

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 222 'A' OF 2013

BETWEEN

KENYA UNION OF COMMERCIAL, FOOD, AND ALLIEDWORKERS UNION....CLAIMANT

VERSUS

1. MOMBASA WATER SUPPLY AND SANITATION COMPANY.....RESPONDENTS

2. COAST WATER SERVICES BOARD.....RESPONDENTS

RULING

1. The Court made an Award in favour of the Claimant Union against the 1st Respondent, on the 31st July 2015. It was ordered the 1st Respondent pays 3 of the Employees, Members of the Claimant Union, 10 months' gross salary as compensation for unfair termination. The Claim against the 2nd Respondent was dismissed.

2. Part of the hearing of the Claim leading to the Award proceeded in the absence of the two Respondents. The hearing dates were scheduled by the Parties in open Court. The 1st Respondent was not satisfied with the outcome and filed an Application dated 1st September 2015, seeking temporary stay of execution of the Award, pending hearing of the Application *inter partes*; setting aside of the Award; and the 1st Respondent be granted leave to reopen its case.

3. Supported by the Affidavit of Mr. Jamal Ahmed, the General Manager Business and Customer Services of the 1st Respondent, sworn on the 1st September 2015, the Application states the 1st did not fail to attend Court and prosecute its Response deliberately. It is explained that the 1st Respondent initially engaged the Law Firm of Otieno Okeyo & Company Advocates to act for it. There was change of Advocates with the Law Firm of Balala & Abed Advocates, instructed to act for the 1st Respondent in place of the previous Law Firm, on the 9th March 2015.

4. The 1st Respondent had been informed by its previous Advocates that the hearing was scheduled "*the week commencing 16th March 2015.*" This information was passed onto the incoming Law Firm. It was realized later by the 1st Respondent that the hearing was scheduled for 13th March 2015. The hearing notice had been served on the previous Advocates. Hearing on the particular date therefore went on, without the participation of the 1st Respondent on account of this misinformation between the two Law Firms. The newly instructed Law Firm through Mr. Salim Advocate raised this matter when it was mentioned before the Court to confirm filing of the Closing Submissions, on the 17th April 2015, but the Court declined to reopen 1st Respondent's case.

5. The 2nd Respondent did not file a Replying Affidavit or Grounds of Opposition to the Application, leaving the matter to the discretion of the Court.

6. The Claimant strenuously opposes the Application and filed a Replying Affidavit sworn by the General Secretary Mr. Boniface Kavuva, on the 9th September 2015. Its position is that there was no Notice of Change served upon the Claimant. It holds the Law Firm of Otieno Okeyo & Company Advocates were to its knowledge, always on record for the 1st Respondent, up to the date the Award was delivered.

According to the Claimant the grounds stated in the Application do not justify the reopening of the case.

7. The Application was heard on the 22nd September 2015. Parties restated their positions as summarized by the Court in the preceding paragraphs. Upon hearing their Submissions; upon reading their Affidavits in Support and Reply; upon reading the Judicial Authorities availed by the Parties; and upon a careful review of the entire record, the *Court Finds:-*

8. There are no good grounds shown by the 1st Respondent why the Court should revisit the Award, and reopen the hearing. There is no affidavit filed by the 1st Respondent's previous Advocates, to support the position held by the 1st Respondent, on its failure to attend the Court on the hearing date. The lack of proper handing over between the two Law Firms engaged by the 1st Respondent cannot be a good ground to warrant reopening of proceedings. It was for the 1st Respondent to take accurate information from its previous Advocates and pass on proper instructions to the new Advocates. The hearing date was taken in Court and Messrs Otieno Okeyo & Company Advocates for the 1st Respondent had notice of the accurate date. The matter was at an advanced stage when the change of Advocates took place. The 1st Respondent would be expected to have followed the dates scheduled in Court from its Advocates. The explanation that the 1st Respondent was aware the hearing was beginning "the week commencing 16th March 2015" demonstrates a lack of seriousness in the 1st Respondent in tracking the dispute. Matters are not normally slated for hearing on a week commencing on a particular date; they are scheduled on a specific date. The 1st Respondent can only blame the source of its information on the hearing taking place "the week commencing 16th March 2015." It would have served the 1st Respondent well to seek clarification on this information from its source. Also, that the 1st Respondent did not serve the Claimant with its Notice of Change of Advocates, confirms the lackadaisical attitude assumed by the 1st Respondent, in responding to the Claim. How was the Claimant expected to know there was a change without service?

9. The decision of the Court considered the Response to the Claim filed by the 1st Respondent. It evaluated the evidence as well as the Pleadings filed by the Parties in their entirety. It was the view of the Court, that while the 1st Respondent did not show valid reasons in terminating the Grievants' contracts, it arrived at its decision following a fair procedure. The material supplied to the Court by the 1st Respondent and its Pleadings were fully evaluated by the Court. The Court even granted the 1st Respondent through its Advocates, an opportunity to file its Closing Submissions, an opportunity that appears to have not been taken by the 1st Respondent. It was noted in the decision of the Court that the 1st Respondent appears not to have filed its Closing Submissions. The decision of the Court therefore took into account the position of the Respondent, and was made after the Respondent was granted adequate opportunity to present oral evidence. This is an old matter which was initially filed in Nairobi. Parties have been through conciliation, and have appeared in Court; had the full opportunity to state their positions; and the Court finally made a decision based on the material supplied to it by all the Parties. There is nothing to warrant reopening of the dispute. ***For these reasons, the Application by the 1st Respondent dated 1st September 2015, seeking to reopen proceedings, is rejected with no order on the costs.***

Dated and delivered at Mombasa this 3rd day of December 2015

James Rika

Judge