



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NUMBER 581 OF 2013

FRANCIS MUTINDA NYAE.....CLAIMANT

VERSUS

DPL FESTIVE LIMITED.....RESPONDENT

RULING

1. By a motion dated 27th November, 2014 the respondent seek among others stay of execution of ex-parte judgment delivered on 16th July, 2014 and that the said judgment be set aside and the respondent be granted leave to defend the claim.
2. The respondent does not deny being served with the Court summons but that it mistakenly forwarded the same to the claimant's union to deal which mistake the respondent unreservedly apologises to the Court for.
3. Setting aside a judgment of the Court is a matter entirely within the discretion of the Judge. However, the underlying and overriding principle is that a judgment on full hearing and on merit lasts and finally settles disputes better than one obtained ex parte or on technicality.
4. In exercising the discretion to set aside a judgment, the Court will not only consider the reasons and or circumstances that may have prevented the applicant from being present before the Court to prosecute or defend the claim but also the merits of the proposed claim or defence.
5. The respondent in this matter states that they mistakenly forwarded the Court summons to the claimant's union to deal. This may have been honest and excusable mistake but as stated above this is not the only consideration the Court takes. The applicant must reasonably show that it has a defence or claim which can be sustained at the trial on merit.
6. The statement of response filed on 9th April, 2014 avers among others that the claimant prior to termination was accused of theft and called upon to explain his view over the accusations. The respondent has further alleged that the claim for house allowance is unsustainable as the wages paid to the claimant were inclusive of house allowance. On accusation of theft, the respondent further averred that the claimant refused to respond and write a statement giving his view on the accusation of theft against him instead the claimant absconded work.
7. These are by no means frivolous defences which ought to be heard on merit.

8. In exercising the discretion to set aside a judgment, the Court usually considers if in doing so any prejudice not compensatable by costs would be occasioned to the party affected by the order. The Court further considers the time lag since the ex parte order was made and the bringing of the application to set it aside to see if there has been any inordinate delay.

9. I have taken into account both factors and I am persuaded that there is no inordinate delay in bringing the application and if the ex parte judgment is set aside no prejudice not compensatable by costs would be occasioned by setting aside the ex parte judgment.

10. The Court therefore sets aside the ex parte hearing and judgment delivered on 16th July, 2014 and orders a trial de novo on merits.

11. Costs in the cause.

12. It is so ordered.

Dated at Nairobi this 19th day of February 2016

Abuodha J. N.

Judge

Delivered this 19th day of February 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge