



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 92 OF 2016**

***(Before D. K. N. Marete)***

**ELPHA JOHN ESEKON.....CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF TURKANA.....1ST RESPONDENT**

**EKUTAN WONYANY PAUL.....2ND RESPONDENT**

**RULING**

This is an application by way of Notice of Motion dated 2nd March, 2017 by the respondents. It seeks the following orders of court.

- 1. THAT this matter be certified as urgent and service of this application be dispensed with in the first instance.*
- 2. THAT this honorable court be pleased to vary its orders of 27<sup>th</sup> February 2017 and allow the Respondents to file their written submissions.*
- 3. THAT the Honourable Court be pleased to defer the date for judgment and to move it to such a time after both parties have filed their submissions.*
- 4. THAT costs of this application be in the cause.*

It is grounded as follows;

- 1. The Respondents have always been ready and willing to defend the suit. To this end, they have religiously and dutifully attended to the case.*
- 2. However, the advocate who was handling the matter abruptly and without prior warnings developed complications on the eve of the mention this being the night of 26<sup>th</sup> February, 2016.*
- 3. Accordingly, he was rushed to the hospital on the 26<sup>th</sup> and diagnosed. These events were so rapid that he was unable to reach the office and communicate to the opposing counsel of his inability to attend court.*

4. That on the 27<sup>th</sup> January 2017, the matter came up for a mention to confirm the filing of submissions and judgement was scheduled for 8<sup>th</sup> March, 2017.

5. That if it proceeds, the Respondents who have always been ready and willing to present their case will be condemned unheard despite the current circumstances arising being out of their control.

6. That by the same token, it is trite law that the mistake of counsel should not be visited on innocent litigant especially those who have exhibited diligence and interest in pursuing their matter.

7. That it is for the foregoing reasons and for the interests of justice that the Honourable Court should allow the current application, allow the Respondents to file their submissions and another date for judgement be provided.

The claimant in a Replying Affidavit sworn on 13th March, 2017 opposes the application.

The respondent rests and grounds the application on the ground that the action counsel suddenly got indisposed on the night of 26th February, 2017. He was therefore not able to attend court as he was rushed to hospital.

It is the respondent's other case that the respondent has been keen and willing to present their case and in the event of not allowing this application, he will be condemned unheard. Again, the claimant would not suffer any prejudice in the event of allowing the application and any prejudice if at all, can be atoned by way of damages.

The applicant also pleads and relies on the age old cliché that the omissions and mistakes of counsel shall not be visited on the litigant.

The Claimant/Respondent opposes the application for *inter alia* being vexatious and a

waste of the court's time. It is his case that the mention date was taken by consent and therefore there is no excuse for non attendance. He avers that this application is ill intended and a delay tactic on the part of the respondent and should not be condoned at all.

This is a very simple matter and application. The facts of the case are even clearer. It is all agreed that the wheels of justice must be effected and enabled to traverse freely, leisurely and naturally on their own motion and choice. The only dictate here are the facts and circumstances of the case.

If we were allowed to aide and facilitate the unabridged ran of these wheels, we would buy the respondent/applicants position that no prejudice would be incurred in the event of allowing this application. In any event, the supporting affidavit of the application sworn on 2nd March, 2017 ably supports the malady and happenings of the night of 26th February, 2017.

I am therefore inclined to allow the application and order as follows;

- i. That this court's orders of 27th February, 2017 be and are hereby set aside.
- ii. That the respondent be and are hereby allowed to make, file and serve their response written submissions in fourteen days.
- iii. That the judgement date be and is hereby deferred to a later timing.
- iv. That the cost of this application in the court.

Delivered, dated and signed this 16th day of May 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Omulama instructed by Rachier & Amollo Advocates for the Respondents.
2. Mr. Kirwa holding for Kiboi instructed by Kiboi Tuwai & Company Advocates for the Claimant/Respondent