



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 1049 OF 2014
PAUL MAKAU MUTUTU.....CLAIMANT
VS
NASIB INDUSTRIAL PRODUCTS LIMITED.....RESPONDENT

RULING

1. The Respondent's application brought by Notice of Motion dated 7th March 2016 and filed in Court on 11th March 2016 seeks orders for setting aside the *ex parte* proceedings of 9th November 2015 and the judgment entered on 5th February 2016.
2. The application which is supported by the affidavits of Charles Njenga, Advocate and Willis Agayi is based on the following grounds:
 - a. That the firm of Muchoki Kang'ata Njenga & Co. Advocates which is on record for the Applicant never participated in the taking of a hearing date;
 - b. That the court record shows that on 5th December 2014 somebody by the name James for the firm of Muchoki Kang'ata Njenga & Co. Advocates and Kyalo for Namada & Co. Advocates took a hearing date at the Registry;
 - c. That on the said date of 5th December 2014, the firm of Muchoki Kang'ata Njenga & Co. Advocates did not have a court clerk by the name James and its clerk at all material times, was Willis Agayi.
 - d. That the court clerk working at the firm at the time, Willis Agayi did not participate in the taking of the hearing date;
 - e. That the Claimant's Advocates failed to serve a hearing notice;
 - f. That the Claimant's Advocates did not serve their submissions on the Respondent's Advocates in spite of directions by the Court;
 - g. That the taking of a hearing date, subsequent hearing, filing of submissions and judgment was done *ex parte* without the knowledge of the Respondent and/or their Advocates on record;
 - h. That the Claimant now seeks to execute the court orders against the Respondent and if the

proceedings and judgment are not set aside, the Respondent will suffer irreparable loss;

i. That it is in the interest of justice and fairness that the Court grants the orders sought.

3. In the supporting affidavit sworn by Willis Agayi on 10th March 2016, he depones that he is responsible for the attendance of court registries to fix hearing dates on behalf of the firm of Muchoki Kang'ata Njenga & Co. Advocates. He states that he had never attended the Court Registry to fix a hearing date in this matter.

4. Agayi further depones that he is not aware of any clerk by the name James working for the firm of Muchoki Kang'ata Njenga & Co. Advocates and it was therefore untenable that a person by that name attended the Registry and fixed a hearing date on behalf of the firm. He adds that no hearing notice was served on the firm.

5. The Claimant's reply is contained in a replying affidavit sworn by Namada Simoni, Advocate on 21st April 2016. He depones that by letter 19th November 2014, the Claimant invited the Respondent to attend the Registry on 5th December 2014, for purposes of fixing a mutually convenient hearing date.

6. Counsel states that by consent of the parties present, the case was set down for hearing on 9th November 2015.

7. Being satisfied that the hearing date was fixed by mutual consent and the Respondent having willfully failed to attend Court during the hearing, the Court proceeded with the hearing on 9th November 2015.

8. Counsel goes on to depone that the Claimant served the Respondent with a mention notice dated 10th November 2015 for purposes of confirming filing of submissions.

9. On 8th December 2015, when the matter came up for mention to confirm filing of submissions, there was no appearance for the Respondent and the Court proceeded to give a judgment date. Judgment was thereafter delivered in favour of the Claimant on 5th February 2016.

10. Thereafter, the Claimant's Advocates wrote to the Respondent's Advocates offering to negotiate on costs but there was no response from the Respondent. The Claimant therefore proceeded to file his bill of costs which was served on the Respondent's Advocates on 1st March 2016.

11. Attached to the replying affidavit of Namada Simoni, Advocate is another affidavit sworn by Festus Kyalo who is a court process server performing clerical duties at the firm of Namada & Co. Advocates.

12. Kyalo depones that on 3rd December 2014, he served upon the firm of Muchoki Kang'ata Njenga & Co. Advocates an invitation letter to fix a hearing date and on 5th December 2014, he personally attended the Registry for purposes of fixing a mutually convenient date with the Respondent's representative. While at the Registry, he met a legal clerk by the name James who indicated that he was representing the firm of Muchoki Kang'ata Njenga & Co. Advocates.

13. Kyalo and James negotiated and agreed on 9th November 2015 as the hearing date and both entered this date in their respective diaries. The date was also entered in the court diary.

14. Kyalo further depones that at the Registry, James had a copy of the invitation notice received by the Respondent's Advocates which invitation gave him the right to represent the Respondent's Advocates.

15. The single issue for determination in this application is whether the Respondent has made out a case for setting aside of the proceedings conducted on 9th November 2015 and the judgment entered on 5th February 2016.

16. Order 12 Rule 7 of the Civil Procedure Rules gives power to the Court to set aside an *ex parte* judgment upon such terms as may be just. The power of the Court in this regard is discretionary and discretion must always be exercised judiciously.

17. In considering a similar application in ***Joseph Macharia Mbugua v M/s Young Club 7 & Restaurant [2014] eKLR*** the Court held that apart from considering the sufficiency of the cause of an applicant's failure to attend a hearing, the Court ought to inquire into whether the Applicant is guilty of obstructing justice. Additionally, the Court ought to take into account any defence filed by the Applicant.

18. The events of 5th December 2014, leading to fixing of the hearing date of 9th November 2015 are highly contested. On the one hand, the Claimant's Advocate states that the Respondent was duly represented at the fixing of the hearing date, while on the other, the Respondent's Advocate denies having instructed the person who ostensibly took the hearing date on his behalf.

19. It is however not in contest that on 3rd December 2014, the Respondent's Advocates received a letter dated 19th November 2014 from the Claimant's Advocates, inviting them to attend the Court Registry on 5th December 2014 for purposes of fixing a suitable hearing date by consent.

20. Assuming that James had no instructions from the Respondent's Advocates, then they failed to honour an important date towards the hearing and disposal of this matter and no explanation was offered for this failure.

21. Further, the Respondent's Advocates were served with a mention notice on 16th November 2015 to appear in Court on 8th December 2015 for purposes of confirming filing of submissions. Again, there was no appearance for the Respondent and no explanation has been offered for the non-attendance.

22. The Respondent's Advocates also failed to respond to the Claimant's Advocate's letter dated 22nd February 2016 proposing a compromise on costs.

23. Overall and taking all factors into consideration, this Court has arrived at the conclusion that the Respondent and its Advocate failed to demonstrate commitment to expeditious disposal of this case and I therefore decline to exercise discretion in favour of the Respondent. In reaching this decision, I have taken into account that the judgment of the Court delivered on 5th February 2016 took into consideration the Respondent's Response filed on 26th August 2014.

24. The result is that the Respondent's application dated 7th March 2016 fails and is dismissed with costs to the Claimant.

25. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF SEPTEMBER 2016

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JUDGE

Appearance:

Mr. Mulaku for the Claimant

Mr. Njenga for the Respondent