



**REPUBLIC OF KENYA**

**THE EMPLOYMENT & LABOUR RELATION COURT OF KENYA**

**AT MOMBASA**

**CAUSE 74 OF 2014**

**KENYA BUILDING CONSTRUCTION TIMBER & FURNITURE INDUSTRIES**

**EMPLOYEES UNION ..... CLAIMANT**

**VERSUS**

**WESTCON CONTRACTORS (K) LTD..... RESPONDENT**

**RULING**

**Introduction**

1. The claimant brought this suit on 12.3.2014 but despite service with summons the respondent never entered appearance or filed any defence. Thereafter the suit was fixed for hearing on 30.9.2014 when directions were sought to dispense with the hearing of the 2 witnesses in attendance and instead dispose of the suit on the basis of the pleadings and written submissions. After satisfying itself that there was no cause shown as to why the hearing should not proceed, the court granted the directions sought. The result of the said ex parte proceedings was the entry of the judgment dated 2.10. 2015.

2. The respondent ( herein after called the applicant) has now challenged the said judgment by the Notice of Motion dated 16.6.2016 which basically seeks for the setting aside of the impugned judgment/ decree upon just terms and that leave be given to the applicant to defend the suit. The motion is supported by the Affidavits sworn by Samuel S. Ouma on 16.6.2016 Associates Advocates. The motion is however opposed by the claimant vide his Replying affidavit sworn on 21.7.2016 by Mr. Francis Karimi Murage and it was disposed of by written submissions of both parties.

**Applicant's case**

3. The motion is founded on section 3(1) 12(3) (i), 12 (3) (iii) and section 16 (1) of the Employment and Labour relations Court Act, section 51 (1) of the civil Procedure Rules and all other enabling provisions of law. The applicant has admitted that she was served with summons and instructed the firm of COOTOW & Associates Advocates to represent her in the suit. That out of an inadvertent error on their part, the lawyer firm failed to enter appearance and file defence. That the said default is purely a mistake on the part of her counsel as such it should not be visited on her. That she has a good defence which raises triable issues and as such she should be given leave to defend the suit. She cited several decisions of the Court of Appeal to support the contention that a mistake of counsel should not be visited on the litigant to deny him a day in court.

**Claimant's reply**

4. The claimant has opposed the motion and submitted that it lacks merits and it should be dismissed with costs. She further submits that the applicant did not act diligently after being served with summons and never followed up the progress of the matter after she allegedly instructed counsel. That the applicant lacked the keenness of concluding the dispute even during the conciliation proceedings prior to the filing of the suit. That according to her, the application is only meant to frustrate the grievants from accessing justice.

### **Analysis and determination**

5. After careful consideration of the Application, affidavits and submissions, the issue for determination herein is whether the motion has merits and should be allowed. I have carefully perused the correspondences between the applicant and her counsel and noted that indeed the applicant gave instructions to the said firm of lawyers to represent her in court starting 14.4.2014. There is also no dispute that the applicant and counsel never attended court on 15.4.2014 as notified and on 30.9.2014 for hearing as notified by the hearing notice dated 18.8.2014 and served on 20.8.2014.

6. I agree with the claimant's contention that the claimant was not diligent in defending the suit. Even if he instructed counsel to attend court as instructed, that did not mean that she handed over the brief to the counsel to be conducted recklessly. Even if the court was to excuse the mistake by the counsel to act on 14.4.2014, I find it impossible to excuse the applicant's deliberate failure to attend court for hearing on 30.9.2014. Indeed the service of the hearing notice on her instead of her lawyer should have alerted her to enquire from her lawyer whether he had entered appearance in the suit. Instead she ignored the notice and was only awakened from the slumber by the notice of judgment. Consequently I find that the exparte judgment herein was not occasioned by the honest mistake of counsel but also by the deliberate default by the applicant.

7. As regards the contention that the applicant has a defence which raises triable issues, I have considered the draft defence filed together with the motion and noted that the applicant denies ever dismissing the grievants and instead blames them for absconding duty. The said defence was stated by the applicant in her letter dated 5.10.2012 to the County Labour Officer and as such I find consistence in the defence case. In my view, the draft defence raises some triable issue which warrants a determination on the merits. On that ground therefore I exercise my discretion to allow the motion and set aside the judgment dated 2.10.2015 and also give the applicant leave of 14 days of today to file and serve her defence. The applicant will however pay to the claimant thrown away costs of kshs. 20,000 within 14 days of today and in default execution to issue.

### **Disposition**

8. For the reasons stated above, the applicant's motion dated 16.6.2016 is allowed subject to the terms stated above in relation to time and costs.

**Signed, dated and delivered at Mombasa on 11<sup>th</sup> day of November 2016.**

**ONESMUS N. MAKAU**

**JUDGE**