

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 262 OF 2016

FRANCIS WAWERU KARIA.....CLAIMANT

VERSUS

MT. KENYA BOTTLERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 14th July, 2017)

RULING

The application by a notice of motion was filed for the respondent in the suit on 20.06.2016 through George Masese Mabeya Advocate of the Federation of Kenya Employers. The application was said to be under the Judicature Act, section 3 High Court (Practice and Procedure) Rules; section 12(3), section 16 and 20 of Industrial Court Act, Rules 27 (1) (c) & (g) of Industrial Court (Procedure) Rules, Order 10 rule 11, order 22 rule 22(1) & order 51 rule 15 of the Civil Procedure Rules, section 3 & 3A of the Civil Procedure Act, and all enabling provisions of law. The substantive prayer was that the court is pleased to set aside the judgment entered on 16.06.2017 and grant leave to the applicant to file a memorandum of defence out of time and the case be reopened for hearing on its own merits. The judgment delivered on 16.06.2017 awarded the claimant Kshs. 614, 296.00 payable by the respondent by 01.08.2017 and failing interest at court rates to be payable till full payment. Costs were also awarded. It was also declared that the claimant was entitled to payment of the outstanding dues as set out in the pension scheme rules.

The application was based on the supporting affidavit of George Masese Mabeya Advocate and the affidavit of Amos Chege attached thereto and upon the following grounds:

- a) That at all material time the applicant was not aware of the institution of the suit and could not therefore participate in the proceedings.
- b) It would be unfair for the applicant not to be given an opportunity to defend the suit.
- c) That summons and pleadings in the suit were never served upon the applicant.
- d) The applicant had an arguable defence and the claimant's employment had been lawfully terminated.

The claimant filed his replying affidavit on 22.06.2017 through Warutere & Associates. It was urged for the claimant that the respondent was served with the summons, the claim, the mention notices, and the hearing notices but had failed to enter appearance or to take steps to participate in the proceedings. Accordingly, the application should be dismissed as it lacked merit especially that the applicant deliberately refused to take steps in the suit after due service.

The court has revisited the material on record and particularly the affidavits of service and the court returns that the respondent was duly served with all relevant court processes. Further there is no draft of the statement of response exhibited to show that indeed the respondent has a defence raising serious triable issues. Accordingly, the court finds that the applicant is undeserving of the court's discretion. The court returns that the applicant is clearly the author of its own fate in the suit and cannot, without justification, change its own design of its destiny in the suit.

While making the finding the court is guided by the principles under Article 159 of the Constitution and particularly that justice shall be done to all irrespective of status, and, that justice shall not be delayed. Further the court is guided that under section 3 of the Employment and Labour Relations Court Act, 2011, the court, litigants, and litigants' representatives are all bound by the principal objective of just, expeditious and proportionate resolution of disputes before the court. The court will therefore consistently focus on ethical, efficient and effective delivery of justice so that, litigants who deliberately fail to adhere to the principal objective, like the applicant has been shown to have opted to do, will not enjoy the court's discretion to remedy their own designs to derail the wheels of justice.

That the applicant invoked rules of the court which have since been revoked will serve as an impetus to dismissing the application.

In conclusion, the application by the notice of motion dated 20.06.2017 and filed the same date is hereby dismissed with costs.

Signed, dated and delivered in court at **Nyeri** this **Friday, 14th July, 2017**.

BYRAM ONGAYA

JUDGE