



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 310 OF 2013

BETWEEN

MOHAMED HASSAN MKOMA CLAIMANT

VERSUS

KENYA MARINE CONTRACTORS
[EPZ]LIMITED.....RESPONDENT

RULING

1. On 13th May 2015, the Court delivered an Award in favour of the Claimant. It was ordered:

a) Termination was unfair.

b) The Respondent shall, within 30 days of this Award, pay to the Claimant 12 months' salary in compensation, at the rate of Kshs. 30,000 per month, total Kshs. 360,000.

c) Costs to the Claimant.

2. The Claimant gave evidence and closed his case way back on 19th March 2014. The Respondent's case was scheduled, with the concurrence of the Parties' Advocates, for hearing on the 25th November 2014. Neither the Respondent, nor its Advocates attended Court on this date. Claimant's Advocate prayed the Court to order the proceedings closed, and he is allowed to file his Closing Submissions. The Court granted that prayer.

3. The Respondent then filed an Application dated 15th July 2015, asking the Court to set aside its Award and all consequential orders. The main ground, upon which the Application is based, is that the Respondent's Advocate's Clerk, failed to diarize the hearing date on 25th November 2014.

4. It is also submitted by the Respondent that the Court had directed the Claimant to serve his Closing Submissions and Mention Notice upon the Respondent, after the hearing closed; the Claimant did not comply with either of these directives. The Respondent states it was similarly not notified when the Award would be read.

5. The Application is supported by the Affidavits of the Respondent's Advocate Mr. Sitonik, and Clerk Mr. Omondi, both sworn on the 15th July 2015. Attached to Mr. Sitonik's Affidavit is an extract of the Advocate's diary for 25th November 2014, which indicates the hearing was omitted from the diary on the

particular date.

6. The Claimant filed a Replying Affidavit sworn by his Advocate Mr. J. Asige. He argues that the Respondent was absent on the date scheduled for the hearing of its case. The Respondent failed to prosecute its case. On several other occasions, it had sought adjournments, delaying hearing of the Claim. Respondent was granted 7 days on 5th November 2013 to file its supporting documents; no documents were filed. It would be a miscarriage of justice to reopen proceedings.

7. The Advocates addressed the Court on their Clients' respective positions, on the 28th July 2015. Upon hearing their Submissions; and upon reading their respective Affidavits;

The Court Finds-

8. There is no convincing reason shown by the Respondent why it did not attend the hearing scheduled for 25th November 2014. The date was taken in Court with the consent of the Advocates instructed to hold brief for the Advocates on record. The explanation given by Mr. Omondi on his oversight in diarizing the hearing date is most wanting. How does a Party's Representative sit in Court, listen as the Judge makes orders on the hearing date, and record nothing in the diary? Mr. Omondi returned to the Office with a blank diary? Did the Clerk not discuss the day's Court Business with the Advocate at the end of the day? Was there no appraisal, and communication to the Client? And where was the Client when these dates were scheduled and dishonoured? Parties cannot take serious Court Business for a daily diet of trivia, and return to Court seeking to be reheard, when such trivialization works against them.

9. The record supports the submission by the Claimant that the Respondent has foot-dragged throughout the proceedings. On the first mention in November 2013, the Respondent sought and was granted 7 days to file its supporting documents. No documents are shown to have been filed. At the first hearing the Respondent's Advocate sought adjournment on the ground he had failed to contact his Witness. The failure in attending Court on the 25th November 2014 fitted this general trend of foot-dragging and is inexcusable.

10. The failure by the Claimant to serve his Closing Submissions and the Mention Notices as directed by the Court, cannot explain the Respondent's failure to attend hearing on the 25th November 2015. These were defaults on the part of the Claimant, which had no effect on the matter at hand- failure by the Respondent to attend Court and prosecute its case. The Claimant must be chided by the Court for not notifying the Respondent on the Mention date, and for not serving its Submissions. Service would have enhanced case-management. The default however did not affect the Respondent's ability to attend Court and present its Response. If the default had any effect, it would be on the expeditious filing of this instant Application. There is no complaint however, that there was delay in filing of the Application. It certainly cannot have the effect of setting aside the Award, and reopening the dispute for hearing.

11. Lastly the Court does not consider the Statement of Response, weighed against the recorded evidence, to raise fundamental issues that merit rehearing. The Respondent alleged the Claimant was on probationary contract and barred from claiming unfair termination under Section 42 [1] of the Employment Act 2007. The Court examined the evidence on record, and found the Claimant was in regular employment. He was fired on allegations of fuel theft, allegations over which the Claimant was tried in a Criminal Court, and acquitted. The Respondent filed nothing to show it granted the Claimant a hearing before taking its decision. Although the Judgment of the Criminal Court did not bind the Employer in taking its decision, there is no suggestion in any form, why the Respondent would disagree with the findings of the Criminal Court. There was nothing filed justifying the termination decision. In the view of the Court, the Statement of Response on record does not raise important matters of law and fact which merit review by the Court through a second round of hearing. This litigation is closed.

IT IS ORDERED:-

[a] The Application by the Respondent dated 15th July 2015, is hereby dismissed with costs to the

Claimant.

Dated and delivered at Mombasa this 28th day of September, 2015

James Rika

Judge