 13.11.2016 basically seeking for the setting aside of the ex parte judgments and leave to defend the suits. The main grounds of the Motions are that the applicant was never served with summons to enter appearance and that she has a defence that raises triable issues.

2. The claimants have opposed the Motions on ground that the applicant had been served with summons and their pleadings but failed to file defence; and that the draft defence annexed to the Motion raises no triable issues and was therefore a waste of judicial time.

3. The Motions came up for hearing on 21.11.2016 when the parties agreed to have the Motion in this file proceed as a test case and the outcome to apply to the other two files.

4. In his submissions, counsel for the claimant contended that although he was opposed to the setting aside of the judgment, he nevertheless would concede on condition that he was paid throw away costs of kshs.30,000 and the judgment debt be deposited in court because he feared that the respondent was closing shop. In response to the foregoing conditional setting aside of the judgment the defence counsel contended that his client is willing to pay kshs.10,000 as throw away cost. He however denied that his client was closing shop.

5. In view of the foregoing position of possible compromise by the parties, I do not see the point of going to the merits of the Motion and especially after the defence counsel conceded in his submissions that the respondent was indeed served with summons to enter appearance and defaulted to file defence within the prescribed time. The purposes of the court is to do justice and I will do so by making the following orders:-

(a) The judgments of the court dated 11.11.2016 be and is hereby set aside.

(b) The respondent to pay the claimant kshs.20,000 as throw away costs within 14 days from today as a condition for the setting aside the judgment and in default execution to proceed,

(c) The respondent to file his pleadings within 14 days from today.

(d) The orders in this file to apply in respect of the Motion in ELRCC 765 of 2015 and 799 of 2015.

Signed, Dated and Delivered at Mombasa this 20th day of January 2017.

O.N. MAKAU

JUDGE