



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 1564 OF 2012**

**STEPHEN MUSYOKA MUIA.....CLAIMANT**

**VS**

**MUNYIRI 64 TRADERS LIMITED**

**T/A MUNYIRI FISH & CHIPS.....RESPONDENT**

**RULING**

**Introduction**

1. On 11th December 2013, I heard the Claimant *ex parte* and on 27th February 2014, I delivered an award in his favour in the following terms:

- a. 3 months' salary in compensation for unfair ,termination.....Kshs. 24,000.00
- b) 1 month's salary in lieu of notice.....Kshs.8,000.00
- c. Leave pay (Kshs.8,000/30x42).....Kshs.11,200.00

**Total.....Kshs.43,200.00**

2. On 8th July 2014, the Claimant appeared before the Deputy Registrar, **Hon E. Kimaiyo** when the bill of costs was taxed at Kshs. 78,106. The Claimant initiated execution proceedings and the Respondent obtained interim orders of stay of execution on 10th October 2014 before **Nzioki Wa Makau J.** The parties appeared before the same Judge on 3rd November 2014 and they agreed to dispense with the Respondent's application by way of written submissions.

**The Application**

3. The Respondent's application brought by way of Notice of Motion dated 14th October 2014 seeks orders for review and/or setting aside of the award issued by this Court on 27th February 2014 .

4. The application which is supported by the affidavit of Peter Kariuki Njiiri is based on the following grounds:

- a. That the case proceeded *ex parte* on 11th December 2014 and an award was issued on 27th February 2014;
- b. That the Respondent's failure to attend court was due to the fact that it was not advised of the

- hearing date by its Advocates on record;
- c. That the Respondent's Advocate's failure to attend court was due to a human error as Counsel who held his brief failed to inform him of the hearing date and the matter was not diarised;
  - d. That the Respondent has a good defence and stands to suffer irreparably if the award is not set aside;
  - e. That the Respondent's movable goods have been attached;
  - f. That the Respondent is ready and willing to deposit the decretal amount as a conditional stay;
  - g. That there will be no prejudice to the Claimant if the orders sought are granted as he can be compensated by an appropriate order for costs;
  - h. That the Court should not let an innocent litigant suffer for no deliberate reason on its part.
5. In the supporting affidavit sworn by Peter Kariuki Njiiri on 14th October 2014, he depones that when the matter came up for hearing on 30th July 2013 he was indisposed. Counsel holding his brief sought and was granted an adjournment and a new date of 11th December 2013 was given. The date was however not diarised and hence the Respondent's failure to attend Court on the said date.
6. Mr. Njiiri goes on to depone that during this period, he was in the process of negotiating for a merger of his law firm with A L Kariu and Co. Advocates with the merger being concluded in June 2014. Mr. Njiiri moved his office from Caxton House to Eagle House on 1st July 2014.
7. Following the *ex parte* proceedings of 11th December 2013, an award was delivered on 27th February 2014. The Claimant's bill of costs filed on 21st May 2014 was served on the Respondent's Advocate on 9th July 2014. The bill of costs and taxation notice was received by a secretary who filed it in a general folder and the taxation date was not diarised. A court clerk by the name Peter Njoroge came across the taxation notice but did not pay attention to it. A letter dated 28th July 2014 from the Claimant's Advocates was filed in the same general folder.

### **The Claimant's Reply**

8. In a replying affidavit sworn by the Claimant's Counsel, Chrispine S. Maondo on 29th October 2014, it is deponed that the Respondent's application is a mere afterthought lodged very late in the day with the sole intention of denying the Claimant his rightful dues. According to Mr. Maondo, it is evident that the Respondent's Advocates have all along been aware of the proceedings in this case but opted not to attend court.
9. Further to the award by the Court in favour of the Claimant, his Advocates by letter dated 25th May 2014, forwarded a draft decree to the Respondent's Advocates for approval. Despite the letter having been stamped received, no response was forthcoming from the Respondent's Counsel and the Court proceeded to issue a decree.
10. The Claimant's Advocates thereafter filed a bill of costs which was served on the Respondent's Advocates together with a taxation notice for 28th July 2014. Again on 28th July 2014, there was no appearance for the Respondent and the Court having been satisfied that there had been due service proceeded to tax the bill of costs.
11. On the same day, the Claimant's Advocates wrote to the Respondent's Advocates notifying them of the taxation and calling for payment of the decretal sum. This letter did not elicit any response and the Claimant's Advocates initiated execution of the decree.

### **Findings and Determination**

12. The single issue for determination in this application is whether the Respondent has made out a case for setting aside of the Award issued by this Court on 27th February 2014. The Respondent's application is premised on the argument that Counsel's failure to attend Court was inadvertent and that this error should not be visited on the Respondent who pleads innocence.

13. In exercising its discretion in an application for setting aside an *ex parte* award, the Court is called upon to balance the Respondent's right to be heard with the Claimant's right to actualise their award.

14. I have examined the attendance history in this case and have observed that Counsel for the Respondent failed to show up for a record five (5) court appearances out of which only one was excused. Further, he failed to respond to the Claimant's Advocate's request to approve the draft decree. While the Court is expected to accommodate honest human error, the errors in this case are far too many and even taking into account the explanation by Counsel that he was caught up in administrative details of a merger involving his law firm, the Court finds that he failed to give this matter the attention it deserves. This failure should not be visited on the Claimant who has been holding an unsatisfied award for the last thirteen (13) months.

15. The Respondent's application therefore fails and is dismissed with costs to the Claimant. The interim orders granted on 10th October 2014 are consequently set aside.

16. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20<sup>TH</sup> DAY OF APRIL, 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Maondo for the Claimant

Mr. Kariu for the Respondent