



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

**CAUSE NO. 17 OF 2015**

*(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)*

**WILLIAM ODUOR ORUKO ..... CLAIMANT**

**-VERSUS-**

**NATIONAL CEREALS AND PRODUCE BOARD ..... RESPONDENT**

**RULING**

This case was fixed for hearing on 30th November 2016 when Counsel for the Claimant sought adjournment on grounds that he is bereaved. Counsel for the Respondent opposed the adjournment on grounds that she had travelled from Nairobi and had 3 witnesses who had also travelled for hearing of the case. She argued that counsel for the Claimant had not informed her that he would not be able to proceed with the hearing on that day. After hearing arguments from both parties I granted the adjournment but condemned counsel for the Claimant to pay costs of both counsel and witnesses of the Respondent for the day in the total sum of Kshs.21,000 being Kshs. 8000 for counsel, Kshs.5000 for the witness from Nairobi and kshs.3000 each for the 2 witnesses from Eldoret and that payment be made before the next hearing date. Aggrieved by the said order for payment of costs counsel for the Claimant filed a motion dated 31st January 2017 seeking the following orders-

1. That the Court be pleased to set aside and or review the orders made on 30<sup>th</sup> November 2016 directing the Claimant to pay Kshs.21,000/- before the next hearing,
2. That costs of the application be provided for

The application is grounded on the supporting affidavit of WILLIAM ODUOR ORUKO the Claimant/applicant and on the following grounds on the face of the application.

In the grounds and affidavit, the applicant deposes that he was present in court on the hearing date when his advocate applied for adjournment, that the costs ordered by the court were excessive as there was valid reason for non-attendance by his counsel, that the mistake of his counsel should not be visited upon him and that it is un-African to punish an advocate for bereavement.

At the hearing counsel for the applicant Mr. Mwamu submitted that the Claimant's advocate had lost his father and was involved in the funeral arrangements, that the Claimant was present in court ready to proceed, that the claimant was being punished for a mistake which was not of his own making. He submitted that the discretion of the court to punish a party by award of costs should only be exercised when there is a deliberate move to delay the hearing of the suit or obstruction to delay justice. He submitted that this was not the case in the present suit. He submitted that the Respondent is a large parastatal that can afford costs and it is not in the interest of justice to award it costs. He submitted that in

the case of **Pithon Waweru Maina v Thuka Mugiria** there was a notice of death of the father of the Respondent while in the case of **Republic v District Land Registrar, Uasin Gishu & Another** the advocates counsel was bereaved. That the court ordered each party to pay its costs.

Mr. Mwamu further submitted that the constitution provides for access to justice. That condemning parties to costs would scare people from filing suits in court He prayed that the orders sought be awarded.

The Respondent filed a replying affidavit of SANDRA KAVAGI, Counsel for the Respondent in which she deposes that she was in court on 30th November 2016 when the matter came up for hearing and when the Claimant was present in court. She deposes that she had three witnesses Mr. Zephania Chepchieng', Mr. Jonah Marindich and Mr. George Abila and was ready to proceed with the defence case. That while waiting for the case to be called out she was handed a letter by a clerk from the Claimant's counsel's office. The letter was dated 29th November 2016 and indicated that counsel would not be ready to proceed as Mr. Mwamu was bereaved. She deposes that when the case was called out counsel holding brief for the Claimant's counsel made the application for adjournment which she opposed on grounds that she learned about the bereavement while in court, that had she been informed in time her witnesses and herself would not have travelled from Nairobi and Eldoret respectively to attend court. She deposes that awarding costs is within the discretion of the court and the Respondent being a public body must not expend public money in sending witnesses to court. She submitted that although costs were awarded when the advocate was bereaved it was as a result of mistake of counsel failing to inform her of his bereavement in time to avoid coming for the hearing on that date. She deposes that the application is intended to delay the hearing of the claim and prays that it be dismissed.

Ms Netoro who appeared for the Respondent relied on the replying affidavit and list of authorities filed by the Respondent. She reiterated the averments in the replying affidavit. She submitted that parties in court are not supposed to look at obituaries and a simple email would have been sufficient. She submitted that the court considered all these factors before awarding costs.

Ms. Netoro submitted that justice is two-pronged and it does not matter that the Respondent is a large organisation with public funds. She submitted that the costs were not unfairly awarded. She submitted that the authorities cited by the applicant are not relevant. She prayed that the application be dismissed.

### **Determination**

I have considered the application and the grounds and affidavit in support of the application, the replying affidavit and the arguments for and against the application.

The record of the proceedings on the material day speaks for itself. The Respondent was in court ready to proceed but counsel holding brief for the Claimant's counsel sought adjournment on grounds that counsel for the Claimant was bereaved. The reason for the court condemning counsel for the Claimant to pay costs was not because he was not in court or was asking for adjournment per se, but because he had not informed his counterpart who had to travel all the way from Nairobi together with his witnesses as she was not informed in good time by the Counsel for the Claimant that he will be seeking adjournment due to his bereavement. The work of a litigation counsel is to go to court and every person in the firm is or ought to be aware of this fact such that should the advocate not be available the office is supposed to, as a matter of courtesy and professionalism, inform all the counterparts about the unavailability of the litigation counsel. This must be done in good time. Failure to do so constitutes professional recklessness of the counsel and his office.

The court is not supposed to condone laxity of counsel, and bereavement, unless it has just occurred, is not a ground for counsel to fail to notify his counterparts of his unavailability. The orders for costs were made because counsel failed to inform the Respondent's counsel of his unavailability in good time to avoid the travelling of counsel and the witnesses which was not only a waste of money but time too.

I have considered the authorities cited by counsel and in my opinion they are not relevant to the circumstances herein. In all those cases the consequences of non-attendance by counsel was to lock the

applicant out of the proceedings while in the present case the applicant was only penalised with costs.

For the foregoing reasons it is my opinion that I exercised my discretion judiciously and appropriately by ordering the Claimant's counsel (and not the Claimant) to pay costs of the Respondent's counsel and witnesses for 30th November 2016.

However, to avoid delay and prejudice to the Claimant for counsel's mistake, I review the order to the extent that adjustment for the costs ordered against the claimant's counsel on 30th November 2016 will be made at the conclusion of the case so that if the Claimant is successful those costs will be recovered from what is due to his counsel while if he loses the case the costs will be paid at the conclusion of the case.

**Dated, Signed and Delivered this 22<sup>nd</sup> day of September, 2017**

**MAUREEN ONYANGO**

**JUDGE**