



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT MOMBASA
CAUSE NO. 205 OF 2013
BETWEEN
THOMAS MGHANGA WANDOE..... CLAIMANT
VERSUS
KASSAM HAULIERS LTD.....RESPONDENT
RULING

1. The Claimant was heard, and closed his case on 27th May 2015. The Respondent's case was scheduled to be heard on 23rd June 2016.
2. Neither the Respondent, nor its Advocates, attended Court on 23rd June 2016. The Claimant applied for, and the Court ordered, closure of the proceedings, and scheduled delivery of the Award for 23rd September 2016.
3. Award was delivered in favour of the Claimant as scheduled.
4. The Respondent filed an Application dated 25th October 2016, a month after the Award was delivered, seeking to have *ex parte* Award set aside, and the Respondent allowed to give its Response.
5. The Application is supported by the Affidavit of Mr. Makasembo Makonyango Advocate, appearing for the Respondent, sworn on 25th October 2016. It is opposed through the Affidavit of Claimant's Advocate Mr. Samuel Odhiambo Eliakim, sworn on 18th November 2016.
6. The Application was heard on 25th November 2016.
7. The gist of the Application is that when the matter came up for hearing of the Respondent's case, Mr. Makasembo was taken ill. He was unable to participate in the proceedings of 23rd June 2016.
8. The Claimant opposes the Application on the ground that Mr. Makasembo did not send or request any Advocate to hold his brief on 23rd June 2016. No medical record supporting Respondent's position was made available to the Court.

The Court Finds

9. The hearing of the Respondent's case was fixed by the Respondent, for 23rd June 2016. The Claimant attended Court upon being notified by the Respondent.

10. The Respondent and its Advocates did not attend Court. There was no communication to the Court, or to Mr. Odhiambo, about Mr. Makasembo's illness. There was no correspondence, no e-mail, no sms or call from Mr. Makasembo saying he was ill, and unable to attend Court. There was no Advocate or Legal Assistant in Court for the Respondent, on 23rd June 2016.

11. There is no medical record in whichever form, shown to the Court to establish Mr. Makasembo was unwell.

12. There were two cases involving the Respondent which were to be heard on the same date, and in the view of the Court, the Respondent should have been more focused in responding to these Claims, having taken the hearing date on its own. It cannot be said that the Court took away the Respondent's right to be heard, or that the Claimant unreasonably sought closure of the proceedings.

13. Lastly, it is noted the Respondent has been lethargic in responding to the Claim, right from day one. The matter first came for mention on 31st October 2013, when the Respondent had not filed its Response and Documents. Leave to comply was granted to the Respondent on various dates subsequently. Throughout, the record suggests, the Respondent participated in the proceedings through a large measure of prodding. Parties should not wait until the Court has made an adverse determination, to become energized.

14. The failure to participate in the hearing was consistent with this trend of lethargy, and is inexcusable.

IT IS ORDERED:-

a. The Application filed by the Respondent on 25th October 2016, and the related Application of 21st October 2016, are rejected.

b. Costs to the Claimant.

Dated and delivered at Mombasa this 13th day of December, 2016.

James Rika

Judge