



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO.132 OF 2015**

**STEPHEN MUTINDA MUTHINI.....CLAIMANT**

**VS**

**SUDHIR J. DHUTIA t/a**

**SUDHIR AUTOR SPARES.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Motion before the court is dated 19.8.2016. It is brought by the Respondent in the suit and it seeks to set aside the judgment and decree of this court dated 29.7.2016. The main reason for motion is that the applicant's advocate wrongfully diarized the hearing date and as such failed to attend the hearing which resulted to the impugned judgment. The motion is supported by the affidavits of the claimant and his counsel Mr. Jack Matheka.
2. The Motion is opposed by the claimant through his Replying affidavit sworn on 31.8.2016. The gist of the claimant's affidavit is that the hearing date was fixed in the open court by the consent of counsel for two parties and as such no good ground has been shown as to why the respondent and his counsel never attend the hearing.
3. The Motion was argued in the open court on 7.9.2016 by Mr. Matheka, counsel for the applicant and Mr. Mutisya for the claimant.

**Applicant's case**

4. Mr. Matheka submitted that on 10.2.2016, he send his colleague Mr. Mkomba Advocate, to attend court and fix a suitable hearing date. That although the date fixed was 29.6.2016, Mr. Mkomba diarized 29.4.2016 by mistake. That based on the said mistake, Mr. Matheka notified the respondent that the suit was fixed for hearing on 29.4.2016 and invited him to attend. That on 29.4.2016, he attended court with the respondent for hearing only to find that the court was not sitting and they just went home to await communication from the claimant about the next hearing.
5. Mr. Matheka further submitted that he was shocked to receive a letter from the claimants counsel dated 29.7.2016 demanding the decreed sum. That, he then discovered that the correct hearing date fixed by his colleague was 29.6.2016 and that the suit proceed exparte and thereafter the impugned judgment was passed. He submitted that the failure by the defence to attend the hearing on 29.6.2016 was occasioned by

honest mistake on the part of the Advocate and as such it should not be visited on the respondent. In his view, the court should not have closed the hearing on 29.6.2016 because by doing so it condemned the respondent unheard. He also blamed the claimant for not serving the defence with a hearing notice for 29.6.2016 as he had done before. He concluded by submitting that the respondent has good defence which should be considered on merits.

### **Claimant's case**

6. Mr. Mutisya submitted that Mr. Mkomba Advocate who is alleged to have committed the mistake of wrongfully diarizing the hearing date has not sworn any affidavit or given any other form of evidence herein to prove that he indeed wrongfully diarised the hearing as 29.4.2016. Consequently, the claimant contends that the alleged honest mistake has not been proved to warrant the setting aside of the impugned judgment. In addition, the Mr. Mutisya submitted that after the respondent and his counsel found the court not sitting on 29.4.2016, they just went to sleep and never even verified with him or the court registry about the correct date for hearing of the suit.

7. He denied that the claimant was supposed to serve hearing notice on the defence and maintained that the hearing date had been fixed by consent in court. He further denied that the court erred by closing the hearing before hearing the respondent and contended that Order 10 rule 2 of the Civil Procedure Rules allows the court to close the hearing after hearing the plaintiff unless a good cause is shown to warrant an adjournment.

8. Finally the claimant submitted that the Motion is brought in bad faith because the applicant has admitted part of the decreed sum and further deponed that we cannot afford to pay the decreed sum. That according to the claimant, the reason for challenging the judgment and the decree herein is because he cannot afford it and not because of the mistake by counsel. In conclusion the claimant has urged that should the judgment be set aside, the decreed sum should be deposited as security and that he paid throw away costs of kshs.35,000.

### **Analysis and Determination**

9. There is no dispute that on 10.2.2016, counsel for the two parties appeared in court and fixed the suit for hearing on 29.6.2016. There is also no dispute that on 29.6.2016 the respondent and his counsel never attended the said hearing and the hearing proceeded ex parte and judgment passed on 29.7.2016. There is further no dispute that the judgment so delivered was regular in view of the aforesaid chronology of events. The issues for determination are:-

**(a) Whether the applicant has shown any good cause to warrant setting aside the impugned judgment.**

**(b) If (a) above is yes, what terms should be imposed as condition for setting aside the judgment.**

### **Setting aside**

10. The reason advanced for urging the court to exercise its discretion is mistake on the part of the counsel. The counsel who is alleged to have committed the mistake did not give any evidence in this Motion to confirm that, he indeed committed the mistake and that such mistake was genuine, honest and excusable. Without such evidence from Mr. Mkomba Advocate, I decline to exercise my discretion in favour of the applicant. As submitted by the claimant, the conduct of the applicant and his counsel after allegedly attending court on 29.4.2016, which they have not proved, is one which militates against this application. How could they attend court and after finding that the court was not sitting, they just walked away? They never verified with the Court Registry whether indeed the matter was listed for hearing that day or not. They also never contacted the claimant's counsel or Mr. Mkomba advocate to verify the same. Instead, they went to sleep only to be woken up by the impugned decree. They should not therefore accuse the court of condemning them unheard. The truth is that they appeared in court, requested for

hearing and after it was given to them they failed to attend court.

11. The second reason why I will not exercise the discretion sought is that some of the claims are not opposed. The applicant has admitted the claim for the salary for February 2015 in paragraph 6(e) of the defence. The court will not be able to reach a different decision on the award for salary for February 2015 even if I set aside the judgment and heard the respondent on his defence. Lastly, I will not set aside the judgment merely on ground that the applicant states that he cannot afford to settle the decreed sum. In my view that contention is not a reasonable ground to warrant the setting aside of the judgment.

**Terms for setting aside**

12. In view of the finding herein above that no good cause has been shown to warrant setting aside the judgment, I will not consider to make any orders in respect of conditions for setting aside the judgment.

**Disposition**

13. For the reasons stated above, I dismiss the Notice of Motion dated 19.8.2016 with costs.

**Signed, dated and delivered this 14<sup>th</sup> day of October 2016.**

**ONESMUS MAKAU**

**JUDGE**