



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 2498 OF 2012**

**JONATHAN PATRICK ONDIEKI NYANGAU.....CLAIMANT**

**VERSUS**

**NAIROBI WATER & SEWERAGE CO LTD....RESPONDENT**

**RULING**

1. On 13<sup>th</sup> October 2016, in the presence of Counsels for both parties my brother **Nduma J** fixed the main claim for hearing on 20<sup>th</sup> February 2017. The file was placed before me but there was no appearance for the Respondent. I therefore heard the Claimant *ex parte* and gave directions for filing of final submissions.
2. The Respondent subsequently came to Court by way of Notice Motion under certificate or urgency dated 6<sup>th</sup> March 2017 seeking orders to set aside the *ex parte* proceedings and for the matter to commence *de novo*.
3. The application which is supported by the affidavit of Hellen Kisaka, Advocate sworn on 6<sup>th</sup> March 2017 is based on the following grounds:
  - a. That the hearing date was taken in court on 13<sup>th</sup> October 2016 but the firm of Advocates on record for the Respondent recorded the wrong date of 28<sup>th</sup> February 2017 instead of the correct date of 20<sup>th</sup> February 2017;
  - b. That on 28<sup>th</sup> February 2017, the Advocate who had conduct of the matter went through the online cause list but did not find the matter on the day's cause list;
  - c. That upon inquiring from the Registry, a clerk from the law firm discovered that the matter had proceeded *ex parte* on 20<sup>th</sup> February 2017;
  - d. That failure to attend Court was occasioned by an inadvertent and excusable error by the Respondent's Advocate which should not be visited on the Respondent;
  - e. That the Respondent will suffer irreparable prejudice, loss and damage if the orders sought are not granted;
  - f. That the Claimant will not suffer any prejudice that cannot be mitigated by an award of reasonable costs;

g. That the application has been brought without undue delay;

h. That it is in the interest of justice that the orders sought are granted.

4. The Claimant's response is contained in a replying affidavit sworn by Judith Abrahams Guserwa, Advocate on 14<sup>th</sup> March 2017. She depones that on 13<sup>th</sup> October 2016 Counsels for both parties appeared before **Nduma J** for mention when the matter was fixed for hearing on 20<sup>th</sup> February 2017.

5. On 20<sup>th</sup> February 2017 there was no appearance for the Respondent and the matter therefore proceeded *ex parte*. The Claimant had since filed and served the Respondent with his final submissions.

6. Counsel states that no good reason has been advanced as to why the Respondent did not attend Court on 20<sup>th</sup> February 2017.

7. This application turns on a balance of the Respondent's right to be heard as against the Claimant's right to expeditious disposal of his claim.

8. I have looked at the affidavit sworn by Hellen Kisaka, Advocate in support of this application and find that the Respondent's failure to attend Court on 20<sup>th</sup> February 2017, though unfortunate, was excusable. Further, once Counsel discovered the error, she took immediate steps to remedy the situation. The Court did not find any scheme by the Respondent or its Counsel to frustrate the ends of justice

9. The Court is however also aware of the Claimant's legitimate expectation for a speedy conclusion of his claim which is fairly old. Balancing the rights of the parties I make the following orders:

a. The Claimant shall be recalled for purposes of cross examination only;

b. The Respondent is at liberty to call witnesses whose statements shall be filed and served on the Claimant's Counsel within the next fourteen (14) days from the date of this ruling;

c. The Respondent will pay to the Claimant the sum of Kshs. 10,000 as thrown away costs before the next hearing date.

10. These are the orders of the Court.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Guserwa for the Claimant

Miss Kisaka for the Respondent