



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

**AT NAIROBI**

**CAUSE NUMBER 926 OF 2014**

**EUNICE AKINYI AIRO.....CLAIMANT**

**VERSUS**

**AVTECH SYSTEMS LIMITED.....RESPONDENT**

**RULING**

1. By a Motion dated 23<sup>rd</sup> July, 2015 the applicant seeks a stay of execution of the judgment of this Court delivered on 10<sup>th</sup> July, 2015. The applicant further sought the setting aside of the said judgment and hearing afresh.
2. The application was made on the ground that when this case came up for hearing on 3<sup>rd</sup> June, 2015 the Counsel concerned, due to oversight, did not diarize the date hence could not attend Court. Further that prior to the judgment parties had agreed upon a consent and that failure to diarize that date was not intentional. Counsel for the applicant reiterated the grounds upon which the application was brought in his submissions. The claimant's counsel on the other hand opposed the application describing it as yet another attempt to delay the matter. Counsel wondered why the secretary whom the respondent's counsel claim failed to diarize the hearing date did not swear an affidavit to confirm the truthfulness of the allegation. Further, the respondent's clerk who attended interpartes fixing of the hearing date did not swear an affidavit to state why the matter was never diarized.
3. This Court prefers inter partes hearing of cases and will proceed ex parte in exceptional cases. There are times when the Court has declined to proceed ex parte where service is doubtful or on short notice. This is because a hearing ex parte almost always present its own problems such as an application to set aside and a hearing de novo such as the one before me. However, where service is clear the Court will proceed ex parte.
4. The hearing date in this suit was taken by consent on 28<sup>th</sup> November, 2014. There was George for Ndikimi Advocate for the claimant and Mutinda for Enonda, Mak'Oloo for respondent. The Court therefore being so informed heard the matter in absence of the respondent and proceeded to write the judgment which the respondent now seeks to set aside and a hearing de novo be ordered.
5. Whereas the applicant avers that they have a good defence to the claim, the Court despite the fact that the respondent did not give evidence considered the defence and noted in the judgment that the respondent did not attach any statement or document to the memorandum of response to

vouch for the averments therein as required by the rules of the Court. For instance, the respondent averred that the claimant absconded duty but their own letter terminating the claimant's service indicated she was being terminated due to reorganization of operations which led to the claimant's position being merged and or eliminated making it necessary to terminate her services. The Court further noted that the leave application form produced by the claimant clearly stated that she was proceeding on maternity leave for 90 days and resuming work on 14<sup>th</sup> April, 2014, the same day she got terminated.

6. Whereas inter partes hearing should take place in all cases, ex parte hearing will occur where there is clear proof of notice of hearing as was the case here. The Court further went out of its way and considered the respondents defence and became of the view that the same was not a good defence even if the respondent were to attend the hearing. Perhaps the Court could have reached the same result as contained in the judgment. A rehearing though can be considered a right in deserving cases, it means double work for a Judge.

7. The Court is not persuaded by reasons advanced by the applicant's Counsel for not attending Court on the material day besides as observed in the judgment, the defendants defence was flawed and even if heard on merit the Court could have reached the same results.

8. The application is therefore found without merit and is hereby dismissed with costs.

9. It is so ordered.

Dated at Nairobi this 19<sup>th</sup> day of February 2016

Abuodha J. N.

Judge

Delivered this 19<sup>th</sup> day of February 2016

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge