



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO 895 OF 2013

BEDAN MUIGAI NJUGUNA.....CLAIMANT

Versus

KENYA TEA DEVELOPMENT AGENCY LIMITED.....RESPONDENT

M/S Walusana for respondent / applicant

Mrs J. A. Guserwa for claimant / respondent

RULING

1. The application dated 15th November 2015 seeks to set aside the proceedings conducted on 25th September 2015 and consequential orders therefrom.
2. The matter proceeded to formal proof on 28th September 2015 in the absence of the respondent and submissions were filed and judgment reserved.
3. The respondent/applicant states that the failure by the respondent to participate in the proceedings was not deliberate but was due to its former advocate's failure to inform the respondent / applicant under the former advocate's mistaken belief that they did not have instructions to act after the transfer of the matter to the Employment and Labour Relations Court from the lower Court.
4. The aforesaid confusion culminated in the matter proceeding exparte on 28th September 2015.
5. The respondent/applicant is desirous to be given a hearing, having filed a statement of defence on 15th December 2003 and amended statement of defence on 9th September 2008.
6. The claimant / respondent filed a replying affidavit sworn by Bedan Muigai, Njuguna on 4th December 2015.
7. The claimant/respondent states that he served the applicant's advocates with a notice of motion application dated 20th May 2010. The said firm of M/S Mukunya & Co. Advocates accepted service and attended court on 18th March 2011. The application for transfer in CMCC No. 11366 of 2003 was heard by the Chief Magistrate on 17th December 2010 and a ruling delivered on 9th March 2013 in which the transfer of the matter was allowed.

8. The matter was fixed for hearing on 28th September 2015 in this court and a hearing notice served on the respondent's advocate on record on 11th December 2014.

9. The matter proceeded by way of formal proof as the same was not defended. Submissions were filed on 14th October 2015. The matter was fixed for mention on 19th October 2015 to confirm compliance of filing submissions. The court ordered the claimant to serve the respondent with a mention notice.

10. On 27th October 2015, the respondent advocates were served with a mention notice and submissions.

11. On 6th November 2015, the claimant's advocate wrote to the respondent's advocate on record and on 11th November 2015 the claimant further effected service of the mention notice to the respondent's advocates.

12. It is clear that the advocates for the respondents were aware of the ongoing proceedings from the start of this case in 2003 till the time the file was transferred to this court.

13. The application by the respondent is baseless, frivolous and an afterthought and same be dismissed with costs.

Determination

14. This application was filed before the court had rendered its judgment in this matter. The application has been filed by a new firm of advocates Millimo, Muthomi & Co. Advocates.

15. The respondent / applicant relies on the decision of the Court of Appeal in **Pithon Waweru Maina Vs Thuka Mugira, civil appeal No. 27 of 1982 per Potter, Kneller JJA & Chesoni Ag. JA.**

16. The case laid down the principles to be exercised by a Judge in the exercise of the judicial discretion to set aside an *ex parte* judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing as follows;

*“(a) firstly, there are no limits or restrictions on the Judge’s discretion except that if he does vary the judgment he does so on such terms as may be just
..... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”*

17. The Judge went on to say relying on the case of **Patel & EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E).**

“Secondly, the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

18. On the fact of this case, the court is satisfied that the transfer of the matter from the Chief Magistrate's Court to the Employment and Labour Relations Court brought confusion on the minds of the advocates on record and they were on mistaken belief that they no longer had instructions to continue handling the matter on behalf of the respondent.

19. The court further notes that, this application was brought timeously before the court had rendered judgment pursuant to formal proof proceedings in which the claimant simply adopted the pleadings and documentary evidence on record and proceeded to file written submissions.

20. The court is of the considered view that no inordinate delay will be caused by allowing the respondent to participate in these proceedings before the court makes its decision.

21. Accordingly, the ex parte proceedings are set aside and the matter be set down for hearing.

Dated and delivered at Nairobi this 6th day of May, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE