



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU
CAUSE NO. 194 OF 2014

(Before Hon. Lady Justice Maureen Onyango on 6th March, 2015)

BENSON OMWALA ODUOR CLAIMANT

-VERSUS-

THE SEC, B.O.G EQUATOR AND SPECIAL SCHOOL RESPONDENTS

R U L I N G

The application dated 19th January 2015 is filed by the claimant Benson Omwala Oduor through his advocate Newton Ingosi. He seeks the following orders:-

1. That this application be certified as urgent and it be heard *ex-parte* in the first instance.
2. That the order dismissing the applicant's application dated 24th November, 2014 be set aside.
3. That the same application be heard *inter parties*.
4. That the costs of this application be provided for.

The application is supported by the said advocate's affidavit and on the following grounds:-

1. That it was not the mistake of the applicant that the application was dismissed.
2. That it would be in the interest of justice that this application be reinstated and the order sought be granted.
3. That the respondent shall not be prejudiced in any way.
4. That failure to arrive in court on time was an act of God.

The application is opposed by the respondent who filed grounds of opposition as follows:-

1. That the claimant did obtain *ex parte* orders restraining the respondent from terminating the claimant on account of redundancy.
2. That when the matter came up for *inter parties* hearing on 19th January, 2015 both the claimant and his advocate were absent from court and the court proceeded to dismiss the claimant's application for injunction at the instance of the respondent.

3. That Rule 16(8)(a) and (b) of the Industrial Court (Procedure) Rules, provides that:-

"The Industrial Court shall not grant an *ex parte* order that reinstates into employment an employee whose services has been terminated."

4. That from the pleadings the claimant was terminated on account of redundancy on 27th October, 2014 and was to serve notice until 30th November 2014 yet the claimant filed the present application on 27th November, 2014 and obtained *ex parte* order for reinstatement contrary to Rule 16(8) (a) and (b) of the Industrial Court (Procedure) Rules.
5. That the claimant's application dated 27th November 2014 is bad in law, irregular and unprocedural as the same is not supported by any Memorandum of Claim with respect to any redundancy.
6. That the Memorandum of Claim on record is with regard to non - payment of salaries as per minimum wage, leave extra duties and arrears.
7. That any application seeking to restrain a redundancy process must be supported by a Memorandum of Claim and there is none in this case thus there is no valid Notice of Motion to be reinstated.
8. That the claimant's application dated 19th January, 2015 seeking to reinstate the claimants' earlier application does not state any prejudice that the claimant is to suffer if the earlier application is not reinstated.
9. That there is no evidence by the claimants' Advocate that he had a mechanical problem with the vehicle. There are no receipts for any repairs for any repairs or otherwise.
10. That the mechanical breakdown of a motor vehicle cannot be an act of God but purely a human error in failing to keep the motor vehicle in good and sound state of repair.
11. That the claimant has not satisfied any procedural requirement for institution a claim against the redundancy process and such the application sought to be reinstated is bad in law, irregular, frivolous and an abuse of the court process.
12. That for the foregoing reasons the claimants' application dated 19th January, 2015 be dismissed with no orders as to costs. The application was argued on 10th February 2015. Both parties substantially expounded on the grounds in the affidavit in support of the application for the claimant and on the grounds of objection for the respondent.

I have considered the grounds in support of the application and those in opposition thereof. The issue for determination is whether there is a valid ground for grant of the orders.

Courts have very wide discretion in setting aside *ex parte* orders in order to meet the ends of justice. As may be gleaned from decisions of courts, the only circumstances when a court may decline to grant orders for setting aside is when the applicant intends to delay the course of justice. In the present case the failure of the applicant to attend court was by the advocate for the applicant who has stated in the supporting affidavit that he was late due to a mechanical problem. I consider this to be an excusable mistake by the advocate.

This is however a situation that could have been avoided by the claimant's advocate calling either the respondent's counsel or any other advocate to place the file aside. This having been the case, I make the following orders:-

1. **The order made by the court dismissing the claimant's application dated 24th November 2014 is set aside.**

2. The claimant's advocate shall pay Kshs 5,000/= to the respondent as thrown away costs before the application is set down for hearing.

Orders accordingly.

MAUREEN ONYANGO

JUDGE

6/3/2015

Appearances:-

..... for the claimant(s)

..... for the respondent(s)

CC. Wamache