



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 527 OF 2012

KIMONGOYO MUIA.....CLAIMANT

VERSUS

STEEL STRUCTURES LIMITED.....RESPONDENT

RULING

The case herein was heard in the absence of the Respondent on 1st February, 2013. Since part of the claim was for compensation for injury suffered in the course of employment the claimant was referred to the Directorate of Occupational Safety and Health for assessment of injury and compensation under the Work Injury Benefits Act. He was thereafter referred to Kenyatta National Hospital and the medical report was finally received by the court on 2nd July, 2013. Notice of date of judgment was sent to the parties setting the date for judgment on 1st October 2013.

Upon receiving the notice the Respondent filed a notice of motion seeking the following orders:-

1. **This application be certified urgent and heard ex-parte in the first instance.**
2. **There be stay of proceedings and judgment to be delivered on 1st October, 2013 pending hearing of this application inter-parties.**
3. **The case herein be re-opened and heard inter-parties and the claimant be recalled for purposes of cross-examination on his evidence.**
4. **The costs of this application be provided for.**

T The grounds upon which the application was grounded are the following:-

1. **That this matter came first for hearing on 1st of February, 2013 after the court fixed it for hearing on the 22nd of November, 2013 in the presence of both Counsels.**
2. **The Counsel for the Respondent left the firm of Kelvin Mogeni Advocates and did not inform the firm of the hearing date of 1st February, 2013.**
3. **The Respondent never served the hearing notice of 18th March, 2013 and the mention of 27th May, 2013.**
4. **The court on the 27th May, 2013 directed KNH to carry out a medical examination on the claimant and further hearing on the 2nd July, 2013.**
5. **The court served a mention notice to the respondent dated 16th April, 2013 despite there being a Counsel on record. The same was never received by the Respondent.**
6. **The court served the Respondent firm with a judgment notice on the 18th July, 2013 and it**

was after consulting with the Respondent that the Respondent's firm found out that the matter proceeded ex-parte.

- 7. That on the 22nd August 2013 when the counsel for the Respondent went to follow up the matter, the court and the clerk were on vacation.**
- 8. That the file was only available to the Respondent's counsel representative on the 12th September, 2013 and it was pending judgment.**
- 9. The Respondent wishes to be heard and be allowed to cross-examine the claimant.**
- 10. The Respondent failure to attend court was not deliberate and the failure of counsel should be visited on the litigant.**
- 11. The Respondent has a good defence if given an opportunity to respond to the claimant's allegations and cross-examine the claimant on his evidence.**
- 12. That it is in the interest of justice that a party should not be condemned unheard.**
- 13. The claimant is ready to meet any conditions as set out by the court.**

The application was supported by the affidavit of Purity Makori Advocate for the Respondent in which she deponed matters substantially similar to the grounds in support of the application on the face of the notice of motion.

The Respondent filed a replying affidavit sworn on 25th October, 2013 and filed in court the same day in which he opposed the Respondents application. He deponed that the Respondent had no proper explanation for the delay of over 8 months which is inordinate, that the respondent's advocate's firm is a large firm and the name of the advocate alleged to have left the firm was not stated in the affidavit in support of the Notice of Motion. The Respondent further depones that the court granted the Respondent the last adjournment on 28th November 2012 and ordered costs to be paid to the claimant which has not been paid to date and that the Respondent failed to attend court on 6th December 2012. That the Respondent's grounds are not sufficient for the court to exercise any discretion in it's favour. He urged the court to dismiss the application with costs and proceed to enter judgment in favour of the claimant.

The parties were heard on 28th October 2013 when Miss Makori represented the Respondent and the claimant was present in person. Ms. Makori relied on the grounds in support of the Notice of Motion and the supporting affidavit. She emphasized that counsel made a mistake that should not be visited upon the respondent and that the claimant can be compensated by way of costs.

The claimant also relied on his replying affidavit. He stated he is unwell and jobless. He does not even have money for treatment and for travelling to court. He urged the court to dismiss the respondent's application and enter judgment in his favour.

I have considered the application by the respondent, the grounds and the affidavit in support thereof. I have also considered the replying affidavit. I have further considered the submissions by both parties.

The case of the claimant has been concluded. The case was pending for judgment when the respondent filed this application. It is in the interest of justice that the Respondent be allowed to present it's case. As stated by Ms. Makori, the claimant can be compensated for the delay by way of costs.

For these reasons I allow the application on the following conditions:-

1. The Respondent pays the claimant kshs.20,000/= as thrown away costs.
2. The Respondent pays the claimant costs ordered by the court on 22nd November, 2012 in the sum of kshs.1,000/=.
3. The case is fixed for hearing the Respondent's case.

Read in open court this 5th day of March, 2014.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Read in the presence of:

.....**for Claimant**

.....**for Respondent**