



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

CAUSE NO. 270 OF 2013

DAVID OKOTH OLAYO.....CLAIMANT

v

LEAH MALOT.....RESPONDENT

RULING

1. The instant Cause was filed on 20 August 2013 and a Response was filed on 1 October 2013.
2. The hearing was then fixed for 4 December 2013, but it was a non-starter as the Respondent had not been served with a hearing notice as directed by the Court. The hearing was adjourned to 3 June 2014 but on this day, both parties indicated they were not ready because they needed to file further documents. The Court directed the parties to share/pay Court adjournment fees but there is nothing on file to suggest the same were paid.
3. The Court set 4 December 2014 for the hearing but on this date, the parties agreed to take the Cause out of the hearing list. The Court then fixed the hearing for 29 July 2015, and directed the Respondent to pay adjournment fees. Again there is nothing on record to show payment.
4. The Claimant's case was eventually taken on 29 July 2015 after which Mr. Akello sought an adjournment, and the reason given was that the Respondent was attending to a sick child.
5. The request was granted and the Respondent's case was set for 23 November 2015.
6. However, on 23 November 2015, Mr. Akello sought an adjournment on the ground that he had been informed that the Respondent was sick.
7. The Court directed Mr. Akello to furnish documents showing that the Respondent was sick, and had the file placed aside.
8. When the Cause was called at 11.40am, Mr. Akello informed the Court that his office had not been able to locate the Respondent as her phone was not being picked and that it is her husband who had earlier on communicated with the office. Mr. Akello renewed the application for adjournment.
9. The Court declined the renewed request for adjournment because sufficient proof of the Respondent's illness had not been provided after which Mr. Akello informed the Court that he had no instructions to proceed.
10. The Court therefore ordered the Respondent's case closed and directed the filing and service of submissions.
11. However, the Respondent lodged a motion under urgency on 16 December 2015 seeking

1.

2. THAT there be a stay of proceedings pending the hearing and determination of this Application.

3. THAT the Honourable Court be pleased to set aside the proceedings of the 23rd of

November 2015.

4. THAT this Honourable Court be pleased to re-open the Respondent's case.

12. The Court directed that the motion be served for *inter partes* hearing on 2 February 2016.

13. The Claimant filed a replying affidavit to the motion on 21 January 2016.

14. When the motion came up for *inter partes* hearing on 2 February 2016, it emerged that the Respondent had filed a supplementary affidavit that morning. The Claimant objected to the reliance on the supplementary affidavit, and the Court ordered that it be expunged from the record because it had been filed without leave.

15. In fact, Mr. Akello had made no reference to the fact that he had filed a supplementary affidavit when he stood up to state that he was ready to proceed with the motion. It took Mr. Maragia to inform the Court of the supplementary affidavit.

16. Clearly, the conduct of the Respondent's counsel has fallen below the expected standards of ethics and professionalism. However, that is not here or there. Back to the motion.

Respondent's case on the motion

17. According to the Respondent, she could not attend Court on 23 November 2015 because she was admitted in hospital (ground on face of motion) and her advocate was aware of the situation.

18. The Respondent annexed to the motion medical notes from Moi Teaching & Referral Hospital (signed by a Dr. Cosmas K. Sang) and that her husband called Mr. Chepkonga Advocate and informed him of her condition.

Claimant's rebuttal

19. The Claimant in his replying affidavit tore into the case as advanced by the Respondent and deposed that the medical note produced by the Respondent was dated 18 November 2015, while the reason given in Court was that the Respondent was ill on 23 November 2015.

20. The Claimant also produced a letter dated 18 January 2016 from the Director, Moi Teaching & Referral Hospital (signed by Senior Medical Officer) in response to a letter from his advocate stating that the medical note produced in Court by the Respondent was not from the hospital.

Evaluation

21. The Respondent has not been candid with the Court and the same is demonstrated by her inconsistent stories. One of the grounds she advanced on the face of her motion was that she had been admitted into hospital on 23 November 2015 while she did not provide any proof that in deed she was admitted on that date.

22. She also asserts that her husband called Mr. Chepkonga, Advocate to inform him of her illness. There is absolutely no corroboration of this deposition either by Mr. Chepkonga through affidavit or otherwise.

23. Further, Mr. Akello in seeking the adjournment on 23 November 2015 had informed the Court that it is the Respondent's son who had called to advise on the Respondent's illness, a fact which was disputed by the Claimant on the spot, when he disclosed that the Respondent's son was only 3 years old!

24. This inconsistency was not explained.

25. It is also quite telling, without going into any depth, that the medical note sought to be relied on by the Respondent was disowned by the Director Moi Teaching & Referral Hospital.

26. A party seeking the Court to exercise its discretion in her favour must make an honest, candid and full disclosure of material facts within her knowledge, and should not make disclosure in bits only as a response to adverse information coming from the other side, to challenge the little that has been disclosed.

27. All said, the Court reluctantly allows the Respondent's case to be reopened and a date for its witness(ess) to testify will be given forthwith.

28. Further, the Respondent must pay within 3 days all the unpaid adjournment fees it was directed to

pay.
29.It is so ordered.

Delivered, dated and signed in Nakuru on this 7th day of March 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Maragia instructed by Kakai Mugallo & Co. Advocates

For Respondent Mr. Akello instructed by A.K. Chepkonga & Co. Advocates

Court Assistant Nixon