



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 888 OF 2014

JOSEPHINE WANJIRU MUIRU CLAIMANT

VERSUS

NOVARTIS PHAMA SERVICES INC 1ST RESPONDENT

MOHAMED METWALLY 2ND RESPONDENT

MARIA SOTOMAYOR 3RD RESPONDENT

RULING

1. On 1st December 2014, the Claimant Josephine Wanjiru Muiro filed application through Notice of Motion seeking for orders that there be stay of the order on 17th November 2014 and all consequential orders thereto and the Court to review, uplift and or set aside the orders so made. The application is supported by the annexed affidavit of Samson Alosa and on the grounds that there was an error on the face of the record as the application was dismissed when the matter was coming up for a mention and consequent the orders are erroneous and the failure by the Court to take into account the merits of the case and the documents already filed in Court is in itself an error apparent on the record. Further grounds are that there is sufficient reason for the Court to review its decision as it if allowed to stand, it will be condemning the Claimant unheard. The delay in filing the written submissions was not intentional but was due to the fact that the registry was closed on Friday the 14th November 2014. The Claimant did not get a chance to defend self on the respondent's application dated 15th August 2014.

2. In the affidavit of Alosa, he avers that as advocate for the Claimant the 2nd and 3rd respondents did not serve the Claimant with their application dated 15th August 2014 seeking to strike out the two parties from the proceedings herein, the Claimant filed grounds of opposition and replying affidavit on 15th September 2014 and on 30th September 2014 when the matter came up for hearing, both parties agreed to proceed by way of written submissions and have a mention on 17th November 2014 to confirm and be allocated a ruling date. On 14th November 2014 when the clerk went to file the submissions the registry was closed. On 17th November 2014 when the matter came up in court, he [Mr Alosa] had a medical emergency at Kenyatta national Hospital and requested one associate in the firm of Mr Wekesa to hold his brief but counsel delayed at the registry when filing the submissions and only walked into Court when the matter had been mentioned and directions given by granting the Respondent the prayers striking out the 2nd and 3rd respondent. That the matter was coming for mention and not hearing. At a mention a matter cannot be heard unless parties consent. The Court action is prejudicial to the Claimant as it

amounts to determining the matter without considering the merits of the case. The parties have since filed their written submissions and in the interests of justice the Court should exercise its discretion to allow the written submissions.

3. There exists a mistake on the face of the record and the Court has power to correct and the orders made should be reviewed. The Claimant relied on the case of **JR Misc. Application No.11 of 2012, Republic versus The anti-Counterfeit Agency & others.**

4. In reply, the respondents filed Grounds of Opposition on 5th December 2014 noting that the climate had not laid any reasonable basis to warrant or justify the grant of orders sought, the application is misadvised and an abuse of the Court process and should be dismissed.

5. The Respondent also submitted that directions were made on 30th September 2014 with regard to parties filing written submissions with regard to the respondents application dated 15th August 2014 but the Claimant only explains events of 14th November 2014 and not any other date as to why such written submissions were not filed as directed. That the Court moved as appropriate in making orders of 17th November 2014.

6. The failure of counsel to attend Court on 17th November 2014 is not explained. There will be no prejudice suffered by the Claimant as only the 2nd and 3rd respondents have been removed from the suit. The applications now made are in themselves delaying the hearing of the claim. The respondents relied on the cases of **Fred Odhiambo versus the AG & another [2014] eKLR** and **Grace Mwendwa Munjuri versus Trustees of the Agricultural Society of Kenya [2014] eKLR.**

7. Rule 32 of the Industrial Court Procedure Rules regulate the filing of applications for review such as this one. The memoranda is set out under the Rules and the requirements for the same. It is important to refer when filing an application such as this one as under the requirements, a party is able to know as to what the Court should be looking out for.

8. There are undisputed facts. On 30th September 2014 both parties herein took directions with regard to filing written submissions. Mention was scheduled for 17th November 2014 when Court was to allocate a date for ruling. Such ruling and orders were made on the same date, the 17th November 2014. Based on the very limited grounds outlined under Rule 32(1) of the Industrial Court (Procedure) Rules, nothing in the claimant's application now before Court has alluded to the matters that justify a review of the orders made. Upon determination of the application dated 15th August 2014, the Court became *factus officio* in that to go back on the same without good cause would be to set in own appeal.

9. Matters averred by Samson Alosa for and on behalf of actions undertaken by his clerk at paragraph 5 of the supporting affidavit and action done by Mr Wekesa as averred under paragraph 8 and 9 of the Supporting Affidavit cannot be confirmed by him. Only the parties alleged to have found the registry closed, took time to file the submissions or found the Court in motion or having given directions can only confirm on 14th or 17th November 2014 can confirm the same. For Alosa to thus make such averments, in the absence of exactly what transpired in his absence on 14th November 2014 or 17th November 2014 shall remain unknown to the court. When the matter came before Court on 17th November 2014, the claimant, counsel or the person holding brief were absent. The orders made were not based on a mistake, misapplication of the law or lacking in recognition of the application pending before Court for determination.

10. In any event, directions with regard to parties filing their written submissions were issued on 30th September 2014. This is a period of over 37 days to 17th November 2014 within which time the Claimant does not account for. To thus rush at the last minute and place blame on the Court for giving directions on the due date is inappropriate. Where the registry remained closed on 14th November 2014, this is just one day out of the 37 available days. Noting such closure on 14th November, the opportunity still remained on

17th November 2014 when the matter was due for mention for counsel to appear and seek extension of time where there was good cause as noted at paragraph 6 of Alosa's Affidavit – he had an emergency at Kenyatta national hospital. If such ground is found sufficient herein, then it should have equally been sufficient on 17th November 2014, but alas! That was not in the knowledge of the Court when directions were made and orders issued.

I find no sufficient grounds to review, set aside or in any way interfere with orders made on 17th November 2014. Application dated 28th November 2014 is declined. Costs in the cause.

Delivered in open court and dated this 16th day of July 2015.

M. Mbaru

JUDGE

In the presence of

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