

REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 984 OF 2013

LUKE OKOBA BUSILY.....CLAIMANT

VERSUS

MR. VIPIN PATEL T/A MANSI ENTERPRISES....RESPONDENT

Mr Okaalo for Respondent/Applicant

Claimant in person

RULING

1. Application dated 10th June 2016 and filed on 13th June 2016 seeks to set aside an order of Nderi Nduma J made on 6th June 2016 dismissing the application filed herein on 10th May 2016.
2. The application that was dismissed dated 9th May 2016 sought to stay execution of the judgement of the court delivered on 22nd May 2016 in favour of the claimant. The dismissed application was set down for hearing on 6th June 2016 by the court on 23rd May 2016 in the presence of Mr Okaalo for respondent/applicant and the claimant in person.
3. Mr Okaalo did not attend court on 6th June 2016 and no explanation was given for his absence. The court heard the claimant ex-parte and dismissed the application for non-attendance. Mr Okaalo filed the application to set aside the order of dismissal on 13th June 2016. The application is supported by an affidavit of Mr Anyangu Okaalo advocate sworn on 13th June 2016.
4. The counsel states that he was in court when the application was fixed for hearing on 24th May 2016, but he mis-diarised the hearing date for 7th June 2016 instead of 6th June 2016. That counsel realized the error on 7th June 2016 when he attended court only to be advised that the matter had been dispensed with on the previous day being on 6th June 2016.
5. The counsel was able to locate the file on 10th June 2016 as it had been moved to the officer responsible for extraction of the court order hence was not traced immediately. That the application be allowed and the order of 6th June 2016 be set aside. That this was an error by counsel and it should not be visited on the applicant.
6. The application did not attach a copy of the entry into the diary to demonstrate the error he purports to have made. The claimant who is not represented made verbal submissions in opposition to the application.
7. He stated that the respondent is out to frustrate him from enjoying the fruits of the judgement. That the application that was dismissed was filed almost a year after the judgement of the court was delivered. He had filed a response in opposition to the same. That no good reason has been given to justify the non-attendance of the applicant.
8. The court has considered the merits and demerits of the application and the court has found that the failure by the counsel to demonstrate to the court that he infact had mis-diarised the matter has left the

court with no choice but to find that the application has not been proved on a balance of probability.

9. The court therefore finds that no reasonable justification has been established for the failure to attend court. The respondent had given the claimant a cheque of Kshs 667,719.50 dated 6.5.2016 in satisfaction of the judgment decree of the court only to stop the cheque before it was en-cashed by the claimant. The court has considered this to be lack of good faith on the part of the respondent.

10. In the final analysis, there being no reasonable ground advanced and proved on a balance of probability by the applicant to set aside the order of the court, the application is dismissed with costs.

Dated and delivered at Nairobi this 11th day of July, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE