



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 936 OF 2014

WILLIAM WAMBUA MUNYAO.....CLAIMANT

VERSUS

THIKA COFFEE MILLS.....RESPONDENT

RULING

1. On 17th May 2016, the Claimant closed his case in the main claim upon which the matter was fixed for defence hearing on 28th September 2016. On this date neither the Respondent nor its Counsel was present and the Court proceeded to close the *viva voce* hearing and directed the parties to file written submissions.

2. The Respondent then brought an application by Notice of Motion dated 7th November 2016 seeking reopening of the case for defence hearing. The application which is supported by the affidavit of Anthony Thuo Kanai, Advocate is based on the following grounds:

a) That in the evening of 27th September 2016 at 6.00 pm, Counsel for the Respondent checked the online cause list posted in the Kenya Law Website and noted that the matter was not listed for hearing on 28th September 2016.

b) That Counsel checked the online cause list again in the morning of 28th September 2016 and found that the matter was still not listed. He therefore concluded that the matter had been taken out.

c) That in the evening of 28th September 2016, while checking the online cause list for another matter, Counsel realised that the cause list appearing on the Website was for the previous day, 27th September 2016 and that it had not been updated to reflect the matters coming up on 28th September 2016;

d) That the Respondent had three witnesses ready to give evidence who were informed that the matter was not listed and hence it is in the interest of justice that they be allowed to testify.

3. In the supporting affidavit sworn by Anthony Thuo Kanai, Advocate on 7th November 2016 he depones that his non-attendance and that of the Respondent's witnesses was occasioned by reliance on the erroneous cause list that had not been updated to reflect the matters coming up on 28th September 2016.

4. Counsel further depones that upon realising the mistake he came to Court on 29th September 2016 and sought audience with the Deputy Registrar who advised him to seek a mention date before the Court. He also called the Claimant's Advocates to explain the mistake and to seek their consent to re-opening of the case in order to allow the Respondent's witnesses to testify.

5. The Claimant's response is contained in a replying affidavit sworn by Alex Inyangu, Advocate on 15th November 2016. He depones that the reason advanced by the Respondent for failing to attend Court on 28th September 2016 is not sufficient for the Court to exercise discretion in the Respondent's favour.
6. Counsel adds that the hearing date was taken in Court by consent of the parties and the matter was listed on the day's cause list. The assertion by the Respondent that the matter was not listed on the online cause list was therefore not a good reason for failure to attend Court.
7. It is the Claimant's position that the Respondent is seeking to deliberately delay the matter in order to frustrate the Claimant. In this regard, the Claimant cites two previous adjournments on 16th December 2015 and 17th May 2016.
8. The issue for determination in this application is whether the Respondent has made out a case for reopening of the case for *viva voce* evidence. Counsel for the Respondent took responsibility for failure to attend court on 28th September 2016 and undertook to pay costs for the inconvenience caused to the Claimant.
9. As held by **Havelock J** (as he then was) in ***Esther Wamaita Njihia & 2 others v Safaricom Limited [2014] eKLR*** to deny a party the right to be heard should be the last resort. The question then is whether the mistake made by Counsel for the Respondent is excusable in the circumstances. I think it is. In the business of the life of a practicing Advocate it is foreseeable that on a bad day there will be a mix up of dates in the mind of the Advocate and such an error should not be visited on a client who places full confidence in their Advocate.
10. I therefore allow the Respondent's application, set aside the order made on 28th September 2016 and reopen the Respondent's case for *viva voce* hearing.
11. This order is subject to the Respondent paying the Claimant thrown away costs assessed at Kshs. 15,000 before the next hearing date.
12. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 3RD DAY OF FEBRUARY 2017

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JUDGE

Appearance:

Mr. Inyangu for the Claimant

Mr. Thuo for the Respondent