



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.1749 OF 2013**

**KENYA BUILDING, CONSTRUCTION, TIMBER AND**

**FURNITURE INDUSTRIES EMPLOYEES UNION.....CLAIMANT**

**VERSUS**

**M/S NEWLINE FURNITURE LTD.....RESPONDENT**

**RULING**

The respondent, M/s Newline Furniture Ltd by application dated 29<sup>th</sup> May, 2015 is seeking for orders to review and or set aside and or vacate the orders of 25<sup>th</sup> May 2015 and all consequential orders as the same will harm the respondent adversely through no fault of its own.

The application is supported by the affidavit of Alibhai F Hassan, Advocate for the respondent and on the grounds that on 25<sup>th</sup> May, 2015 when the court issued orders striking out the defence by the respondent on submissions by the claimant that the defence was not properly on record and the claimants evidence was allowed to testify.

The orders were issued at the behest of the claimant without any regard to article 159 of the constitution. The respondent's advocate was present in court and made an undertaking to comply with the Civil Procedure Rules and to file Notice of Appointment and a substantive defence to the claim.

The respondent will suffer irreparably is the orders sought are not issued and thus denied audience in this suit. The respondent is aggrieved by the orders of the court and directions issued and should be reviewed. The claimant misled the court into issuing the impugned orders.

In the Supporting Affidavit, Mr Hassan avers that on 25<sup>th</sup> May, 2015 the court issued orders striking out the defence filed by the respondent's advocate. The failure to file a Notice of Appointment was not deliberate but occasioned by an inadvertent failure and or omission to capture the order of 13<sup>th</sup> February, 2015. The respondent only filed the response but not the Notice of Appointment of Advocate and thus did not follow the directions of the court.

The respondent is aggrieved and thus filed the current application. Striking out the response is punitive to the respondent as such orders stand to expose the respondent to unnecessary legal liability. The respondent has a good defence and once allowed will be demonstrated. There will therefore be grave prejudice on the respondent if locked out of this case.

In reply, the claimant filed Replying Affidavit sworn by Francis Karimi Murage who avers that as the Secretary General to the claimant he has authority to reply herein. What the respondent is seeking is an appeal for the court to change its ruling and directions with regard to orders of 25<sup>th</sup> May, 2015.

On 23<sup>rd</sup> February, 2015 the parties had attended the hearing of this matter where the respondent obtained an adjournment to file Notice of Appointment and the court gave 7 days for the respondent to comply. The respondent failed to comply.

On 25<sup>th</sup> May 2015 the respondent tried to sneak in a defence to which the claimant objected to and the court heard the claimant's case noting the delay of 3 months by the respondent to comply. There was no appearance by the respondent at the hearing as no Notice Appointing Advocate had been filed and the respondent was not in attendance.

The respondent has not been diligent. The orders sought cannot issue to the respondent as they are before court without clean hands.

Both parties filed written submissions

The right to be heard is well secured under articles 48 and 50 of the constitution, 2010 which guarantee the right to access justice and have a fair hearing. These rights are due herein to the respondent and the claimant in equal measure.

In the enjoyment of the constitutional and statutory rights to access justice and have a fair hearing, this court has its Rules of procedures as articulated under the Employment and Labour Relations Court (Procedure) Rules, 2016. These Rules are in place to ensure that each party enjoys access to justice in a simple and fair manner. To ensure that before a hearing can commence, each party has had access to the registry where all records are kept and thus be able to file any record in the file and which is to be taken into account at the hearing.

Once pleadings close, the court has the mandate to proceed and hear the parties. The claimant having filed this claim, there is the right to be heard expeditiously and in compliance with section 3 of the Employment and Labour Relations Act, 2014.

The Rules of the Court remain in force and have not been ousted by the constitution. By reliance on the Rules, the court is not blind to the provisions of article 159 of the constitution, 2010. The Court of Appeal has held as follows in **Nicholas Kiptoo Arap Korir Salat versus IEBC & 6 others [2013] eKLR** that;

*....I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice.*

The application filed by the respondent is supported by the Affidavit of Alibhai F Hassan, an Advocate practicing in the firm of Gerane & Associates Advocates and who have the conduct of this matter for the respondent. The firm of Gerane & Associates Advocates filed the Notice of Appointment herein on 3<sup>rd</sup> June, 2015.

The respondent in the application and supported by Mr Hassan as noted above avers that they seek to have the orders of 25<sup>th</sup> May, 2015 be reviewed or set aside on the basis that the failure to file defence and Notice of Appointment of Advocate was an inadvertent failure by counsel. A defence was filed on 13<sup>th</sup> February, 2015 but by an inadvertent mistake, counsel failed to file the Notice of Appointment.

As such, as of 25<sup>th</sup> May, 2015 when the court heard the claimant and issued orders striking out the defence, the respondent had not appointed counsel to represent them in this matter. By failing to file the

Notice of Appointment and opting to file a defence through Gerane & Associates Advocates, the record was thus by a stranger to these proceedings herein.

The application now sought to be filed by the firm of Gerane & Associates Advocates and averments made in the subject application over matters that arose before 3<sup>rd</sup> June, 2015 when the Notice of Appointment was filed are based on facts and material of a third party. Why would the respondent own officer(s) not address the court in view of the lapses by their own counsel? On whose behalf was counsel in court before 3<sup>rd</sup> June, 2015? Procedurally it cannot be for the respondent. The record herein had not matured to that level that the respondent had legal representation and thus proceedings on 25<sup>th</sup> May, 2015 were on the basis that the respondent was not before the court. Such attendance cannot now be addressed retroactively without the respondent explaining their absence in court on the material day.

**However best Mr Hassan is able to explain his circumstances, before appointment by the respondent on 3<sup>rd</sup> June, 2015 the firm of Gerane & Associates Advocates remains a third party to these proceedings. Application dated 29<sup>th</sup> May, 2015 is hereby dismissed.**

Delivered in open court at Nairobi this 7<sup>th</sup> day of November, 2017.

**M. MBARU JUDGE**

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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