



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 76 OF 2014

AGNES WAMBUI WAMWAKI...CLAIMANT (RESPONDENT)

VERSUS

JOSEPH KIBE.....RESPONDENT (APPLICANT)

(Before Hon. Justice Byram Ongaya on Friday 2nd October, 2015)

RULING

The respondent filed a notice of motion on 7.05.2015 under Order 51 Rule 1 and Order 12 Rule 7 of the Civil Procedure Rules. The substantive prayers in the notice of motion were as follows:

1. That the judgment entered ex-parte against the respondent on 24.04.2015 be set aside.
2. That there be stay of execution of the judgment pending the hearing of the application.
3. That the respondent be given time to present his case.
4. That this case be transferred to equivalent labour court in Nairobi.
5. That cost of this application be provided for.

The application was supported with the affidavit of Joseph Kibe Kanogu, the respondent in the suit. It was urged for the respondent as follows:

- a. The respondent did not attend the hearing on 7.04.2015 because he was sick and the advocate's representative assigned to attend court arrived late.
- b. The respondent did not deliberately fail to attend court.
- c. The respondent had wished to get somebody to take care of his affairs in view of his health status.
- d. That the respondent has a meritorious defence.
- e. The case was filed in Nyeri yet the parties reside in Kiambu County so that the suit should be have been heard by the court sitting at Nairobi.

The claimant acted in person and did not file papers to oppose the application. The application was fixed for hearing on 18.06.2015 when counsel for the respondent informed the court that he had served the application but not filed the affidavit of service. The court ordered on that date that the return of service be filed and the application be heard on 22.09.2015 at 9.00am. A hearing notice was ordered to be served by 15.07.2015 but the affidavit of service on record shows that the hearing notice was served on 30.07.2015. The return of service for the service of the application upon the claimant has never been filed as had been ordered.

On 22.09.2015 counsel for the respondent submitted that the application should be allowed on the basis of the grounds in the affidavit and the motion and, in view of the fact that the claimant had not filed a replying affidavit or grounds of opposition. The court has considered the submissions, the application and

the supporting affidavit, and makes the following findings:

1. The claimant cannot be blamed for the failure to file the replying affidavit or grounds of opposition because there is no evidence that the application was ever served upon the claimant.
2. The respondent failed to serve the hearing notice within the ordered time for the hearing as scheduled on 22.09.2015.
3. The representative for the respondent's counsel who is said to have been sent to court when the hearing of the main suit proceeded ex-parte has not been disclosed and the time he arrived in court has not been disclosed. The court record shows that the hearing commenced at 1025hrs. Whereas the respondent has exhibited general medical evidence that he attends hospital, the court has noted that he has been able to make the supporting affidavit but no specific reason has been advanced to explain why he failed to attend court at the hearing of the suit to explain his circumstance. Accordingly the court finds that the respondent has failed to show believable and good reason for the failure to attend court at the time and date appointed for the hearing of the suit.
4. The court enjoys country-wide geographical jurisdiction and the suit having been determined, the issue of transferring the suit for hearing at the court sitting in Nairobi was not relevant to the issue of setting aside the ex-parte proceedings.

Taking into account all the foregoing findings by the court, the court returns that the application lacked merits as the orders prayed for are not justified. The application by the notice of motion filed on 07.05.2015 is dismissed with costs.

Signed, dated and delivered in court at **Nyeri** this **Friday, 2nd October, 2015.**

BYRAM ONGAYA

JUDGE