



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NARIOBI

CAUSE NO 823 OF 2016

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

KIAMBAA DAIRY FARMERS CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

RULING

1. On 13th July 2016, my brother **Nzioki Wa Makau J** allowed the Claimant's application dated 10th May 2016 *ex parte*. The Respondent now asks the Court to set aside the *ex parte* order and allow them to defend the Claimant's application.
2. The application which is supported by the affidavit of Mwaniki Gachomo, Advocate sworn on 13th July 2016, is based on the following grounds:
 - a. That the Advocate attending to the matter was held up in another court when it proceeded *ex parte*;
 - b. That the Respondent has a good defence to the Claimant's claim;
 - c. That it is only fair and just that the Respondent be given an opportunity to defend the claim;
 - d. That no prejudice shall be suffered by any party if the orders sought are granted.
3. In the supporting affidavit sworn by Mwaniki Gachomo, Advocate on 13th July 2016, he depones that although he was within the court precincts on 13th July 2016, he asked Mr. Ouma Advocate to hold his brief and the matter was set aside for 11.05 am.
4. Counsel thereafter mentioned the matter before the Judge in the presence of Mrs. Macharia for the Claimant with the intention of seeking another hearing date as the Respondent's documents had not been filed as Counsel had previously been indisposed. The Judge indicated that the matter would be mentioned as earlier directed.
5. Counsel proceeded to the Chief Magistrate's Court where he had another matter involving fourteen (14) accused persons and eight (8) Advocates which was scheduled for plea. This matter took longer than anticipated and when Counsel came back before Wa Makau J. at 11.15 am, he found the Claimant's application had proceeded *ex parte*.

6. The Claimant's response is contained in a replying affidavit sworn by Hellen Macharia on 26th July 2016 in which she gives a chronological history of this case while citing the Respondent's failure to file a reply to the Claimant's application.

7. Regarding the proceedings of 13th July 2016, Macharia states that when the matter was called out at 11.05 am, the Respondent's Advocate was absent and the Claimant asked the Court to grant orders as prayed. She asserts that Counsel for the Respondent was well aware that the matter would proceed at 11.05 am.

8. Order 12 Rule 7 of the Civil Procedure Rules gives discretion to the Court to set aside an *ex parte* order upon such terms as may be just. 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 participate in proceedings, the Court ought to inquire into whether the applicant is guilty of obstructing justice. Additionally, the Court is expected to take into account any defence filed by the applicant.

9. I have looked at the reasons advanced by Counsel for the Respondent for the failure to attend court on 13th July 2016 and find them reasonable in the circumstances of the case. Further, the ends of justice would best served if the Court hears both parties in the matter.

10. I therefore allow the Respondent's application dated 13th July 2016 with costs to the Claimant.

11. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF OCTOBER 2016

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JUDGE

Appearance:

Mr. Gachomo for the Claimant

Ms. Macharia for the Respondent