



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 1508 OF 2013

GODANA GODUO DUO 1ST CLAIMANT

FREDRICK MULWA MUSYOKA 2ND CLAIMANT

ROBERT K MUNYOWKI 3RD CLAIMANT

VERSUS

LANDMARK HOLDINGS LIMITED RESPONDENT

RULING

1. On 20th May 2015 the respondent, Landmark Holdings Limited filed their application through Notice of Motion brought under the provisions of section 87 of the Employment Act, order 12 Rule 7 and order 51 Rule 1 of the Civil procedure Rules seeking for orders;

1. ... *spent*
2. *That this court be pleased to set aside its orders made on 19th May 2015 dismissing respondents application dated 9th April 2015 and all its consequential orders*
3. *That the court be pleased to reinstate the respondents application and the same be heard on merit.*
4. *That costs of this application be in the cause*

2. The application is supported by the annexed affidavit of Kabue Thumi Advocate and on the grounds that the suit was dismissed on 19th May 2015 for non-attendance and that Mr Kabue Thumi had requested Mr Samuel Nyambane to hold his brief but he was overwhelmed by other matters and could not attend to this matter. The respondent was present in court but for reasons that canto be understood he did not respond. The respondents advocates have always attended court and the mistake of counsel should not be visited upon the client. The respondent shall suffer irreparable harm if the orders are not set aside as prayed and in the interests of justice the application should be allowed.

3. In the affidavit of Kabue Thumi he avers that as the respondents advocate he requested Mr Nyambane to hold his brief in the matter but was overwhelmed with some other matters and could not attend to this matter and later found the matter had been dismissed for non-attendance. This mistake of the advocate should not be visited upon the respondent.

4. In reply, the claimants filed their Grounds of opposition noting that the respondents fail to be candid with the truth and thus do not deserve the discretion of the court as no reasonable explanation has been given on the failure to attend court for address an application that had been filed under Certificate of urgency. The conduct of the respondent throughout the case has been of disinterest, delay and miscarriage of justice for the claimant and the current application is only intended to further delay the matter

especially the execution of the orders of the court.

5. The main issue in the application by the respondent is the prayer that the orders of 19th may 2015 should be set aside. The explanation and grounds in support is that the respondents advocate was not able to attend court as he was overwhelmed with some other matters and the respondent who was in court failed to respond, for reasons not understood.

6. An application seeking to set aside the orders of the court must have good grounds the basis of which the Court can determine the same and use its discretion as requested by the Applicant. The Court discretion must be based on fair reason and for purposes of meeting the ends of justice. Parties come to court to assert their rights. a party who files an application and does not pursue it for hearing or for purposes of having it concluded, cannot be said to be a party keen to assert his rights. see **John Ogutu Ragama versus Elimu Co-operative Savings & Credit Society limited, Cause no.476 of 2012.**

7. The respondent moved the court by setting this matter for hearing upon filing an application through Certificate of urgency on 9th April 2015. On 8th may 2015, the respondent was in court when they were given an *ex parte* hearing date noting the urgency of the application, they served the claimants who dutifully attended court on 19th may 2015 but the respondents were absent. to therefore file such an application that was certified urgent, serve the claimant and then fail to attend court to prosecute it finds no justification. The reason given for non-attendance by the respondent is worth mention. The respondent's advocate was not in court on the grounds that the advocate holding brief was overwhelmed with other matters. Such matters are not noted and it is not clear as to the whereabouts of counsel so as not to be in court on a date taken *ex parte* and confirmed by the court. Further grounds are that the respondent was in court but failed to respond to the matter. This is absurd as the respondent is a corporate and the officer/person/identity of the person present for and on behalf of the respondent is not noted/stated/outlined. The averment by Kabue Thumi that the mistakes of the advocate should not be visited upon an innocent client therefore lacks basis as where the respondent's advocate was not in court for being overwhelmed with other matters elsewhere, there was a respondents representative in court who failed to respond for unknown reasons. The court cannot thus be said to have acted unfairly at the expense of an innocent respondent.

I find no genuine reason/s and grounds to set aside the orders of the court made on 19th May 2015. The application dated 19th May 2015 lacks merit and the same is dismissed with costs to the claimants.

Delivered in open Court dated and signed in Nairobi on this 25th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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