



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

CAUSE NO. 45 OF 2014

(Originally Nairobi Cause No. 1606 of 2012)

DANIEL MAINA WANYOIKE

CLAIMANT

v

KENYA POWER & LIGHTING COMPANY LTD

RESPONDENT

RULING

1. Daniel Maina Wanyoike (Claimant) sued Kenya Power & Lighting Co. Ltd (Respondent) on 11 September 2012 in Nairobi. The Respondent was served with Notice of Summons and Memorandum of Claim and it filed a Response on 15 April 2013.
2. Other documents were filed and exchanged.
3. On 16 May 2014, the Court fixed the Cause for hearing on 27 November 2014. When the Cause was being fixed for hearing, Mrs. Gatei held brief for Mr. Onyony for the Claimant while Mr. Kibet held brief for Mr. Njiru for the Respondent.
4. On 27 November 2014 when the Cause was called out for hearing, the Respondent was not present nor was it's advocate on record.
5. The Court in the event allowed the hearing to proceed and a judgment was delivered on 20 February 2015. The Court found the Claimant's dismissal unfair and awarded him the equivalent of 6 months gross wages assessed as Kshs 871,446/- (as compensation).
6. On 23 March 2015, the Respondent filed a motion seeking among other orders the setting aside of the judgment and grant of leave to defend.
7. The Claimant filed a replying affidavit through his advocate on 8 May 2015. The motion was heard *inter partes* on 21 May 2015 and is the subject of this ruling.
8. According to the Respondent, although the hearing date was taken by consent, the Advocate who had conduct of the Cause, Mr. Martin Njiru had left the employment of the Federation of Kenya Employers by the time of hearing and he had not diarised the hearing date and therefore the Federation of Kenya Employers was not aware of the hearing date.
9. The Respondent also contended that although the Cause was filed in Nairobi and was being handled from Nairobi, it was supposed to have been transferred to the Federation of Kenya Employers Nakuru office but due to an oversight, it was not.
10. The Respondent also stated that Mr. Masese who was to deal with the Cause in Nakuru was on leave at the time of hearing and was not aware of the hearing.
11. In his supporting affidavit, Mr. Masese deposed that at the time of hearing, the Federation of Kenya Employers entire legal team was attending a retreat and so no legal officer was able to check the cause list.
12. Mr. Masese exhibited a copy of his diary and leave application duly approved.

13. The Respondent urged that it was ready to deposit the decretal amount in a joint interest earning account as security and that the Claimant stood to suffer no prejudice were the orders sought be granted. It was also submitted that the Respondent had an arguable case and that the failure to attend Court was not intentional.
14. The Respondent cited 2 authorities, Nairobi High Court Civil Case No. 62 of 2011, *Esther Wamaita Njihia & 2 Ors. v Safaricom Ltd* and Nairobi Civil Appeal No. 27 of 1982, *Maina v Mugura*, for the legal principles applicable to applications such as the instant one and the proposition that the Court ought to consider a defence on record.
15. The Claimant opposed the motion. In his replying affidavit, Mr. Onyony deposed that the motion was misconceived and devoid of substance and was legally untenable.
16. Mr. Onyony also deposed that Mr. Masese was not the advocate in conduct of the brief and that the Cause was being handled by the Federation of Kenya Employers Nairobi office.
17. Mr. Onyony deposed that although the hearing date was taken in the presence of both parties on 16 May 2014, he nonetheless served a hearing notice upon the Federation of Kenya Employers Nairobi office on 13 August 2013 as a reminder (copy exhibited).
18. He further deposed that after the hearing, he served the Federation of Kenya Employers with the Claimant's submissions but no action was taken.
19. According to Mr. Onyony, Mr. Njiru should have handed over, and proper records maintained.
20. He urged that the Cause had taken 5 years to determine and therefore the Claimant would be prejudiced and occasioned an injustice were the Cause be set for rehearing.
21. He urged that the Respondent had not met the threshold for setting aside a judgment.
22. And in this regard he cited *Wangulu Enterprises v Abdallah Said Kugotwa & 6 Ors* (2013) eKLR for the proposition that the failure of legal counsel should not be a ground for the Court's exercise of discretion to set aside a judgment.
23. He also cited *Teachers Service Commission v ex parte Patrick M. Njuguna* (2013) eKLR for the legal principle that not every mistake of advocate is excusable or would be sufficient ground for setting aside a judgment.
24. He rounded off by submitting that the Court should not exercise its discretion as a matter of sympathy and that the Court in its judgment considered the Respondent's defence as filed.
25. In a brief rejoinder, Mr. Masese urged that the Court being a Court of equity should consider that blunders would be made from time to time.
26. The Court has considered the affidavits tendered, the authorities cited and the submissions.
27. It cannot be disputed that the hearing date was taken in the presence of the parties legal representatives. It can also not be disputed that the Claimant went a step further and served a hearing notice though it was not necessary.
28. It is also not disputed that it is the Federation of Kenya Employers Nairobi office which had conduct of the Respondent's case and it is Mr. Njiru Advocate who had the brief (not Mr. Masese).
29. It is clear from the evidence and submissions that Mr. Njiru left the employment of the Federation of Kenya Employers. But the Respondent did not disclose exactly when he left the employment of the Federation.
30. This information should have been disclosed to put into perspective and context the failure to diarise, if at all he failed to diarise the hearing date. This is so because Mr. Njiru's diary was not produced or exhibited. It was not necessary for Mr. Masese to exhibit an extract page of his diary when he admitted the counsel who had conduct of the brief was Mr. Njiru.
31. The Court was not even informed whether Mr. Njiru left employment with his diary or it was among items handed over.
32. Mr. Masese did not make any rejoinder to Mr. Onyony's contention about handing over of the matters under Mr. Njiru's docket.
33. The Court publishes its cause list one week in advance (including on the web) and that must have been the case in the hearing week of this Cause. The purpose is to remind and put parties on notice about hearings coming up.
34. Even if the Federation of Kenya Employers legal team was attending a function, the prudent thing would have been to consult with the cause lists of the various Courts and make suitable arrangements for representation.
35. Further, when the hearing date was fixed the Respondent must have informed and advised its

- client. Not even the client's representatives were in Court on the hearing date.
36. Setting aside of a judgment no doubt requires the Court to exercise its discretion. The same should not be exercised arbitrarily or capriciously. It should be exercised to avoid obvious injustice but not to aid a party who is not diligent.
37. Considering all the above, the Court reaches the conclusion that the Respondent has not placed sufficient reasons/grounds before it to enable it exercise the discretion in its favour.
38. The result being that the Court declines the invitation by the Respondent and dismisses the motion dated 23 March 2015 with costs to the Claimant.

Delivered, dated and signed in Nakuru on this 24th day of July 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Onyony instructed by Onyony & Co. Advocates

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Nixon