



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 235 OF 2014**

(Before Hon. Justice Hellen S. Wasilwa on 29<sup>th</sup> June, 2017)

**HENRY WASIKE TUMBU ..... CLAIMANT**

**-VERSUS-**

**CHINA JIANGXI INTERNATIONAL (KENYA) LIMITED.....RESPONDENT**

**RULING**

1. The Application before the Court is dated 5<sup>th</sup> December, 2016, brought under Section 20 of the Industrial Court Act, Section 1A, 1B, 3A of the Civil Procedure Act and the inherent jurisdiction of the Court seeking for orders:

- 1. That leave be granted to the Respondent to re-open the Claimant's case and be allowed to cross examine the Claimant.***
- 2. That leave be granted to the Respondent to file its bundle of documents, out of time.***
- 3. That costs of this application be in the cause.***

2. The Application is founded on the grounds that:

- 1. When the matter came up for hearing on 20.9.2016, the advocate for the Respondent did not attend Court as the hearing date was erroneously diarized in the Advocate's diary on 21<sup>st</sup> September, 2016.***
- 2. The Respondent has not yet filed its bundles of documents due to the absence of the relevant officers of the Respondent who have just forwarded to the Respondent's Advocate the documents requested for.***
- 3. None of the parties herein will be prejudiced in any way whatsoever by this Honourable Court granting leave to the Respondent to cross-examine the Claimant and file the bundle of documents.***
- 4. The said leave is necessary in the interests of justice so that the real issues in dispute between the parties are placed before the Court for final determination thereof.***

3. The Application is supported by the affidavit sworn by Naima Sheikh the advocate appearing in the matter on behalf of the Respondent. She reiterates the averments on the face of the application and adds that the Claimant herein was the Plaintiff in CMCC 6731 of 2013 whereby the Respondent was the Defendant and judgment was delivered dismissing the Suit.

4. Furthermore that during the hearing of the said case the Claimant admitted that he had stopped working on his own volition due to the alleged injuries he had sustained at work and therefore the Current suit is an abuse of the Court process.

5. She further avers that being denied the opportunity to cross examine the witness and file their bundle of documents will be a draconian step as the overriding interest of justice will not be met. They pray for the Court to apply its discretion and allow the application as drawn.

6. The Claimant filed grounds of opposition to oppose the application wherein they state that they served the Respondent's advocates with a hearing dated on 29.3.2016. However neither the Respondent nor his Advocates attended Court for the hearing. Further that the instant application was brought after undue delay as the case was heard on 20.9.2016 whereas the application was filed on 5.12.2016, as such the application should be dismissed with costs.

### **Submissions**

7. The Respondent submit that they have a meritorious defence which they should be allowed to ventilate for the reasons outlined in their replying affidavit and that it would be in the overriding interest of justice if their application is allowed.

8. They cite the case of **Paul Asin T/A Asin Supermarket Vs Peter Mukembi (2013) eKLR** where it was stated:

***“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits... I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”***

9. The Claimant in submissions reiterate the grounds of opposition and on non-attendance they cite the case of **Johanna Zouari Geissbulher vs. Viloj Fredrigo & Another(2016) eKLR**, where it was stated:

***“Other than not attending Court on 2<sup>nd</sup> February, 2015, the Respondent's advocate did not file any response to the said Application. This coupled with the failure to diarize the Application, shows that he Plaintiff's advocate was not keen in opposing the Application.”***

10. They pray for the application to be dismissed with costs for lack of merit in the alternative they state that should the Application be allowed, the Respondent be ordered to pay thrown away costs of Kshs. 30,000/=.

11. I have considered the Application before me. I note that this case was filed before Court on 21.2.2014.

12. The Respondents were served the same month. They filed their response on 11.3.2014. The Claimant proceeded to set down the case for hearing on 20/9/2016 and served the Respondent. They failed to attend the hearing.

13. The case proceeded exparte.

14. The Applicants contention now is that they failed to attend Court because of misdiazation of the hearing date

15. The primary duty of this Court is to dispense justice. The Court also has a role to ensure access to justice and therefore it would not be in the interest of justice to lock out the Respondents at this time having filed a response.

16. I will therefore allow the Applicant to reopen Claimant's case since the Claimant had already testified and closed his case, I would order the Respondent/Applicants to pay the Claimant Kshs.20,000/= as thrown away costs.

17. Fresh directions be taken on the hearing.

Read in open Court this **29<sup>th</sup> day of June, 2017** in Nairobi.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Mutundi holding brief for Mandala for the Claimant – Present

Miss Chebet holding brief Maina for the Respondent – Present