



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 30 OF 2012

(Formerly Cause No. 163 of 2012 at Nairobi)

KUDHEIHA WORKERS..... CLAIMANT

-VERSUS-

**DIOCESE OF MERU, ST. PAUL PRIMARY BOARDING
SCHOOL..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 24th April, 2015)

RULING

The court entered judgment for the claimant against the respondent on 19.12.2014 in the sum of Kshs. 520,240.00. Despite service, the respondent failed to attend the hearing of the case on 10.12.2014. The judgment of the court therefore flowed from the ex parte hearing of the suit on 10.12.2014. The respondent filed a notice of motion on 26.01.2015 seeking to set aside the judgment of 19.12.2014 and all consequential orders and the matter be heard afresh. That notice of motion was fixed for hearing on 3.03.2015 when the respondent as the applicant in the notice of motion did not attend court and the notice of motion was dismissed for non-attendance.

The respondent in the suit subsequently filed on 11.03.2015 the notice of motion brought under sections 1, 1A, 1B, 3A & 63(e) of the Civil Procedure Act and order 12 rule 3(1) and order 50 Rule 1 of the Civil Procedure Rules. The substantive prayer in that notice of motion was that the honourable court be pleased to reinstate the applicant's application dated 23.01.2015 which was dismissed for non-attendance on 3.03.2015 and to allow the same to be heard on merits. The application was supported by the affidavit of the applicant's counsel, Kiautha Arithi Advocate, sworn on 9.03.2015 and filed together with the notice of motion.

The reason advanced for reinstatement of the motion that was dismissed is that counsel for the applicant knew that the motion was scheduled for hearing on 3.03.2015 but Mr. Waweru Macharia Advocate who had attended court in another suit on 27.03.2015 had informed the applicant's counsel that the court would not sit on 3.03.2015. Accordingly, counsel for the applicant did not attend the court on 3.03.2015. However, counsel for the applicant stated at paragraph 9 of the supporting affidavit that the court actually sat on 3.03.2015 and the matter was dismissed for non-attendance. At paragraph 10 of the supporting affidavit counsel states that at around 11.00AM on 3.03.2015 he called the court registry to arrange for an early hearing date and the court official known as Wanjohi informed counsel that the court was actually in session. Thus, counsel stated in the affidavit that the default on his part not to attend court was not deliberate and the same was highly regretted. It was submitted for the applicant that the mistake occasioned was excusable and the application had been filed without undue delay.

The claimant, the respondent in the application, filed the “**verifying affidavit**” of John Ombima without indicating the date it said to have been sworn at Nairobi. The court has considered the missing date and finds that the omission rendered the affidavit fatally defective and it is expunged from the record. The claimant also filed the notice of motion on 26.02.2015 and stated that it also relied upon that motion to oppose the application. Counsel for the applicant submitted that the proper way to oppose an application was by filing grounds of opposition and replying affidavit but the claimant would nevertheless be excused and allowed to rely on the motion in line with Article 159(1) (d) which guides the court to administer justice without undue regard to procedural technicalities.

The claimant’s submissions to oppose the application were that the applicant and the applicant’s counsel had consistently failed to attend court as directed by the court throughout the proceedings in the suit. Counsel for the applicant opposed that submission and urged the court to uphold the opinion of the Court of Appeal in **Billey Olouch Okun Orinda –Versus- Ayub Muthee M’igweta and 2 others**[2014]eKLR that the court should focus on the application presently before the court being the application to revive the application for setting aside the judgment that had been dismissed and not to consider grounds in opposition to that dismissed application subject of the revival orders.

For the claimant it was further submitted that the applicant ought to have applied for review under rule 32 of the Industrial Court (Procedure) Rules, 2010 and not to have invoked the provisions of the Civil Procedure Act and the rules made under the Act.

The court has considered the application, the supporting affidavit and the submission made for the parties.

In the opinion of the court, section 3 of the Employment and Labour Relations Court Act, 2011 is pertinent in determining the present application. Sub-Section 3(1) of the Act provides that the principal objective of the Act is to enable the court to facilitate the just, expeditious and proportionate resolution of disputes governed by the Act. Sub-Section 3(3) of the Act provides that the parties and their representatives, as the case may be, shall assist the court to further the principal objective and, to that effect, to participate in the proceedings of the court and to comply with the directions and orders of the court.

In the present application, counsel for the applicant says that he was aware that the application that was dismissed was scheduled for hearing on 3.03.2015. In unexplained prompting, the applicant’s counsel further says that he called the court registry on 3.03.2015 and was informed that the court was in session. The applicant’s counsel further says that the purpose of the telephone call was to find out the possibility of an early hearing date for the application that had been dismissed.

The court has considered the enumerated flow of events and further that at all material time there was an interim order in place given on 28.01.2015 thus, “**2. THAT a stay of execution of the judgment or decree dated 19th December 2014 be and is hereby granted until interpartes hearing of the notice of motion dated 23.01.2015 before the industrial court on 3.03.2015.**” In the opinion of the court, by reason of lapsing of that interim order on 3.03.2015 and despite a communication by another advocate holding the applicant’s brief in the unrelated case that the court would not sit on 3.03.2015, the applicant’s counsel was duty-bound to attend court; at least for the purpose of the destiny of the lapsing interim orders, if not for the purpose of hearing the application as was expressly directed by the court and the orders of 28.01.2015 having not been varied one way or the other. In any event, it is not said that the court had put up a formal notice that it would not be sitting on 3.03.2015. Accordingly, the court finds that the flow of things on the part of the applicant’s representative in this matter went against the principal objective as set out in the cited provision of the Act and in the circumstances the court finds that allowing the application would not be in furtherance of that principal objective. In the opinion of the court it would not be just, expeditious and proportionate resolution of the present suit if the application was allowed in the circumstances whereby for the applicant, express orders and directions of the court were not complied with. The application will therefore fail.

In conclusion, the application by way of the notice of motion filed on 26.01.2015 is dismissed with costs.

Signed, dated and delivered in court at **Nyeri** this **Friday, 24th April, 2015.**

BYRAM ONGAYA

JUDGE