



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 685 OF 2010
KENYA PLANTATION & AGRICULTURAL WORKERS UNION CLAIMANT
VERSUS
KACHORоба TEA ESTATE RESPONDENT

Mr. Munyu for respondent/applicant

Mr. Muli for claimant/respondent

RULING

1. The notice of motion application dated 18th January 2016, seeks to set aside the *ex parte* proceedings in this cause and hear the matter *denovo*.
2. The application is based on the grounds set out on the face of the notice of motion to wit, that the firm of Iseme Kamau & Maema Advocates took over the conduct of this matter by a notice of change of Advocates dated 29th May 2014 filed on 6th June 2016. The notice was served on the firm of Kimani Kahiro & Associates but was inadvertently not served on the claimant due to an inadvertent and excusable mistake of the Advocate handling the matter.
3. As a result, the Advocates on record and the applicant were not served with a hearing notice or a mention notice relating to the proceedings in this matter. The claimants state that they at all material times served the previous Advocates with invitation to fix hearing dates, hearing notices and mention notices. The previous Advocates did not bring the information to the attention of the applicant.
4. The application is opposed vide the replying affidavit of Thomas Kipkemboi, the Deputy General Secretary of the claimant union.
5. The facts as stated by the applicant are not in dispute. It is clear that no service of the hearing notices and mentions was done on the new advocates by the claimant because the new advocates did not serve the notice of change of Advocates on the claimant.

Determination

6. The application was filed following *ex parte* hearing and filing of submissions by the claimant. The applicant did not participate in the hearing of the suit due to a mistake of its Advocates on record.
7. In the case of **Pacitica Moraa Nyambane & another Vs. Clerk Suneka Town council & 2 others [2011] eKLR**, in allowing an application to set aside an order dismissing a suit for non-attendance of the

plaintiff's Advocates, the court held;

"..... the courts do intervene to ensure that justice is done to the parties particularly in cases where the party seeking the excusal of such mistake is completely not at fault and the loss or damage likely to be occasioned by the court's failure to excuse such error or mistake would be irreparable....."

In conclusion, it is my finding that the plaintiffs have laid a proper basis on which this court can exercise its powers under Order 12 Rule 7. The plaintiffs have demonstrated that their failure to attend court on 28th September, 2009 was a result of excusable mistake or error. I am not persuaded that the plaintiffs failure to attend court on the said date was deliberate and that it was intended to delay the hearing and disposal of this case."

8. In **Pithon Waweru Maina Vs. Thuka Mugiria [1983] eKLR**, in setting aside a default judgment the court held;

"a discretionary power should be exercised judiciously in a selective and discriminatory manner, not arbitrarily and idiosyncratically. The respondent could have been compensated by costs for the delay occasioned by his Advocates in dilatoriness and the appellant should not have been denied a hearing because of his advocates even if it amounted to negligence in the circumstances of the case."

9. In the present case, the Advocates for the applicant have owned up to negligent conduct by failing to serve the claimant with a notice of change of Advocates thereby misleading the claimant to continue to serve the previous Advocates. The previous Advocates, acted unprofessionally by failing to forward the notices to the new Advocates hence compounding the problem.

10. The circumstances of this case, show that the applicant had no fault at all in failing to attend court but was the failure of his advocates which led to its non-attendance of the various mentions and hearing of the case.

11. In the court's view, the mistake of the Advocates is excusable to avoid undue punishment to the applicant by denying it a hearing. However the costs incurred by rehearing the matter *denovo* will be borne personally by the Advocates for the applicant.

12. The view by the claimant that only judgments and orders of the court but not proceedings may be set aside is erroneous.

13. Accordingly, the court sets aside the proceedings in this cause held on 19th May 2015; 1st October 2015, 3rd November 2015 and 23rd November 2015 and directs the hearing of this matter to commence *denovo*.

14. The costs of the proceedings held on the stated date including making and filing of submissions and handling of this application be met by the Advocates for the applicant. The same be assesstes for the applicantdatedied and paid immediately.

15. Meanwhile, the suit will be allocated a hearing date on the date of this ruling on priority basis.

Dated and delivered at Nairobi this 25th day of November 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE