REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 397 OF 2014

SAMMY NZIOKA BITA………..…..……..…1ST CLAIMANT

MUTIO GEORGE MUTIO……..………..…..2ND CLAIMANT

SYLVESTER OTIENO………..……..……..3RD CLAIMANT

VICTOR OCHIENG……………..……..…....4TH CLAIMANT

-VERSUS-

CASABLANCA RESTAURANT CLUB

VICTOR WAUDI

CASABLANCA HOLDINGS LTD....……..RESPONDENTS

RULING

Introduction

[1] The application before the Court is the 1st respondent's Notice of Motion dated 4.4.2016. It is brought under Article 159 of the Constitution of Kenya and Rule 25 of the Industrial Court Procedure (20…) Rules (ICPRs). It's basically seeking for the reopening of the hearing and leave to be given to the 1st respondent to call witnesses. The ground upon which the motion is premised is that failure to call the defence witnesses was done due to a mistake by Counsel.

[2] The motion is opposed by the claimants through the Replying Affidavit sworn on 15.4.2016. The gist of the claimants' affidavit is that the respondents had no intention of calling any defence witnesses and that is why they never filed any witness statements before the hearing date. That indeed a Counsel appeared for the 1st respondent on 16.2.2016 and after the close of the claimants' case, he told the Court that the 1st respondent did not intend to call any witness. Additionally the claimant deposed that the respondents have caused delay in finalization of this suit and have disobeyed Court order to pay Court Adjournment Fees as per the Court's order of 23.9.2015.

[3] The motion was disposed of by written submissions filed by both parties on 6.6.2016 and 14.6.2016

respectively.

1st Respondent's Case

[4] It was submitted for the 1st respondent that the failure to call witnesses on the hearing date was due to excusable mistake. That on the day of the hearing Mr. Paul Amuga, the Counsel on record for the 1st Respondent instructed Mr. Lawrence Machiaho, Counsel on record for the 2nd and 3rd Respondent to hold his brief and prosecute the matter on his behalf. However the latter Counsel never attended Court but instead he instructed Mr. Ratemo Advocate to hold brief for him and Mr. Amuga. That such abrupt change led to a communication breakdown as a result of which the 1st Respondent's witnesses failed to attend Court to give evidence. That closing defence case before producing the documentary evidence by the defence witnesses was an error on the part of the defence Counsel which should be excused.

[5] The 1st respondent cited **Commissioner of Income Tax vs Kencell Communication Ltd (2013) eKLR** where The Court held that a mistake of Counsel ought not to be visited on his client. She also cited my decision **Elvis Isangi Mwandembo vs Steel Makers Ltd (2015) eKLR** where the Court reopened defence hearing to allow the defence produce documents which were not filed during the hearing.

Claimant's Response

[6] The claimants submitted that the discretion of the Court to reopen the hearing must be exercised judiciously. They cited **Shah vs Mbogo & Another (1967) E.A 116** where it was held that discretion to set aside exparte judgment is only intended to be exercised to avoid injustice or hardship resulting from advertence, accident or excusable mistake or error but not to assist someone who deliberately evades or otherwise obstructs or delay, the cause of justice.

[7] They submitted that the conduct by Mr. Amuga Advocate in handling his client's brief was not excusable mistake but poor in – housekeeping. They denied that the failure to call witness for the 1st Respondent on 26.2.2016 was due to communication breakdown. They contended that failure by the 1st respondent to file witness statements before the hearing was a clear indication that she never intended to call any witnesses during the hearing.

Analysis and Determination

[8] The issue for determination is whether the application has met the threshold for reopening of hearing.

Threshold for Reopening

[9] Rule 25 (2) of the Industrial Court Procedure Rules states as follows:

> ***"The Court shall not re-open hearing or review facts unless it, considers it fit to do so or as provided in rule 32 (1)".***

[10] From the following provisions, it is clear that the threshold for reopening hearing is sufficient reason, or a ground for review under Rule 32 (1) of the Industrial Court Procedure Rules. The question that arises is whether the applicant has demonstrated that there is a sufficient reason to warrant the reopening of the hearing.

[11] I have considered the motion, the rival affidavits and the submissions filed and find no sufficient reason to warrant the reopening of the hearing. I agree with the submissions by the claimants that the applicant, just like the other defendants had no intention of calling any defence witnesses. The reason for the foregoing finding is that although the 1st respondent filed a list of documents, she never filed any list of witnesses and their statements.

[12] Secondly, the said defendant did not swear any affidavit to support the present mistake to prove that she was indeed desirous to call witnesses in her defence but her Counsel neglected or otherwise failed to act according to her instructions. Finally, the applicant has not filed any affidavit from Mr. Machiaho Advocate and Mr. Ratemo advocate to confirm that Mr. Amuga Advocate had indeed instructed Ratemo not to close the 1st respondent's case before calling her witnesses.

[13] Considering the foregoing observations and the Court record generally, I am not satisfied that the applicant has demonstrated on a balance of probability, any sufficient reason to warrant reopening of the hearing herein. The present case is distinguishable from all the cases cited by the two sides in their submissions in that in the present case, Mr. Ratemo appeared for the applicant during the hearing with full instructions to represent her. He stated at start of the hearing: '

> ***"We will not call any witness. I will majorly proceed on matters of law".***

[14] After the close of the claimants 'case, Mr. Ratemo told the Court that:

> ***"I will not call any witness. I wish to close our case and file written submissions***".

[15] With the foregoing bold statements the Court had nothing else to do but close the hearing as requested by the parties who also requested for 21 days each to file their respective submissions. The claimants filed their submissions but the respondents did not. Instead the 1st Respondent brought the present motion after one month out of time seeking to reopen the hearing.

[16] That motion can only be dismissed as an afterthought because it has been brought after an inordinate delay. I wonder why it took Mr. Amuga the period of 35 days between 26.2.2016 and 7.4.2016 to file the motion, if at all Mr. Ratemo had acted against his express instructions.

[17] I cannot agree more with the claimant that the applicant did not take the proceedings herein serious. She never filed defence within the time required and had to be given leave to do so by the Court. Secondly she never filed witness statements before the hearing date. Thirdly she caused adjournment of the hearing on 23.9.2015 and never paid Court Adjournment fees ordered of Kshs 1,000. Fourthly, she never attended the hearing on 16.2.2016 and finally, she failed to file her submissions within 21 days of service by the claimant and as stated above, delayed to bring the present motion early enough.

[18] In my considered view, the failure to call defence witnesses was neither communication breakdown nor excusable mistake but the culmination of deliberate choices by the applicant through her Counsel. It cannot be blamed on the Counsel alone. If indeed it is the Counsel alone to blame, the applicant has redress elsewhere and not here. Allowing this motion would be to prejudice the claimants who diligently prosecuted their case and filed the final submissions to the case. It would also delay the trial unfairly and unconstitutionally.

Disposition

[19] The Notice of Motion dated 4.4.2016 is dismissed with costs to the claimant. The respondent is further directed to pay the Court Adjournment Fees of Kshs 1,000 ordered on 23.9.2015 within 7 days of this ruling.

Ruling dated, delivered and signed this 9th day of September 2016

O. MAKAU

JUDGE