

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 151 OF 2013

RONGI KIRANDI.....CLAIMANT

-VERSUS-

NICODEMUS MACHOKA NYAKENYANYA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th March, 2014)

RULING

The court delivered the judgment in favour of the claimant and against the respondent on Friday 21.02.2014. The claimant did not file any statement of response and did not attend court at the hearing of the case on 26.11.2013 and despite service of the hearing notice upon the respondent's advocates on record being Maxwell O. Ogonda & Associates.

On 24.02.2014, a notice of change of advocates was filed for the respondent appointing Olaly Cheche & Company Advocates in the place of the respondent's initial advocates. On 27.02.2014, an application under certificate of urgency was filed for the respondent. The notice of motion was brought under **Order 51 Rule 1 and Order 10 Rules 10 and 11 of the Civil Procedure Rules**. The respondent (applicant in the application) prayed that the application be certified urgent; pending the inter-parte hearing, there be stay of execution; that the ex-parte judgment entered by the honourable court against the applicant on 21.02.2014 be set aside; and the defendant (the applicant) be allowed to file his defence out of time.

The application was supported by the applicant's affidavit attached on the application. The applicant's case was that he appointed an advocate to represent him but unfortunately the advocates neither filed a defence nor notified the applicant of the hearing date despite service by the claimant's advocates. The applicant stated in his affidavit that his advocates on record were to take care of his interests but failed to do so. The applicant therefore urged the court to set aside the judgment. The applicant at paragraph 4 of the supporting affidavit acknowledges that his advocates did not file a defence to oppose the claim. The court has observed that the supporting affidavit has no draft defence and has not raised any triable issue that would have been included in the defence that the applicant acknowledges was never filed.

The claimant filed his replying affidavit on 18.03.2014 to oppose the application. He urged that he be allowed to enjoy the fruits of his successful litigation as there was no ground to justify the setting aside of the judgment. The claimant's counsel submitted that the application was calculated to derail justice and to waste the time of the court.

The court may set aside an ex-parte judgment upon such terms as may be just. The court has considered whether the applicant should enjoy the favour of the court's discretion in the case.

First, no explanation has been offered why the applicant failed to file the defence or the memorandum of response within the statutory time.

Secondly, the applicant has not in the application, the supporting affidavit or otherwise means established the line and substance of the defence to the claimant's claims and prayers.

Thirdly, there is no any excusable mistake of the applicant's advocates on record at all material time that would justify the setting aside of the judgment to protect justice as urged for the applicant.

Fourthly and to reiterate the court's considered justice in the case, the material on record shows that the applicant before and after the judgment has not established any possible defence to the claimant's claims and prayers.

Thus, the court finds that the application does not merit the favourable discretion of the court.

The court has observed that the change of advocates after judgment was delivered was without the requisite leave by the court and that irregularity is an impetus for finding the application was doomed.

In conclusion, the application is dismissed with costs.

Signed, dated and delivered in court at **Nakuru** this **Friday, 28th March, 2014**.

BYRAM ONGAYA

JUDGE