



REPUBLIC OF KENYA

IN THE IN THE EMPLOYMENT & LABOUR RELATION COURT OF KENYA

AT MOMBASA

CAUSE 443 OF 2014

JUSTINE ABURI OKEMWA CLAIMANT

VERSUS

SHEIKH ZAYED CHILDREN WELFARE CENTRE..... RESPONDENT

RULING

Introduction

1. The claimant brought this suit on 12.9.2014 and the respondent entered appearance and filed defence on 29.9.2014 and 27.10.2014 respectively. Thereafter the suit was fixed for hearing but could not proceed for one reason or the other. On 9.7.2015, counsel for both parties mentioned the matter in the open court and by consent fixed it for hearing on 28.7.2015. On the said date the respondent and her counsel never attended the court for the hearing and they never send anyone to represent them. After satisfying itself that there was no cause shown as to why the hearing should not proceed, the court allowed the claimant proceed *ex parte* and fixed the case for judgment on 23.10.2015.
2. In the meanwhile the respondent (applicant) filed the Notice of Motion dated 29.7.2015 on 30.7.2015 seeking basically the setting aside of the *ex parte* proceedings and leave to defend the suit. In addition the respondent negotiated a consent with the claimant and indeed signed a consent order dated 8.9.2015 and filed it in court on 14.9.2015. Both the motion and the consent order were never put in the court file because it had been withdrawn from the registry and locked by the judge for writing of the judgment. The court delivered its judgment on 23.10.2015 and the respondent sought to have the aforesaid consent order for setting aside the *ex parte* proceedings adopted by the court. However the request was declined because the order had already been overtaken by events.
3. As a result of the foregoing, the respondent filed the amended Notice of Motion dated 26.10.2015 now before the court. The amended motion basically seeks the seeking aside of the *ex parte* judgment entered on 23.10.2015 and leave to cross examine the claimant, and tender his defence. The motion is supported by the Affidavits sworn by Muhammed Faki Khatib on 26.10. 2015. The motion is however opposed by the claimant vide his Replying affidavit sworn on 5.11. 2015 and the Notice of Preliminary Objection (P.O) dated 9.11.2015. The motion and the P.O were disposed of by written submissions.

Applicant's case

4. The motion is founded on section 3(1) and section 20 (1) of the Employment and Labour relations Court Act, Article 50 (1) and 159(2) of the Constitution and all other enabling provisions of law. It

has been submitted for the applicant that, Mr. Khatib advocate who was to represent the respondent in the hearing was held up in the High Court conducting other matters. That he sent his intern to trace his colleague Mr. Mwinyi but he went to the wrong court. That the mistake of the counsel should not be visited upon the respondent. In response to the P.O. It was submitted for the respondent that a notice of motion is not a pleading within the meaning of rule 2 of the industrial court procedure rules 2010 (ICPRs) and such it does not require leave to amend under rule 14 of the ICPRs. That the issue of leave is a technicality which should be overlooked by the court as provided by Article 159 (d) of the constitution. Finally she denied that the court is *functus officio* or that the motion is an abuse of the process of the court.

Claimant's reply

5. The claimant has submitted that the applicant's motion lacks merits and fatally defective and as such it should be dismissed with costs. That the amended motion was filed without the leave of the court as required under rule 14 (6) of the ICPRs. That even after filing the motion, the applicant has not sought for leave to have the motion deemed as properly on record. That the motion as filed is an abuse of the process of the court only meant to delay conclusion of the case. That the court is now *functus officio* because the court has already delivered its judgment and if the applicant is dissatisfied should appeal.

Analysis and determination

6. After careful consideration of the Application, affidavits and submissions, the issues for determination herein are:-
 - a. whether the application herein is incompetent
 - b. whether the court is *functus officio* and,
 - c. whether the motion has merits and should be allowed.

Incompetent amended motion

7. It has not been denied that the amended notice of motion was amended without the leave of the court and that the applicant has also not asked for leave after the filing that the amendment be adopted by the court. Consequently the amended motion on record is incompetent for want of the leave of the court. The respondent has maintained that a notice of motion is not a pleading and as such it does not require leave to amend. Section 2 of the ICPRs defines pleadings as follows:-

“Pleading includes the statement in writing of the claim or demand of an applicant, and the defence by a respondent thereto, the reply of the applicant to any defence or a counterclaim of a respondent.”

8. The court interprets the words “statement of claim or demand by an applicant” to mean that pleadings include the statement of the main suit and a statement of an application. In that sense the court finds that the ICPRs do not contemplate a scenario whereby parties have the liberty to amend motions without leave. For that reason the court does not see the need to consider the amended motion on merits but it instead allows the P.O. by the claimant and proceeds to strike out the amended motion for want leave.

Disposition

9. For the reasons stated above, the applicants amended motion dated 26 10.2015 is struck out with costs.

Signed, dated and delivered at Mombasa on 26th day of February 2016.

ONESIMUS N.MAKAU

JUDGE